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F.C.C. and the Fairness Doctrine

Marilyn G. Zack

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MOST PEOPLE ARE FAMILIAR with the law requiring radio and television stations to offer equal time to opposing candidates at election time. However, the legal obligation imposed upon broadcasters to present contrasting, responsible points of view on controversial issues of public importance—the fairness doctrine[1]—is little known, despite the recent controversy over the fairness of the news media which began with Vice President Spiro T. Agnew's speeches of November, 1969. In *Red Lion Broadcasting Co., Inc. v. F.C.C.*[2] the Supreme Court upheld the fairness doctrine and the rules promulgated under it—rules relating to editorializing about candidates for public office and to personal attacks made during the presentation of views on controversial issues of public importance. Mr. Justice White wrote: "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." [3] Yet, in the opinion of Vice President Agnew, ". . . a broader spectrum of national opinion should be represented among commentators of the network news. Men who can articulate other points of view should be brought forward." [4]

Red Lion has been hailed as a landmark case, both by broadcasters and by proponents of the view that the first amendment should be oriented toward the listener rather than the speaker. The broadcasters claim that in its decision against them, the Supreme Court "embarked on a broad exhortation before which would seem to fall almost any limitation on program regulation." [5] The winners claim that the emphasis on the public's right to *hear* has created a concomitant right of access to the broadcasting media.[6]

The essential facts of *Red Lion* were that in November, 1964, station WGCB, licensed to the Red Lion Broadcasting Company, carried a 15 minute program by Rev. Billy James Hargis. He discussed a book by Fred J. Cook entitled *Goldwater—Extremist on the Right* and alleged,

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1 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (Hereinafter cited as Editorializing Report).

2 395 U.S. 367 (1969).

3 *Id.* at 369.

4 Cleveland Plain Dealer, Nov. 21, 1969, at 12-A.

5 Blake, Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes, 23 Fed. Com. B. J. 75, at 76 (1969).

6 Note, Red Lion Broadcasting Co., Inc. v. FCC—Extension of the Fairness Doctrine to Include Right of Access to the Press, 15 S.D.L.Rev. 172 at 179 (1970).

among other things, that Cook had been fired by a newspaper for fabricating charges against public officials and that Cook had worked for a Communist-affiliated publication. Hearing of the broadcast, Cook demanded free time to reply, but WGCB refused. Cook protested to the F.C.C., which ruled that the broadcast constituted a personal attack and that the station had failed to meet its obligation under the fairness doctrine.[7] In 1962 the Commission had ruled that licensees have a duty to offer reply time to persons whose character is impugned on the air.[8] In *Times-Mirror* the F.C.C. spelled out the duty of licensees to send a transcript of any personal attack to the person or group impugned.[9] Interestingly, this latter ruling originated in the 1962 California gubernatorial campaign. As stated in the F.C.C.'s Fairness Primer, "The continuous, repetitive opportunity afforded for the expression of the commentators' viewpoints on the gubernatorial campaign, in contrast to the minimal opportunity afforded to opposing viewpoints, violated the right of the public to a fair presentation of views." [10] The candidate "unfairly" treated in this instance was Governor Pat Brown. (His opponent was Richard M. Nixon.)

WGCB appealed the free reply time ruling to the Circuit Court of Appeals for the District of Columbia, which affirmed the F.C.C.'s order, declaring it constitutional and within the F.C.C.'s statutory authority.[11] The station sought Supreme Court review.

Meanwhile, the F.C.C. issued a Notice of Proposed Rule Making to provide procedures in the event of certain personal attacks and station editorials on political candidates.[12] As stated in its July 5, 1967, Memorandum Opinion and Order, when the rules were adopted:

> The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. . . . These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[13]

The Radio Television News Directors Association appealed the Commission's action to the Court of Appeals of the Seventh Circuit. This

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[7] Red Lion Broadcasting Co., Inc. v. F.C.C., *supra* n. 2 at 372.

[8] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415, 10420 (1964). (Hereinafter cited as the Fairness Primer.)

[9] *Id.* at 10421.

[10] *Id.*

[11] Red Lion Broadcasting Co., Inc. v. F.C.C., 381 F. 2d 908 (D.C. Cir. 1967), cert. granted, 389 U.S. 968 (1967).

[12] 31 Fed. Reg. 5710 (1966).

[13] 32 Fed. Reg. 10303 (1967).

court set aside the F.C.C.'s order and held that "the rules here challenged collide with the free speech and free press guarantees contained in the first amendment." [14] It should be noted, however, that the Court also said, ". . . we are not prepared to hold that the Fairness Doctrine is unconstitutional." [15] The Supreme Court granted certiorari to both *Red Lion* and *R.T.N.D.A.*

In the United States broadcasting is a competitive business. But radio and television also are media for the expression of free speech in matters of vital concern in a self-governing society. Freedom of speech is protected from governmental abridgement by the first amendment. Is free speech unconstitutionally abridged by governmental action with respect to program content? Or do the fairness doctrine and the personal attack and editorialization rules enhance free speech? What quantum of program control can be justified on the basis of the public interest in view of the first amendment—which applies also to broadcasters?

How to reconcile the first amendment with the needs of all members of a democratic society to have exposure to the full range of opinion on matters of public importance has long concerned legal scholars. The conflicting lower court decisions in *Red Lion* and *R.T.N.D.A.* are evidence that scholars have not agreed.

The first Congressional enactment pertaining to radio was passed in 1912 when the Radio Act gave the Secretary of Commerce power to issue licenses and regulate frequencies and hours of operation.[16] But when Secretary Hoover tried to penalize the Zenith Radio Corporation for operating on an unauthorized frequency, the court held that the Act did not permit enforcement.[17] Recognizing that "the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard" and "that scientific development at that time was a limitation upon the number of broadcasting stations," [18] Congress passed the Radio Act of 1927, establishing the Federal Radio Commission to allocate frequencies among competing applicants.[19] This Act was superseded by the Communications Act of 1934, and in 1938, when television was incipient, the administrative agency was renamed the Federal Communications Commission.[20] Both these Acts provided for the licensing and regulating of broadcasters in the "public convenience, interest and necessity," [21] denied any ownership right to licensed fre-

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14 Radio Television News Directors Ass'n v. U.S., 400 F. 2d 1002, 1021 (7th Cir. 1968).

15 *Id.* at 1018.

16 Radio Act of 1912, ch. 287, 37 Stat. 302.

17 U. S. v. Zenith Radio Corp., 12 F. 2d 614 (D.C.N.D. Ill. 1926).

18 Red Lion Broadcasting Co., Inc. v. F.C.C., *supra* n. 2 at 376.

19 Radio Act of 1927, ch. 169, 44 Stat. 1162.

20 47 U.S.C. § 301 et seq. (1964).

21 47 U.S.C. § 307(a) (1964).

quency users,[22] and provided that candidates for public office should have equal opportunities to use broadcast facilities for political purposes.[23] Unlike the equal opportunities doctrine, the fairness doctrine was not specifically enacted.

In 1949, the F.C.C. issued its Editorializing Report in an attempt to elucidate "the Commission's position with respect to the obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion." [24] It should be noted that since the 1941 FCC ruling in *Mayflower Broadcasting Corp.*,[25] broadcasters had refrained from editorializing. The Commission's statement that ". . . the broadcaster cannot be an advocate" had been accepted as banning editorializing.[26] The Editorializing Report stated:

> It is axiomatic that one of the most vital questions of mass communications in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensees or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.[27]

Accordingly, the Report obligated licensees to operate in the public interest by 1) devoting reasonable time to the discussion of controversial issues of public importance and 2) being fair in the presentation of these issues.[28] It also laid to rest the misconception regarding station editorializing: ". . . we have . . . come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness . . . is not contrary to the public interest." [29]

The F.C.C. further declared its intention to apply a "standard of reasonableness," "one of the basic standards of conduct in numerous fields of Anglo-American law" [30] when fairness questions came before it. Noting that some of the witnesses to the public hearings held prior to the adoption of the Report had raised the issue of the constitutionality of the Commission's fairness standard as an abridgement of the broadcasters' right of free speech, the Commission replied:

> The freedom of speech protected against governmental abridgement by the First Amendment does not extend any privilege to govern-

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22 47 U.S.C. § 309(h)(1) (1964).

23 47 U.S.C. § 315(a) (1964).

24 *Supra* n. 1 at 1246.

25 8 F.C.C. 333 (1941).

26 *Id.* at 340.

27 *Supra* n. 1 at 1249.

28 Red Lion Broadcasting Co., Inc. v. F.C.C., *supra* n. 2 at 377.

29 *Supra* n. 1 at 1249.

30 *Id.* at 10424.

ment licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement.[31]

The Commission used the Supreme Court's words in the *Associated Press* monopoly case as its justification:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[32]

Political Editorial Rule

The political editorial rule upheld under the fairness doctrine in *Red Lion* imposes on a licensee who endorses or opposes a legally qualified candidate the duty to send to other candidates for the same office:

(1) notification of the date and the time of the editorial;

(2) a script or tape of the editorial; and

(3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.[33]

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[31] *Id.*

[32] Associated Press v. U. S., 326 U.S. 1, 20 (1944).

[33] 47 C.F.R. § 73.123, 73.300, 73.598, 73.679 (all identical) (1970). Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (b) (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (b) (2), above. See Section 315(a) of the Act, 47 U.S.C. Sect.

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The effect of this is to apply to editorials supporting or opposing candidates the statutory rule long prescribed under Sec. 315(a) of the Communications Act (the equal opportunities doctrine). Under Sec. 315(a), however, the offer of time must be to the candidate himself.[34] In its Memorandum Opinion and Order adopting the codification of this rule, the F.C.C. stated that "the standard of fairness . . . dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself.[35] No licensee, of course, is required to editorialize and thus trigger this right of reply. The rule does not, as its name would imply to political scientists, pertain to editorials on issues.

This rule has not engendered much critical comment, either from legal commentators or broadcasters. Only a handful of stations editorially supported or opposed political candidates before or after the *Red Lion* case. For example, Storer Broadcasting Company, in encouraging its stations to editorialize in 1959, adopted the general principle that editorials should not support or oppose candidates for elective office.[36] As Jaffe points out, television in particular has changed political campaigning, and its impact on the electorate is significant. "If the contestants are to have the relatively equal opportunity to reach the public, which our political system assumes, they must have an equal opportunity to procure time on television."[37] The rule is "adapted to mitigating broadcasting onesidedness in the context of a political campaign."[38] At election time, the public interest in equal access to the airwaves is most critical to the process of self-government. Editorializing in support of candidates is, as

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315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (b)(3) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

[34] 47 U.S.C. § 315(a) (1964).

[35] 32 Fed. Reg. 10303 at para. 4 (1967).

[36] Letter from John E. McCoy, Storer Broadcasting Company, April 29, 1970.

[37] Jaffe, The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change, 37 U. Cin. L. Rev. 550, 551 (1968).

[38] Note, Freedom of Speech and Association, F.C.C. Editorializing and Personal Attack Rules, 83 Harv. L. Rev. 133, 145 (1969).

a practical matter, granting free time to one candidate, and the F.C.C. rule simply grants the same free time to the opposition.

Editorializing in *opposition* to a political candidate, however, also triggers the reply time obligations. The likely impact on the unopposed candidate has been uniformly overlooked by those commenting on the rule. While the station-opposed candidate has been on the air twice, no broadcast time accrues to his opponent. The effect of such publicity, even though in part bad publicity, does serve to raise the level of public awareness of a candidate's name. Candidates for the many minor elective offices, where public awareness of candidates is low, can be helped in their campaigns by such exposure, particularly if the public thinks the station editorial unfair. In some circumstances, it is conceivable that the rule's benefit would accrue to the opposed candidate and detriment to the unopposed candidate because the latter's name is mentioned neither in the editorial nor in the reply. Applied to those election situations in which any publicity is better than none, the editorialization rule exhibits political naivete and may be unfair to the unpublicized candidate.

Personal Attack Rule

The personal attack rule, codified from the F.C.C.'s *Times-Mirror* decision, fixes an absolute duty to offer an opportunity to reply to the person attacked in the discussion of controversial issues.[39] It is not limited to political candidates. Compared to the general fairness doctrine, its application is relatively simple and definite since it requires that the right of reply be given only to the one personally attacked. The personal attack rule is designed to provide the public with both sides of a controversial issue in circumstances when the character, honesty or integrity of an individual or identifiable group have become part of the issue.[40] Private attacks, therefore, are not included by the rule, since there is no public interest involved. The rule does not apply to bona fide newscast, on-the-spot coverage of a bona fide news event, bona fide news interviews, and news commentary or analysis contained in these types of programs. Although not specified in the regulations, the licensee may stipulate that the reply to a personal attack on a candidate by a person other than the opposing candidate or members of his team must be given by a spokesman of the candidate. Otherwise the equal-time cycle of Sec. 315(a) would come into play.[41]

Robinson and Barrow agree that the personal attack rule probably will not significantly inhibit broadcasters from preventing controversial issues, primarily because of the narrowness of its scope.[42] Further, as

[39] 47 C.F.R. § 73.123, 73.300, 73.598, 73.679 (1970). (See note 33.)

[40] 32 Fed. Reg. 10303 at para. 9 (1967).

[41] *Id.* at para. 16.

[42] Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 447 U. Cin. L. Rev. 447, 461 (1968).

Robinson pointed out, justification and constitutional sanction might have been found "in a long tradition of remedying defamation, antedating the first amendment." [43] Blake agrees that the Court could have upheld the personal attack regulations "as a special tort remedy justified because of the inadequacy of monetary damages." [44] Nevertheless, it is the right of the public to be informed when a personal attack has obscured the merits of an issue and not the reputation of the attacked person or group which provides the rule's rationale.

In criticizing the rule, Jaffe points out that radio and television are part of a complex system of communications, not a whole system by themselves. People are also influenced by newspapers, books, and magazines and by informal communications, all channels in which attacks can be answered. Jaffe questions whether the risk of reducing discussion of controversial issues should be balanced against the risk of "effectively unanswered personal attacks if there is no required opportunity for reply." [45]

As to the rule's potential inhibitory effects, broadcasters who provide the most time to the discussion of controversial issues will be most greatly affected. Since time is money to broadcasters, this rule could militate against controversy on the air and for program blandness. This "human nature" argument was discounted as "speculative" by the Court in *Red Lion,* which stated that "if experience with administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." [46]

Statutory Authority for the Fairness Doctrine

In upholding the F.C.C.'s relatively specific personal attack and editorialization rules, the Supreme Court also sweepingly upheld the broad, general fairness doctrine when it asserted:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." [47]

Surprisingly, *Red Lion* is the first case to challenge the statutory authority of the F.C.C. to impose the fairness doctrine on broadcasters. The Court held: "The fairness doctrine finds specific recognition in stat-

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[43] Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations, 52 Minn. L. Rev. 61, 141 (1967).

[44] Blake, *op. cit. supra* n. 5 at 75.

[45] Jaffe, *op. cit. supra* n. 37 at 553.

[46] Red Lion Broadcasting Co., Inc. v. F.C.C., *supra* n. 2 at 393.

[47] *Id.* at 389.

utory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history." [48] In 1959 Congress had amended Sec. 315(a) of the Communications Act, requiring equal time for opposing candidates, to exempt from equal time requirements certain appearances on news shows. Added to Sec. 315(a) was this sentence:

> Nothing in the foregoing (amendments) shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[49]

Blake claims that the 1959 amendment "was specifically intended only to prohibit unfair broadcast treatment of political candidates in the types of (news) programs which were exempted from the equal time requirement." [50] Barrow, too, concluded that "(a) more reasonable interpretation of the legislative history" is that Congress, while not approving all of the Commission's applications of the fairness doctrine, intended that it should apply to the exempted newscasts.[51] The Court, however, agreed with the Commission's Fairness Primer pronouncement that the fairness doctrine "as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of Sec. 315(a) of the Communications Act." [52]

Fairness and the First Amendment

The fairness doctrine requires that when a radio or television station broadcasts one viewpoint on a controversial issue of public importance, it must affirmatively seek out and make reasonable offers of free broadcast time to spokesmen for contrasting viewpoints. It must be understood that, as presently formulated, the fairness doctrine does not require a broadcaster to devote equal time to contrasting views[53] and does not demand that the station offer time to any particular person or group.[54] Further, it applies over a period of time.[55]

In his discussion of first amendment free speech problems and the tests which courts have developed to solve them, Brennan pointed out

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48 *Id.* at 380.

49 47 U.S.C. § 315(a) (1964).

50 Blake, *op. cit. supra* n. 5 at 82.

51 Barrow, *op. cit. supra* n. 42 at 465.

52 *Supra* n. 8 at 10425.

53 *Id.* at para. 12.

54 *Id.* at para. 16.

55 *Id.* at para. 15.

that only the "absolute" view of the first amendment flatly denies any governmental power to regulate speech. The "redeeming social value" test has been utilized in the obscenity cases; the "clear and present danger" test in regulation of subversive activities; the "balancing" test in situations where regulations indirectly limit free speech. Under each of these last tests government regulation of speech in particular contexts has been upheld.[56] In his classic attempt to build a general theory applicable to all first amendment speech cases, Emerson suggested "definitional balancing," involving construction of conceptual definitions of the key terms "freedom of expression," "abridge," and "law." The fairness doctrine, in Emerson's view, illustrates an "affirmative measure to increase the effective operation of the system" of freedom of expression on which our society relies, to which type of first amendment problem the courts should apply the definition of the word "abridge."[57] Having placed the broadcaster in the dominant position, the government does not abridge freedom of speech when it regulates the broadcaster in order to assure against his abridgement of the freedom of expression of others.

That the first amendment is relevant to broadcasting has been settled.[58] The broadcasters argued, however, that any regulation pertaining to program control, such as the rules under discussion here and the fairness doctrine in general, constitutes unconstitutional prior restraint or governmental control of programming. Broadcasters would rather be treated like the newspapers, content regulation of which is not considered to be constitutional. In their view, the first amendment principles utilized in resolving *New York Times Co. v. Sullivan*[59] to promote "uninhibited, robust, and wide open" debate on public matters are equally appropriate to the speech media. Certainly both types of media have the power to influence public decision making; both are impressed with public interest.

In *Red Lion* the Court chose to rely on the scarcity of frequencies and public ownership of the airwaves cliches to justify governmental regulation. The fact that there are over 6,000 broadcasting stations but only 1,700 daily newspapers did not sway the Court to accord unfettered freedom of the press to broadcasters.[60] It also rang in the myth that anyone can start a newspaper, while not everyone can broadcast (since a license is needed). A more sensible rationale to justify the fairness doctrine and the rules promulgated under it is, in this writer's opinion, the following:

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[56] Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

[57] Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 953 (1963).

[58] United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[59] 376 U.S. 254 (1964).

[60] Blake, *op. cit. supra* n. 5 at 87.

> Perhaps the most satisfactory distinction lies in the nature of the two types of communications organs. Free competition in broadcasting would probably result in the presentation of only the most popular view and programs; newspapers, on the other hand, are sold as a unit rather than by time. There is far less economic impetus for publishers to maximize their audience for each page than there is for broadcasters to maximize their audience for each time period. Indeed, economic motivation might lead publishers to give space to less popular topics, since those who are specially interested in these areas will be encouraged to buy the entire publication. Thus, minority interests and the general public interest in the free exchange of information and ideas—protection of which underlie the first amendment—are fostered by FCC regulation. To invalidate this scheme of regulation in the name of the Constitution would undercut the very protection the Constitution seeks to afford.[61]

At least a part of the problem faced by the Court in *Red Lion* is attributable to the lack of a comprehensive broadcasting policy in this country. The standard of "public convenience, interest, or necessity" is vague as applied to the field of broadcasting, despite the Supreme Court's assurance that this statutory standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." [62] Unlike some administrative agencies which apply a public interest standard, in granting licenses for commercial radio and television stations the F.C.C. almost never makes its decision based on whether or not there is a need for broadcasting service. Instead, this agency decides who should render it.[63]

In Robinson's view the fairness doctrine is "predicated on examination, evaluation, and judgment of the Commission of specific program content." [64] This is, he says, government control over program content based on the F.C.C.'s standard of the public interest. To Kalven this leads to "regulation by dossier." [65] Sullivan believes that while a public interest standard may serve well from a "public utility point of view," this standard is not appropriate in determining the propriety of free expression.[66] Although F.C.C. decisions indicate that the Commission will give great weight to the licensee's judgment in fairness matters and will impose sanctions "only where the facts of the particular case . . . flagrantly call for such action," [67] fairness determinations necessarily involve the F.C.C. in the exercise of program surveillance.

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61 Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701, 714 (1964).

62 F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

63 Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 1055, 1060 (1962).

64 Robinson, *op. cit. supra* n. 43 at 136.

65 Kalven, Broadcasting, Public Policy, and the First Amendment, 10 J. Law and Econ. 15, 21 (1967).

66 Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719, 721 (1964).

67 Pacifica Foundation, 1 P & F Radio Reg. 2d 747, 752 (1964).

Sullivan raises the further valid point that unless a communicator has the duty to present information on significant issues, so that sanctions can be applied when he has not done so, the practical problems created by the fairness doctrine are likely to cause broadcasters to limit the subjects they cover.[68] This precensorship frustrates the purpose of the doctrine—an informed electorate.

By requiring under the fairness doctrine that a single broadcaster must present all viewpoints of any controversial issue he airs, the F.C.C. (and now the Supreme Court) assumes that the availability of diverse viewpoints to the public cannot be left to the marketplace of ideas. Such reasoning seems to overlook the fact that, at least as to radio, the listener in a metropolitan area has a wide variety of stations from which to choose. This fact, plus the F.C.C.'s ownership rule forbidding common control of more than one AM and one FM station serving the same area,[69] militate against the need for the fairness doctrine in all sections of the country. The Supreme Court recognized no such distinction in its opinion.

The most scathing criticism of the Court's opinion in *Red Lion* has been voiced by Jonathan D. Blake. In his view the Court needlessly extended the program control powers of the F.C.C. and its decision was based on fundamental definitional and historical errors.[70] The generally accepted lay definition of fairness does not include the concept of presenting both (or all) points of view on a controversial subject. This country has no legal tradition of compelling one who takes a stand on a controversial issue to tell all sides of the story. Granting that opinion should be identified as such, one advocates his viewpoint on an issue fairly when he does not "misrepresent the opposing viewpoint or does not knowingly make false or reckless allegations of fact concerning the issue." [71] If the F.C.C. were adjudging fairness based on this definition, its decisions would not infringe on broadcasters' discretion over programming except to prohibit grossly unfair conduct. Well established legal principles of misrepresentation would be utilized instead of ill-defined standards of fairness and balance.

According to Blake, early F.C.C. cases involving comparative proceedings in license grants and renewals stand not for the fairness principle as now understood but for the concept that "licenses should not be granted to private interest groups for their essentially private uses." [72] The early cases cited in the Court's opinion were based on the threat of the 20's and 30's that scarce frequencies would be used to further business and sectarian interests.

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[68] Sullivan, *op. cit. supra* n. 66 at 751.
[69] 47 C.F.R. § 73.35, 73.240 (1970).
[70] Blake, *op. cit. supra* n. 5 at 76.
[71] *Id.* at 77.
[72] *Id.* at 79.

Blake's main concern, like the broadcasters' argument before the court in *Red Lion,* is with the inhibiting effect of the fairness doctrine.[73] The Supreme Court totally discounted the argument that the fairness doctrine has inhibitory effects and that its uncertainty would inevitably restrain the airing of controversial topics. One real problem is that of defining a controversial issue. What are the responsible sides of the issue? Who should be the spokesmen for the various viewpoints? No standards which approach any degree of certainty have been established to guide broadcasters in these decisions.

Perhaps an example will serve to illustrate the broadcasters' dilemma under the fairness doctrine as presently delineated. On May 5, 1970, the voters of Cuyahoga County, Ohio, had before them a ballot issue pertaining to the renewal of a county health and welfare levy. The subject of welfare is controversial and the media should inform the electorate on ballot issues. At least one station, WJW, decided to editorialize in favor of the issue. Under the fairness doctrine, this editorial surely triggered the licensee's obligation to present all sides of the question fairly. (Here, it should be noted that the question is fairly simple, a "Yes" or "No" vote. People can either be for the levy or against the levy. There is no complicating in-between view.) Although not required by the fairness doctrine, the station ended each editorial with an offer of reply time to those with viewpoints different from the station's. No one came forward and no organized opposition developed. The station did not seek out a spokesman for the opposing point of view. The levy passed by a vote of 191,802 to 123,545, proving that 40% of Cuyahoga County voters, a substantial group by any test, disapproved of the levy. Emerson has stated that the unorganized sectors need the protection of the law and legal institutions in maintaining a system of free expression.[74] If it is the right of listeners to hear all sides of a controversial question, and if it is the affirmative duty of licensees to seek a representative spokesman, Station WJW did not meet its fairness obligation. What such a conclusion fails to take into account is that as a matter of practical politics, the very designation of a spokesman against the levy by the station could have had the effect of organizing opposition to such a levy. Thus, the station would find itself involved in political organization, an effort which levy opponents were not motivated to perform for themselves.

If it did not wish to designate a spokesman for the opposing point of view, the station could have attempted to speculate for itself what the 40% of the voters would have said if they had wanted to be vocal. But here again, this attempt to verbalize is a highly political act, one which could have the effect of coalescing the opposition. In the situation here described, the broadcaster has no facts on which to base his thesis. Re-

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[73] *Id.* at 82.

[74] Emerson, *op. cit. supra* n. 57 at 901.

quiring him to put together a "con" argument to balance his editorial "pro" stand forces him to put words in peoples' mouths based on little understood voter psychology.

Beyond Red Lion

To the extent that it encourages broadcasters to include the expression of minority opinion in their programming and discourages abusive onesidedness, the fairness doctrine has, as Jaffe concluded, a "marginal utility." [75] Good faith attempts by broadcasters to comply with the spirit should work to the benefit of American society.

It is too soon to judge whether or not the *Red Lion* decision will have any inhibitory effect either on general discussion of controversial public issues or on overt broadcasting advocacy. Much depends on how the F.C.C. handles fairness complaints. The F.C.C.'s recent opinion regarding complaints of news slanting on CBS's program "Hunger in America" gives credence to the view that the F.C.C. recognizes first amendment boundaries of its powers. This opinion stated, "We do not consider it appropriate to enter the area where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event. . . . The Commission is not the national arbiter of the truth." [76] There may be times when the fairness doctrine will provide a measure of protection to broadcasters from pressures from advertisers, government officials, or other sources to express, or refrain from expressing, particular views on the air.

Whether or not *Red Lion* provides a stepping stone to a first amendment right of access to newspapers, as envisioned by Barron,[77] remains for the future.

In the opinion of this writer the spectre of monopoly ownership of news media, though not stressed by the Supreme Court in *Red Lion*, looms large in the background. Few will argue that our society should guard against undue control over the political process and public opinion by a limited few. The F.C.C. is presently considering proposed rules designed to break up common control of television and daily newspapers, based on research indicating that 94 television stations are affiliated with newspapers in the same city.[78] Many observers have claimed that centralization of media ownership was leading to a closed system of communications while our system of government requires an open system. Emerson, accordingly, stated that in this area of public expression, there must be developed legal principles "relating to the measure of govern-

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[75] Jaffe, *op. cit. supra* n. 37 at 556.

[76] Memorandum Opinion, adopted October 15, 1969, 20 F.C.C. 2d 143, 150 (1969).

[77] Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

[78] 35 Fed. Reg. 5963, 5966 (1970).

ment control over the content of the program. But little progress has been made. The need is to formulate reasonably concrete standards, based upon the underlying principles of public service and diversity. Equally important, it is necessary to develop the institutions and techniques for applying the standard and supervising that application." [79] *Red Lion* falls far short of such achievement.

From scrutiny of the criteria which the F.C.C. says it considers when awarding broadcast licenses between competing applicants, Friendly discerns two major public policies:

1. That the community should have the programs best adapted to its needs.
2. That this goal should be achieved in a manner that will avoid undue concentration of the media of mass communications nationally, regionally, and locally.[80]

But neither the Commission nor the Congress nor the House and Senate Committees responsible for broadcasting have ever clearly articulated basic, broad policy goals for broadcasting. If the Court had had the benefit of such goals its decision might have begun the setting of the outer boundaries of F.C.C. control which, Kalven says, is requisite if application of first amendment principles to broadcasting are to extend beyond official lip service.[81]

In any event, the F.C.C.'s license renewal hearings are likely to be more lively in the future, based on the cumulative effect of *Red Lion* and the two *United Church of Christ* cases. The first[82] granted listeners standing to contest license renewals, and the second[83] admonished the F.C.C. to give proper consideration to evidence presented by community representatives of breaches of the fairness doctrine. Recently, Atlanta's blacks used the license-renewal process to obtain promises from all 28 stations in that city to be more responsive to the needs of the black community through their programming.[84] What was formerly a perfunctory triennial ritual may soon be transformed into a time for bargaining between broadcasters and citizen groups seeking access to the airwaves.

A most notable "fairness" development occurred in *Banzhaf v. F.C.C.*[85] which upheld the F.C.C.'s ruling requiring radio and television stations carrying cigarette advertising to also devote time informing their

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[79] Emerson, *op. cit. supra* n. 57 at 954.

[80] Friendly, *op. cit. supra* n. 63 at 1060.

[81] Kalven, *op. cit. supra* n. 65 at 37.

[82] Office of Communications of the United Church of Christ v. F.C.C., 359 F. 2d 994 (D.C. Cir. 1966).

[83] Office of Communications of the United Church of Christ v. F.C.C., 38 U.S.L.W. 2002 (D.C. Cir. 1969).

[84] Broadcasting Magazine, April 6, 1970, at 66.

[85] 405 F. 2d 1082 (D.C. Cir. 1968).

audiences of the case against smoking.[86] Agreeing with the F.C.C.'s definition that smoking constituted a controversial issue, the Court of Appeals said: "Whatever else it may mean, however, we think the public interest indisputably includes the public health." [87] After its *Red Lion* decision the Supreme Court denied certiorari to this Court of Appeals decision. Thus, the content of commercials advertising products detrimental to the public health now comes within the purview of the fairness doctrine.

Taking its cue from *Banzhaf,* at least one conservation group has announced plans to prepare "anticommercials" designed to inform the public of water pollution dangers from the phosphates contained in household detergents.[88] Taking their cue from *Red Lion's* sweeping pronouncement:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[89]

local broadcasters have said they will air them.

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[86] Application of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C. 2d 921 (1967).

[87] Banzhaf v. F.C.C., *supra* n. 85 at 1096.

[88] Cleveland Plain Dealer, May 18, 1970, at 1.

[89] Red Lion Broadcasting Co., Inc. v. F.C.C., *supra* n. 2 at 390.