

# THE RIGHT TO CULTURAL PLURALISM IN BROADCASTING

*[I]nformation and ideas should derive . . . from as many different sources, and with as many different facets and colors as is possible . . . . Our American system presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.*

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## I. INTRODUCTION

Culture is often used to refer to art, music and theatre, but it can be defined more broadly to include behavior, attitudes and modes of thought. Although the United States is often described as a "melting pot," it remains a pluralistic society. However, cultural pluralism is undercut when the behavior, attitudes and modes of thought of minorities<sup>1</sup> are not presented by information dissemination media, such as broadcast news.

This comment explores methods of eradicating bias from news programming of broadcasting stations. As used here, bias is a pattern of exclusion of issues that impact upon minorities. It also exists where issues of concern to minorities are covered, but the news program fails to present their viewpoint. After examining factors which result in biased news and the impact of such bias on American society, this comment will review remedies available under the Communications Act of 1934<sup>2</sup> (the Act) and rules and regulations of the Federal Communication Commission (FCC)<sup>3</sup>, with particular emphasis on the Fairness Doctrine.

## II. NEWS BIAS FACTORS AND THEIR IMPACT

### A. *Techniques of Assembling News*

The news department of a broadcasting station generally includes reporters, anchors, newswriters, assignment editors, producers and camera crews.<sup>4</sup> The technique and method of assembling a news program "influence[s] to a large extent the manner in which the news is perceived."<sup>5</sup> Such techniques include selecting and staging of news stories, inaccurate report-

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\* A. PREISS, TELEVISION INTERNATIONAL, March 1978.

1. As used herein, "minorities" refers to non-white ethnic groups, including Blacks, Native-Americans and Latino-Americans.

2. 47 U.S.C. § 151 (1972).

3. 47 C.F.R. § 73.111 (1976).

4. A single station in Chicago, a major market, typically involves 60 to 70 people in the news operation. Reporters investigate numerous stories, the most newsworthy of which are selected to be aired. The anchor is a personality who has a regularly scheduled news show, which allows such person to develop a rapport with the viewing public. The anchor person presents news stories and introduces reporters who give first hand accounts or commentaries. Behind the scenes are the newswriters who prepare scripts for the anchors and select the "bites" of film, videotape, or sound tape to be aired. The assignment editors choose stories and reporters to investigate them. Producers decide the order and content of stories in the newscast. The crew includes sound, light and camera technicians.

5. Aisenberg, *Law and Media*, 21 ST. L. L. J. 76 (1977) [hereinafter cited as Aisenberg].

ing, editing and misrepresentations. Another factor is the underrepresentation of minority personnel in the news programming process.

The selection of "newsworthy" stories is a technique which results in the broadcast of biased news, since news events concerning ethnic minorities are often eliminated. Former Federal Communications Commissioner Benjamin L. Hooks<sup>6</sup> noted a concrete example of such bias when he chastised a network for not mentioning the 1974 tornado destruction of Central State and Wilberforce Universities, two prominent Black universities: "Again and again, Blacks and other minorities have been overlooked as was author Ralph Ellison's 'Invisible Man'. In the eyes of the majority, they often do not exist. . . ."<sup>7</sup>

Similarly, Black achievements are often ignored by the broadcast media. *Chicago Tribune* columnist Vernon Jarrett expressed disappointment over the inability of the Chicago Board of Education to obtain any television news coverage of an annual science and mathematics fair held to recognize achievement by Black youths.<sup>8</sup> According to Jarrett, had the students planned to invade the hotel where the fair was held, cameras and reporters would have been present without invitation.<sup>9</sup> A United States Civil Rights Commission report, *Window Dressing on the Set* [hereinafter cited as Commission Report],<sup>10</sup> includes a comprehensive study lending support to Jarrett's statement. The study includes an analysis of topics aired and persons covered by the broadcast media during a randomly selected period. The topic analysis is subdivided into minority achievements and economic or political victimization of minorities. None of the 230 stories surveyed dealt with minority achievements.<sup>11</sup>

In addition, the Commission Report investigated media presentation of newsmakers, persons who are newsworthy because of their official positions, entertainment careers or other activities in the public arena. Although minorities constituted 11.3% of the total number of newsmakers during the period covered by the study, "only four stories relevant to Blacks occurred in the sample of 230. Black newsmakers, both male and female, were portrayed primarily in association with stories about their economic victimization, the major kind of story about Blacks."<sup>12</sup> To obtain media coverage, the Commission Report suggests that minorities "must typically assemble them-

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6. In 1972, Benjamin L. Hooks, a lawyer, ordained minister and television commentator, became the first Black to serve on the Federal Communications Commission. *THE NEGRO ALMANAC* 1029 (3d ed. 1976). Hooks served until July 31, 1977 when he succeeded Roy Wilkins as Executive Director of the N.A.A.C.P.

7. *Screen Gems Stations Inc.*, 51 F.C.C. 2d 557, 568 (1975).

8. Jarrett, "Television Ignores Black Achievement", *Chicago Tribune*, May 8, 1977, § 2 at 4, col. 1. Jarrett notes that the Chicago Board of Education sent press releases to all news stations to notify and encourage press coverage, only to yield a return of one white and one Black newspaper reporter, but no broadcast media personnel.

9. *Id.*

10. UNITED STATES COMMISSION ON CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977) [hereinafter cited as COMMISSION REPORT]. In this study, the evening news broadcasts of the three major television networks, ABC, CBS and NBC, were each analyzed on five randomly selected dates between March, 1974, and February, 1975. News programs were observed and analyzed for three components: (1) correspondent, (2) topic, and (3) newsmaker.

11. *Id.* at 50.

12. COMMISSION REPORT, *supra* note 10, at 52-54.

selves in an inappropriate place at an inappropriate time in order to be deemed 'newsworthy'."<sup>13</sup>

The staging of news stories is an additional means of projecting biased news. Incidents which would not have occurred but for the news gatherer's inducement is news staging. For example, staging occurred as a news-photographer covering the Newark riots suggested to a Black youngster that he throw a rock for the camera.<sup>14</sup> The unconscionable aspect of news staging is that it makes significant something which in fact is non-existent and the coverage lacks spontaneity and authenticity.<sup>15</sup>

Inaccuracy in reporting is attributable to the lack of a reasonable basis for reporting the story as presented, or not telling the whole story. It also results from editing film or tape so that the final product is consistent with the reporters' or writers' prejudices without regard for the accuracy of the story.<sup>16</sup> One story which received national coverage was the 1977 New York City blackout. According to one columnist, "All the television and newspaper coverage showed whites being altruistic good citizens, directing traffic, helping little old ladies cross the street, etc. Blacks and Latins were shown toddling out of various stores weighed down with stolen booty."<sup>17</sup> The vice identified by the columnist is that one is led to infer that Blacks steal with no sense of morality but that whites do not steal and have high moral values.

Even if the report was accurate, the erroneous inference which it left indicates a lack of objectivity. The reporter not only presents the news, but is often relied upon to identify its importance. When the reporter does not reveal the importance of an event, or arranges accurate facts in a manner which leads to an erroneous inference, the newscast can be deemed lacking in objectivity. Lack of objectivity is also demonstrated when an anchor or reporter will convey a notion of excitement or danger where none actually exists.<sup>18</sup> This occurs frequently in the reporting of athletic events, but it is also common in news coverage, although not as noticeable there.

### B. *Underrepresentation of Minorities*

If there were sufficient numbers of minorities involved in news programming, the above techniques might become less of a factor in news bias. However, minorities are underrepresented in the media, and complaints are frequently lodged against television news operations to remedy this condition.<sup>19</sup> The Commission Report analyzed the ethnicity of eighty-five net-

13. *Id.* at 55, citing Molatch and Lester, *Accidents, Scandals and Routines* in TUCHMAN, *THE T.V. ESTABLISHMENT* 57 (1974).

14. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, U.S. RIOT COMMISSION REPORT 337 (1968).

15. A. SHAPIRO, *MEDIA ACCESS* 34 (1976) [hereinafter cited as SHAPIRO].

16. *Id.* at 19.

17. Lowe, "Seeing the 'Light' Side of the News", *Chicago Defender*, Aug. 18, 1977 at 18, col. 2. It was noted that the San Francisco Chronicle was the only major newspaper which wrote about white looters in its July 15th issue. In passing, Lowe recalled the Chicago Tribune story reporting 500 De MauMau in a Black killer ring composed of ex-GI's. It was only after such a story had impacted upon white suburbanites that a later story revealed that there were only seven members of the group.

18. E. KONECKY, *THE AMERICAN COMMUNICATIONS CONSPIRACY* 33 (1948) [hereinafter cited as KONECKY]. See the reporting of the De MauMau incident, *supra* note 17.

19. See, e.g., *The Chicago Reporter*, Oct. 1976.

work correspondents who appeared during the study. Non-white women accounted for 2.4% (two Blacks and one Asian), and non-white men were only two percent (two Blacks) of the total number. Further, the study indicated that white males made 88.6% of all appearances and that rarely did minorities report any of the top "newsworthy" stories which were televised during the period under study.<sup>20</sup> The Commission Report concluded that minority correspondents have been underrepresented notwithstanding improvements since the 1950's. Minorities who did appear, did so as tokens and in stereotypical roles because of the limited subjects they covered. Although the Commission Report was limited to the three major national networks, independent and local newscasts would probably have reflected a similar picture.<sup>21</sup>

### C. *Impact of News Bias*

The impact of broadcasting media can be measured by Americans' wide and unfaltering reliance on television and radio as their major source of news. It is estimated that each evening 25 million households view the news broadcast of one of the three major national networks.<sup>22</sup> Some minority broadcasters believe that Blacks and Latino Americans watch television to a greater extent than other Americans because "Black and Latino audiences . . . have fewer opportunities to afford [sic] other pastimes."<sup>23</sup>

While there is no conclusive empirical evidence to support the notion that television shapes the attitudes and ideas of its viewers, a number of observers are convinced that it does have such an effect.<sup>24</sup> Thirty years ago Konecky observed that "broadcasting is a billion-dollar industry, it influences the government, it helps to shape public opinion, it has changed the ways of living of tens of millions of Americans, it has modified language, speeded time, dwarfed space, it has inflamed millions with false ideas or kept them in ignorance."<sup>25</sup> Former FCC Commissioner Hooks also recognized the "great impact" of the broadcasting medium,<sup>26</sup> and the Civil Rights Commission Report found that "research on television's impact on viewers . . . suggests that stereotyping and exclusion of minorities and women may

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20. COMMISSION REPORT, *supra* note 10, at 50.

21. A 1976 study of the Chicago area indicates that "[t]he weekday part-time anchor or co-anchor positions at Chicago television stations are held exclusively by white males." The Chicago Reporter, *supra* note 19, at 7. The Chicago study was compiled from interviews with minority broadcasters whose interests in anchoring apparently were stymied by Chicago's history of segregated schools and housing. This history was said to be indicative of management and viewer mentality.

22. COMMISSION REPORT, *supra* note 10, at 49. Fifty-four percent of those surveyed in 1970 believed that television delivers the latest news most rapidly, and television news scored a high of 33% for being least biased in its coverage. Newspaper and radio news coverage received a significantly smaller percentage. *Id.* at 1.

23. The Chicago Reporter, *supra* note 19, at 1.

24. As one author puts it: "Whatever the research may say, people in general act on the common-sense conviction that broadcasting has a wide range of highly specific effects. Pragmatically, they behave as if predicted effects actually do take place; therefore these putative effects have influence, whether or not they all occur in fact." S. HEAD, BROADCASTING IN AMERICA 499 (1972). *But see*, Bollinger, Jr., *Freedom of the Press and Public Access*, 75 MICH. L. REV. 115 (1976).

25. E. KONECKY, *supra* note 18, at 7-8.

26. *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C. 2d 354, 370 (1975); Aisenberg, *supra* note 5.

have detrimental effects on [individual] viewers, particularly children."<sup>27</sup>

It is said that television confers status and importance on the subjects and persons covered in the news. When biased news is presented, the broadcast media perpetuates public ignorance about minorities as the Commission Report concludes:

To the extent that network news provides information about significant events and issues and important people in American society, this study of network news indicates that minorities and women were considered to be neither significant nor important. They did not make the news nor were stories reported that relate directly to their activities and achievements. Consequently, their exclusion from the national scene, as it was recorded by the networks, suggests to the Nation that minorities and women may not matter.<sup>28</sup>

The ignorance perpetuated by biased news may also be responsible for past and present tensions between whites and minorities. Thus, those Blacks and whites who believe that the pluralism of American society ought to be reflected in broadcast news should support greater government regulation to prevent the media's news bias. The next section will discuss the use of the FCC's Fairness Doctrine as a tool to control news biased against minorities.

### III. CONTROLLING NEWS BIAS THROUGH THE FAIRNESS DOCTRINE

#### A. *General Principles*

A broadcasting license from the FCC allows the licensee to operate a private business from which handsome profits are derived. The license not only yields financial gain, but also functions as a permit to convey information to, and influence the opinion of the masses. A broadcast station is unlike a newspaper in that the owner of the latter has more control of its process and product.<sup>29</sup> However, the broadcast station is a fiduciary of the public; thus a public interest obligation is imposed as the *quid pro quo* for the licensee's use of the public's airwaves. As a prerequisite to granting a license, Section 309(a) of the Act requires the FCC to find that the "public interest, convenience and necessity would be served" thereby.<sup>30</sup> If the licensee should subsequently breach its duty to serve the public interest, the license must not be renewed.<sup>31</sup>

27. COMMISSION REPORT, *supra* note 10, at 72. The report relies heavily upon Dr. Bradley Greenberg's findings with respect to impact. It says, "Greenberg's finding that viewers who do not interact with other racial groups get their information about them from television has significant implications, given the data on minority group portrayals reported in this chapter." *Id.* at 46. The report included two chapters on programming. Chapter One analyzed the role of minorities in commercial television aired in the 1950's, 1960's, and 1970's. Programs characteristic of the respective periods were "Amos 'n Andy," "East Side/West Side" and "All in the Family". Additionally, the 1960's subdivision included a brief analysis of television news indicating black subjects were popular because of racial clashes in the South. Chapter Two concentrated on television drama—one time programs—as distinguished from series programming in the previous chapter. Programs were analyzed for several factors including roles (serious versus comic), parental status, economic status, occupational portrayals and proportion of characters. Each of the above factors was categorized by race and ethnicity. The Report concluded that television's portrayals of minorities and their potential impact is of critical importance to America. *Id.* at 47.

28. *Id.* at 54-55.

29. See *National Broadcasting Co. v. F.C.C.*, 516 F.2d 1101, 1111 (D.C. Cir. 1974).

30. 47 U.S.C. § 309(A) (1971).

31. *Office of Communication of United Church of Christ v. F.C.C.*, 425 F. 2d at 543 (D.C. Cir. 1969).

The public interest concept is the most general of the statutory standards administered by the FCC, but it encompasses a number of different themes. One is the Fairness Doctrine, which originated very early in the regulation of radio and television broadcasting.<sup>32</sup> As common law concept promulgated by the FCC, the Fairness Doctrine does not expressly appear in the Communications Act, but its requirements can be inferred from Section 315.<sup>33</sup> It imposes an "affirmative obligation" on the broadcaster to report controversial issues and a "balancing obligation" requiring that such issues be covered fairly.<sup>34</sup> Since the two obligations are interdependent, the absence of either may breach the doctrine and therefore the public interest standard.<sup>35</sup> The balancing obligation is neither required to be performed in the same broadcast nor does a particular individual have a right to present the other side, except where the individual seeks to reply to personal attacks.<sup>36</sup> There is no precise definition of the phrase "controversial issue of public importance." However, one author has set forth three criteria for identifying such an issue. He suggests that coverage of the issue in other media, the attention paid thereto by public leaders and the breadth of the issue's impact upon the community are sufficient measures of importance.<sup>37</sup>

Absent a showing that the licensee's judgment is "unreasonable" or made in "bad faith" the FCC will not second guess the adequacy of its presentation of a controversial issue of public importance.<sup>38</sup> The licensee's

32. See generally H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* (1973) [hereinafter cited as GELLER]; Barron, *An Emerging First Amendment Right of Access to the Media?* 37 GEO. WASH. L. REV. 487 (1969) [hereinafter cited as Barron]; Comment, *Enforcing the Obligation to Present Controversial Issues*, 10 HARV. CIV. RIGHTS CIV. LIB. L. REV. 137 (1975) [hereinafter cited as *Controversial Issues*]; Note, *Access v. Fairness in Newspapers*, 35 OHIO S.L.J. 952, 969 (1974) [hereinafter cited as *Access v. Fairness*].

33. 47 U.S.C. § 315 (1971) provides in part: (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events including but not limited to political conventions and activities incidental thereto,

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence 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 chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. . . . (d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

34. See GELLER, *supra* note 32, at 107.

35. See *Controversial Issues*, *supra* note 32, at 154.

36. *WTWV, Inc.*, 62 F.C.C. 2d 633, 639 (1977).

37. SHAPIRO, *supra* note 15, at 109.

38. *WTWV, Inc.*, 62 F.C.C. 2d 633, 639 (1977); *Newhouse Broadcasting Corp.*, 61 F.C.C. 2d 528, 541 (1976). See also *National Broadcasting Co. v. F.C.C.*, 516 F.2d 1101, 1120 (D.C. Cir. 1974) (acknowledges the FCC's more active role under the personal attack and political editorializing provisions but explains the FCC is less active where there is a general requirement of fairness.)

"good faith" is the key to undergoing FCC scrutiny.<sup>39</sup> Concisely stated, the test is whether the broadcaster decided unreasonably or in bad faith in choosing not to present another perspective on a controversial issue of public importance.<sup>40</sup> A licensee abuses its discretion if "reasonable men viewing the program would not have concluded that its subject was as described by the licensee."<sup>41</sup>

Prior to 1962, the FCC referred all Fairness Doctrine complaints to the licensee for an initial determination of whether its Fairness obligation had been met. Usually licensees were reviewed for fairness by the FCC upon expiration of the license term.<sup>42</sup> Beginning in 1962, the FCC instituted a practice of resolving fairness complaints as they arose.<sup>43</sup> It has investigated the allegation by requesting the licensee to submit factual reports on the program subject on which the alleged unfairness occurs.<sup>44</sup> Upon finding a complaint valid, the FCC may require the violator to submit steps taken to comply with the Fairness Doctrine,<sup>45</sup> or it may postpone sanctions until expiration of the license term and then deny renewal for breach of the Fairness Doctrine.<sup>46</sup> The complainant has the burden of identifying the violation,<sup>47</sup> but the licensee must bear the burden of meeting the fairness requirement. Since the doctrine imposes a non-delegable obligation, a licensee cannot claim that the balancing obligation was the responsibility of another.<sup>48</sup> Therefore, one cannot look to television reviewers for a determinative indication of fairness.<sup>49</sup> When making a Fairness Doctrine review the FCC distinguishes between "unfairness" and allegations, the heart of which is an attack on truth or accuracy.<sup>50</sup> Fairness is likewise distinguished from the deliberate slanting of news.<sup>51</sup> These distinctions are considered necessary to

39. *Brandywine—Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 44, 46 (D.C. Cir. 1972).

40. *See Screen Gems Stations, Inc.*, 51 F.C.C. 2d 557, 562 (1975).

41. *National Broadcasting Co. v. F.C.C.*, 516 F.2d 1101, 1121 (D.C. Cir. 1974).

42. *See Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367, 380-85 (1969); *Dominican Republic Information Center*, 40 F.C.C. 457, 457-58 (1957).

43. *National Broadcasting Co. v. F.C.C.*, 516 F.2d 1101, 1115, n.43 (D.C. Cir. 1974). Waiting until the license term expired was thought to be unfair to the licensee, to the complaining party, and particularly to one who was campaigning for public office. *Id.* at 1115, n.54.

44. *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994, 998 (D.C. Cir. 1966).

45. *See, e.g., National Broadcasting Co.*, 516 F.2d 1101, 1115 (D.C. Cir. 1974); *Tri-State Broadcasting Co., Inc.*, 40 F.C.C. 508, 509 (1962); *Honorable Oren Harris*, 40 F.C.C. 582 (1963).

46. *See Office of Communication of United Church of Christ v. F.C.C.*, 425 F.2d 543, 545, 550 (D.C. Cir. 1969).

47. *Fairness Doctrine Ruling*, 40 F.C.C. 2d 961 (1973). To further the expeditious handling of complaints under the doctrine, specific information must be included in complaints. It includes: (1) a statement explaining the nature of the controversial issue of public importance; (2) the date and time the matter was broadcast; (3) the basis for the claim to be a controversial and important issue; (4) a statement indicating the basis for the allegation that only one side of the issue was broadcast; and (5) indication of whether the broadcaster offered a reasonable opportunity to complainant to respond. *WTWV, Inc.*, 62 F.C.C. 2d 633, 639 (1977).

48. *Brandywine—Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 50 (D.C. Cir. 1972).

49. *National Broadcasting Co. v. F.C.C.*, 516 F.2d 1110, 1111 (D.C. Cir. 1974).

50. *Fairness Doctrine Ruling*, 40 F.C.C. 2d 958, 961 (1973). *See also SHAPIRO, supra* note 15, at 18.

51. The F.C.C. will invoke its sanctions to prohibit deliberate slanting of news, however, one making such allegations must show extrinsic evidence proving an actual intent to slant the news. *Fairness Doctrine Ruling*, 40 F.C.C. 2d 958, 962 (1973).

avoid infringement of the constitutional guarantee of free speech, but the Fairness Doctrine has been upheld against a First Amendment challenge.

In two consolidated cases, *Radio-Television News Directors Association v. FCC (RTNDA)*,<sup>52</sup> and *Red Lion Broadcasting v. FCC*,<sup>53</sup> the Supreme Court construed the Fairness Doctrine. In the former, the plaintiffs challenged FCC regulations giving a party the right to reply to personal attacks and political editorials. In *Red Lion*, an author and his book were harshly criticized by the host of a television series; the author being labeled pro-communist. In that case the FCC ordered the licensee to grant reply time to the author. In both cases, FCC action was challenged on First Amendment grounds. Reasoning that regulation is the *quid pro quo* for the use of public airwaves, the Court noted that the Fairness Doctrine is a necessary outgrowth of the selection of a few licensees to use frequencies which belong to the public. Selectivity was deemed necessary to avoid overcrowding the airwaves, resulting in chaotic reception.

Thus, the Supreme Court ruled that "the specific application of the fairness doctrine in *Red Lion*, and the promulgation of regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment. . . ." <sup>54</sup> However, the Court did recognize that the Fairness Doctrine may offend a licensee's First Amendment rights under different circumstances. It indicated that it did not

. . . ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.<sup>55</sup> Thus the general rule is that the imposition upon the licensee of the two-fold duty to present controversial issues of public importance and to present such issues fairly by accurately reflecting opposing views will pass constitutional muster.<sup>56</sup>

#### B. *News Bias and Section 326*

News bias complaints have been singled out for special treatment under the Fairness Doctrine. In 1973, the FCC practice was not to make any inquiry into non-entertainment programming such as news.<sup>57</sup> In fact, stations were found to have met the public interest standard without a showing of any non-entertainment programming, including news.<sup>58</sup> Challenges to news

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52. 395 U.S. 367 (1969).

53. *Id.*

54. *Id.* at 375.

55. *Id.* at 396.

56. *Id.* at 377-82, 400-01.

57. Broadcast Licenses for Arkansas, Louisiana and Mississippi, 42 F.C.C. 2d 5, 17 (1973). However, as a practical matter, restricting the application of the Fairness Doctrine to entertainment programming reduced its application to relatively little television programming. Even in the case of entertainment programming, the Fairness Doctrine could not be invoked unless the subject matter aired raised a controversial issue of public importance. Much entertainment programming does not include controversial issues.

58. *Id.*

bias are also made more difficult by the FCC's deference to Sections 326 and 153(h) of the Act.<sup>59</sup> The former provides that "nothing in this chapter shall be understood or construed to give the Commission the power of censorship. . .", while Section 153(h) denies common carrier status to television stations. Interpreting these sections in *Columbia Broadcasting System v. Democratic National Committee*,<sup>60</sup> the Supreme Court stated that both "clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee."<sup>61</sup> This case upheld the licensee's right to deny a request by the Democratic National Committee for paid political advertising time on national television.<sup>62</sup>

It is important to understand the Commission's sensitivity to the censorship prohibition when applying the Fairness Doctrine. The former suggests that the FCC not interfere with the editorial judgments of the licensees and the latter defines the FCC's duty to see that the licensee executes its obligation to seek out "controversial issues of public importance." Despite the obvious inconsistency of duties imposed upon the FCC there is a unity of purpose which is to perform the public interest task of informing the public.<sup>63</sup> In attempting to satisfy both responsibilities, the FCC has imposed a heavy burden on the challenger alleging biased programming. Thus, it is insufficient to allege mere conclusions. Instead the recital of specific programming deficiencies is required.<sup>64</sup> If the allegation is that the bias is manifested by news suppression, the FCC must find that the decision not to report the subject of the complaint was due to "private rather than public interests."<sup>65</sup> Furthermore, the FCC has said that "[a]bsent extrinsic evidence of deliberate distortion, slanting or staging, the Commission will not inquire into a licensee's decisions to cover or not to cover certain stories or certain persons."<sup>66</sup> Mere allegations of slanting, distortion, or failure to cover minority issues have not been sufficient to activate FCC investigatory powers.<sup>67</sup> A former General Counsel of the FCC suggested that deliberate

59. 47 U.S.C. § 326 (1971) is entitled censorship and provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 153(h) (1971) provides as follows:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

60. 412 U.S. 94, 116 (1973).

61. *Id.*

62. *Id.* This case is consistent with *Red Lion* since both support the notion that no individual or group (unless personally attacked) has the right to broadcast his views in person. The Fairness Doctrine merely requires that the licensee give balanced or fair coverage to each side of controversial issues.

63. *Id.* at 112.

64. *See Stone v. F.C.C.*, 466 F.2d 316, 328 (D.C. Cir. 1972).

65. *Screen Gems Stations, Inc.*, 46 F.C.C. 2d 252, 257 (1974).

66. *Rust Communications Group, Inc.*, 53 F.C.C. 2d 355, 364 (1975). *See also Sande Broadcasting Co. Inc.*, 58 F.C.C. 2d 144 (1976).

67. *Sande Broadcasting Co. Inc.*, 58 F.C.C. 2d 144 (1976); *Rust Communications Groups, Inc.*, 53 F.C.C. 2d 355, 364 (1975). In *Rust*, petitioners alleged that none of the programs broadcast

distortion must be a directive from top management, since investigation of acts by a mere employee would breach the censorship proscription of Section 326 of the Communications Act.<sup>68</sup> Such an inquiry into employee intent is said to involve the FCC in the day to day operation of news programming, a course the FCC wants to avoid.

These restrictions on the Fairness Doctrine are unfortunate because it limits the Doctrine's use as a vehicle to ameliorate news bias. However, it may be possible to extend to news programs the result reached in a case involving public service programming. *Office of Communication of United Church of Christ v. FCC*,<sup>69</sup> is the pioneering case concerning unfair coverage of minority issues. A network program about race relation problems on which the N.A.A.C.P.'s General Counsel was to be featured was blacked out by a station. The blackout was later attributed to technical difficulty. On a subsequent occasion, the broadcaster allegedly presented a one sided perspective on integration during a 1962 civil disturbance provoked by practices at the University of Mississippi. The FCC found that the licensee's overall performance indicated a failure to give balanced coverage to the controversial issue of race relations because its programming omitted the black perspective. Nonetheless it renewed the license, on a short term basis. The decision to renew was appealed to the United States Court of Appeals for the District of Columbia. Rejecting an amorphous approach and giving the Fairness Doctrine substance, the court outlined a number of factors which should have been considered by the FCC in making a determination on license renewal. Among them were the fact that the license was renewed for a one year probationary term despite the FCC's prior finding that the public interest standard was not met; testimony that programming was shut off because it showed "Negroes" sitting in at Woolworth's; the hearing examiner's curious "neutrality-in-favor-of-the licensee"; and the broadcaster's role as a fiduciary of the public.<sup>70</sup> After identifying these factors, the court noted:

The Fairness Doctrine plays a very large role in assuring that the public resources granted to licensees at no cost will be used in the public interest. In short, we do not determine how the factors we have discussed should have been weighed by the Commission but only that they had some probative value and should have been considered.<sup>71</sup>

However, the court did overrule the FCC by ordering it to open the license up to other applicants. Although the court recognized that the proper disposition would have been to remand, it decided that the appellants would not obtain a fair hearing before the FCC. The station involved was not prohibited from reapplying and a ruling on that matter was left to the FCC's discretion.

*United Church of Christ* was the first case in which a license was not renewed because of a Fairness Doctrine breach concerning minorities. It

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featured Blacks, Puerto Ricans or other minorities, except for one program which was broadcast on Saturday evenings and for a five minute duration. *Id.* at 358.

68. See GELLER, *supra* note 32.

69. 359 F.2d 994 (D.C. Cir. 1966), 425 F.2d 543 (1969) (ultimately denying license renewal of the licensee).

70. *Office of Communication of United Church of Christ v. F.C.C.*, 425 F.2d 543, 545-48 (1969).

71. *Id.* at 548.

should be noted that this is a public affairs programming case, whereas the question of news programming bias is involved in a 1977 case currently pending before the FCC *WTWV, Inc.*<sup>72</sup> The white complainant was asked to be a substitute by a black civil rights leader who was to have appeared on the licensee's news program, along with other black guests. Upon the complainant's arrival at the station, allegedly he was told by the news director that the station's policy prohibited Blacks and whites from appearing on the same program. The validity of this policy subsequently was confirmed by the program director and general manager.

The FCC designated the complaint for an evidentiary hearing, which was pending when this comment was written. At the hearing a determination will be made as to whether or not the station's practices and policies are in the public interest. The outcome will be particularly interesting because the FCC has ruled that where a licensee's past performance is in conflict with the public interest, a heavy burden rests upon the licensee to justify a renewal under the public interest standard.<sup>73</sup> The licensee is also bound to "run on his record."<sup>74</sup> Additionally, the FCC has already said of this case that "[a] practice of non-integrated programming would raise a serious question concerning WTWV's good faith exercise of . . . discretion."<sup>75</sup>

Hopefully, the FCC's disposition of the *WTWV* case will be more responsive to the need for cultural pluralism than its reaction to the Civil Rights Commission's recommendation that it use its rule making authority and adjudicatory powers on a case by case basis to remedy the broadcast media's poor record of television treatment of minorities.<sup>76</sup> The FCC responded that it was unable to meet this recommendation because of the Act's prohibition on censorship. In his overly charged response, Wallace E. Johnson, Chief of the Broadcast Bureau said "we disagree" with a remedial approach which includes rule making and decision. Continuing, he said:

Not only should the Commission not place itself in the role of a censor, but it would almost certainly bog down hopelessly if it were to try to regulate television programming fare [sic] in the way the report suggests—to oversee the day to day content of entertainment programs, judge role-models, second guess casting decisions, preview scripts, select news stories for coverage, regulate the assignment of reporters to stories and select guests and moderators for discussion programs. Surely, however serious the problem may have been (or is) the suggested cure would be worse. Indeed, carried to its logical conclusion, the suggested solution could also lead to the censorship of all free speech.<sup>77</sup>

By imputing such extremes to the Commission on Civil Rights, the FCC took refuge in the censorship provision of the Communications Act to defend its insensitivity to an existing problem.

Congress has never legislated and the Courts have never ruled that the FCC's hands are tied with respect to using administrative powers to prevent a pattern of exclusion of minorities from news programming. Indeed, the

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72. 62 F.C.C. 2d 633, 640 (1977) (designated for hearing).

73. *Id.*

74. *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994, 1007 (D.C. Cir. 1966); *New Mexico Broadcasting Co.*, 54 F.C.C. 2d 126, 132 (1975).

75. *WTWV, Inc.*, 62 F.C.C. 2d 633, 638 (1977).

76. COMMISSION REPORT, *supra* note 10, at 72, 172.

77. *Id.* at 172.

FCC itself has been willing to assume discrimination exists in broadcasting.<sup>78</sup> In fact, the FCC does make decisions concerning programming.<sup>79</sup> In addition, the FCC ought to read the censorship provisions in conjunction with the Act's provision requiring that stations operate in the public interest. The lesson of *Red Lion* is that the Fairness Doctrine can be applied consistently with the First Amendment. The FCC can become an advocate of free speech by requiring incorporation of minorities' views in news programming. Section 326 of the Communications Act only prohibits the FCC's "interference" with free speech and not the encouragement thereof. Jerome A. Barron, a prolific author on free speech in the broadcasting field, registered his agreement with this position by posing a rhetorical question: Is the First Amendment "inconsistent with requiring the industry as a matter of its internal practice to make some attempt to represent the major social components in our national life, particularly when dialogue between the races is so urgently needed?"<sup>80</sup> To enforce such requirements is not to censor, but rather to make licensees accountable for conduct falling short of that mandated in the public interest.<sup>81</sup> Thus, the next section proceeds from the premise that the FCC does have authority to remedy bias in news programming.

#### IV. REMEDIES FOR VIOLATION OF THE FAIRNESS DOCTRINE

The FCC has a number of measures available to force compliance with regulatory standards, including the initial denial of a license or refusal to renew.<sup>82</sup> It may grant or renew a license for a period less than the full three-year term, known as short-term renewals.<sup>83</sup> Conditions may be attached to a license,<sup>84</sup> and the filing of reports normally due at the expiration of the license term may be required more frequently or in greater detail.<sup>85</sup> Licenses may be revoked for commission of six specified acts.<sup>86</sup> Additionally, fines and imprisonment are authorized under the Act.<sup>87</sup> All of these sanctions

78. FCC Broadcast Bureau Chief Wallace E. Johnson said, "We are willing to assume, for the purpose of this letter [response to Commission Report] that the report's factual base is, in general, accurate insofar as it relates to depiction of minorities and women in television programming." *Id.* at 72.

79. The most well known example of the FCC regulating programming is the Mayflower ruling of 1941 in which the FCC prohibited stations from editorializing in programs. The reasoning behind the ruling was that a public facility was not to be used for the licensee's private purposes. *In re the Mayflower Broadcasting Co.*, 8 F.C.C. 333, 340 (1941). *See also*, *Editorializing by Broadcast Licensees*, 14 FED. REG. 3055 (1949). However, this was a decision prompted by the FCC; neither congress nor the courts imposed such mandate. *See also* E. KONECKY, *supra* note 18, at 38. *But see* *Writer's Guild of America West, Inc. v. F.C.C.*, 423 F. Supp. 1064 (C.D.C. 1976) where the court rejected the Family Hour concept in which an FCC authorized review board could censor programming thought to be offensive to a general family audience. It was held unconstitutional because the government usurped the licensee's duty to not delegate programming decisions.

80. Barron, *supra* note 32, at 502.

81. COMMISSION REPORT, *supra* note 10, at 172 (1977).

82. Communications Act of 1934, 47 U.S.C. § 309(a) and 307(d) (1962).

83. Communications Act of 1934, 47 U.S.C. § 307(d) (1972), *Sande Broadcasting Co.*, 58 F.C.C. 2d 139 (1976).

84. *Employment Policies and Practices of Certain Broadcast Stations Located in Florida*, 44 F.C.C. 2d 735, 740 (1974), *aff'd sub nom. WTRL Broadcasting, Inc.*, 48 F.C.C. 2d 666, 668 (1974).

85. Communications Act of 1934, 47 U.S.C. § 307(d) (1971).

86. Communications Act of 1934, 47 U.S.C. § 312(a) 1-6 (1971).

87. Communications Act of 1934, 47 U.S.C. § 501-04 (1971).

may be used in isolation or in conjunction with one another. Although the Act grants the FCC a full range of enforcement powers, the Commission has failed to use such measures to assure minority participation in broadcasting. Sanctions have been invoked against only two television licensees because of programming discrimination.<sup>88</sup> This low incidence of enforcement would suggest the absence of programming deficiencies, yet such is not the case.<sup>89</sup> Thus, it is imperative that the FCC begin using existing enforcement mechanisms, along with adopting other alternatives.

The FCC must eliminate or minimize the interests that militate against the goal of obtaining fair and unbiased news coverage. Leaving the public interest task of coverage of minority oriented issues to the discretion of licensees without any degree of accountability should no longer be tolerated. As one measure, perhaps all licensees could be required to list issues of the year that were most significant to minority elements of its primary viewing area. After correlating such information, the FCC could then measure the licensee's performance against local, regional and national industry standards.<sup>90</sup> This process would aid the FCC in initiating its own inquiries and in corroborating Fairness Doctrine complaints. More importantly, licensees would be motivated to seek out minority issues and achievements that presently go uncovered.

In addition to compiling a list for the purpose of establishing a standard, the FCC could go further and require specific reports from licensees that employ an under-representative number of minorities, indicating their degree of news coverage of minority communities.<sup>91</sup> This report would give the FCC an indication of the patterns that exist in the news coverage of minority communities. For example, a chart showing total stories concerning minority achievements, civic oriented organizations and events, crime, and any other stories in minority communities would enable the licensee, the FCC and the public to analyze a particular station's degree of news bias.

Implementation of listing and reporting requirements would call to the licensees' attention its obligation to inform the public of controversial issues

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88. COMMISSION REPORT, *supra* note 10, at 62. Licensees were denied in *Office of Communication of the United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966) and *Alabama Educational Television Commission*, 50 F.C.C. 2d 461 (1974).

89. COMMISSION REPORT, *supra* note 10.

90. *Cf. Morris, Custom and Negligence*, 42 COLUM. L. REV. 1147, 1164-65 (1942). Morris indicates that medical doctors, when faced with a charge of negligence must be held responsible for a standard set by the medical profession. The doctor's practice must conform to the customs of the industry. The point is that a licensee's news performance may be measured against the news industry's standard. *See generally, Barron, supra* note 32, at 490. Barron says that an enforceable standard is feasible: "Since the test of renewal is performance in the 'public interest' and since even-handed presentation of controversial public issues can be a criterion of operation in the public interest, extended evasion of public issue programming is within the reach of sanctions." *Id.* Additional measures must be taken to insure that minority issues are included among coverage of controversial issues of public importance. This is true despite the FCC's rejection of a proposed programming Research Officer, who would collect and publish statistics on programming, including minorities. These statistics would have been used to rank stations according to various criteria. For example, stations could be ranked according to their "minority news coverage." *See Citizens Communication Center*, 61 F.C.C. 2d 1120 (1976) (National Black Media Coalition Proposal).

91. It has been recommended that the licensee be required to list ten issues, local and national of each year and that it designate the representative programming covering both sides of such issues. This is thought to get the licensee to focus on the fairness obligation. *See GELLER, supra* note 32, at 48.

of public importance including those derived from minority communities. This approach avoids unwarranted interference by government and impresses upon the licensee that minority communities are an important element in the community. The government in no way would designate which issues or stories should be covered, but it could discourage patterns that are unrepresentative and thus promote unbiased news. The above recommendations would provide an initial step in bringing to the media a self-awareness of news bias. Arguably, the FCC could take the additional step of requiring that total news programming reflect a percentage of issues concerning minorities which correlates with the percentage of minorities in the station's primary service area.<sup>92</sup>

Another remedial measure is minimizing the influence of the market place in news programming. Advertisers should be prohibited from purchasing time during news programming. Instead, a percentage of all funds accruing from advertisements should be utilized to make news programming sponsor-free. This process may serve to counter the influence of sponsors who will advertise only if they can reach a preferred viewing audience.<sup>93</sup> This audience most often is the middle class suburban family. By definition, this would exclude many minority populated areas. To the extent that news coverage reflects this business motive, a corrective measure is appropriate.<sup>94</sup>

Another economic interest having similar impact is the licensee's self interest, which makes it economically inexpedient to cover a news story because of contractual ties between the licensee and the newsmaker,<sup>95</sup> or because of the more intimate subsidiary-parent holding company

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92. See generally, *Stone v. F.C.C.*, 466 F.2d 316, 328 (D.C. Cir. 1972); *Citizens Communications Center*, 61 F.C.C. 2d 1112, 1118-19 (1976). In the latter case, the petitioners proposed a prime time access rule advocating that a public interest issue be raised if minority programming is not aired during such time. The rule was to be applied only where the minority population is a significant part of the viewing audience. However, the FCC dismissed the proposal without proceedings for its consideration. The proposal referred to in the text requiring that total news coverage reflect a percentage of minority issues is much less of an infringement upon free speech than the one dismissed by the FCC. It merely establishes ground rules for preventing the exclusion of issues that concern minority people. At the same time, it yields to the licensee who must program according to the public interest standard. The licensee retains his authority to schedule programming and is ultimately responsible for what is aired. However, issues that pertain to minorities and qualify as controversial issues of public importance would not be subject to present patterns of exclusion from the air.

93. See KONECKY, *supra* note 18.

94. *Controversial Issues*, *supra* note 32, at 154, suggesting that licensees save money by not presenting controversial issues, since they do not have to foot the bill for the balancing obligation or the additional expense of finding a sponsor to pay the air time of presenting opposing views:

[M]inority interests and the general public interest in the free exchange of information and ideas—protection of which underlie the first amendment—can only be fulfilled if professional journalism in broadcasting is reinforced by some intervention that will counter the economic incentives and commercial pressures on broadcasters to limit their offerings to bland and inoffensive programs with mass appeal.

*Id.* at 150.

95. See, e.g., *Screen Gems Stations, Inc.*, 46 F.C.C. 2d 256 (1974). The black petitioners argued that ABC was engaged in a conflict of interest, because its alleged news suppression was motivated by a financial interest in broadcasting the Sugar Bowl Game. They said that ABC suppressed news by not covering the controversy incited by the petitioner's protest against the discriminatory practices of the National College Athletic Association (N.C.A.A.). They complained about N.C.A.A.'s failure to broadcast black college sports events, which allegedly resulted in substantial pecuniary gains for the selected predominately white universities. The FCC claimed to have no

relationship.<sup>96</sup> Because of the impact of news programming, it should be sheltered from the economic influence to which other programs are subject. In determining the priorities between the licensee's economic interest and the social interest of the public, the FCC must concede to the latter, as one thoughtful writer concluded: "The social force of radio and television—the economic, political and cultural power it wields—is a thousand times more precious than the billions of dollars invested in radio and the hundred million dollars of gross profits made annually by the broadcasting chains. . . ."<sup>97</sup> Yet, neither the present administration of the Communications Act nor the Act itself satisfy the social interest of the public.<sup>98</sup> The failure of broadcast licensees to assign the proper weight to social interests stem from failure to recognize the public trust character of its role.<sup>99</sup> Were the proper weight assigned to the interests of society, implementation of the nonsponsored newscasts as described above would not be problematical.

## V. CONCLUSION

There is no paucity of suggestions for improvement of the rather dismal record of the broadcast industry.<sup>100</sup> Several interest groups and community organizations have continued to press the industry toward an acknowledgment of cultural pluralism.<sup>101</sup> Ultimately, however, the question of whether fair news coverage will be obtained rests with the enforcement of law and policy by the FCC. In 1968 the FCC noted that the media could play a role in fostering understanding between Blacks and whites:

The nation is confronted with a serious racial crisis. It is acknowledged that the media cannot solve that crisis but on all sides it has been emphasized that the media can contribute greatly in many respects, particularly to understanding by Whites and Blacks of the nature of the crisis and the possible remedial actions and that such understanding is a vital first and continuing step.<sup>102</sup>

The crisis recognized in 1968 is a continuing one, and thus is still deserving of media attention. That attention should be designed to lift the veil of invisibility with which broadcasting often shrouds minorities, and should be directed toward the objective of fostering cultural pluralism.

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jurisdiction over the discriminatory practices of the N.C.A.A. and that extrinsic evidence did not suggest deliberate news distortion. *Id.* at 254-55.

96. See KONECKY, *supra* note 18, at 7.

97. See Aisenberg, *supra* note 5, at 90.

98. See Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (D.C. Cir. 1966). See generally *Controversial Issues*, *supra* note 32.

99. See Barron, *supra* note 32, at 500 for the suggestion that cease and desist orders and short term renewals be utilized to stress licensee compliance with the Fairness Doctrine.

100. Among the more active organizations are the Citizens Communications Center, Media Access Project, National Black Media Coalition, National Citizens Committee for Broadcasting and the Office of Communication of the United Church of Christ.

101. Nondiscrimination In Employment Practices of Broadcast Licensees, 13 F.C.C. 2d 773 (1968).

102. See NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 1978.