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The Fairness Doctrine and Pro-Natalism in Television

Myra Spicker

Education and persuasion constitute two important functions of mass communications in our society. Certainly a countless variety of groups attempt to influence public opinion through the use of the mass media, and, most particularly, through the medium of television. “Messages” may be transmitted directly through commercial advertisements and editorial opinions; they may also be transmitted indirectly through dramatized presentations which more subtly convey attitudes and points of view. Theoretically, the airwaves are committed to the presentation of all points of view, but in practice, because of the nature of American television and its commercial grounding, many voices are given short shrift or are not heard at all if they have neither the economic clout nor the political power to gain access to the broadcasting media.

It is a premise of this paper that television reflects a pro-natalist bias in its promotion of the traditional female role in society, and that such bias is evident in both commercial advertisements as well as in dramatic presentations particularly on daytime television. Those who are opposed to a pro-natalist point of view will find it virtually impossible to air their opposition effectively. At best anti-natalist groups may be able to garner only meager financial resources to air spot commercials, but this is hardly adequate to combat the subtle onslaught of the opposition. Suggestions have been made that pro-natalist attitudes be countered by means of the Federal Communications Commission’s Fairness Doctrine which might possibly

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enable anti-natalist groups to gain access to the airwaves. This paper will examine present television attitudes as well as the history and status of the Fairness Doctrine in an attempt to evaluate the availability of this doctrine as a tool for those interested in population control.

* * * * * *

Commentators, critics and casual viewers have long noted that women are depicted stereotypically on television in accordance with age-old traditional notions of the "female role." The portrayal of women primarily as housewives and mothers pervades daytime television but is also evident in product commercials and in more sophisticated television fare. The majority of female characters are portrayed as housewives, widows, sex kittens, secretaries, and nurses. Afternoon soap operas and product commercials hammer home the point that a woman’s most important life role is that of guardian of the nursery and keeper of the kitchen. One commentator, M. L. Ramsdell, spent over 600 hours viewing and charting the story lines and character developments in eight soap operas. According to Ramsdell, the stories teach that for characters to attain the good life boys should plan to be physicians and lawyers while girls should plan to be "mommies."

The education level of the housewives...is not indicated, but for those female characters who work outside the home, the occupational level as well as the educational level is lower than the males. As of this writing, only eight female roles out of 57 primary ones are professional...The majority are affluent housewives, and the housewife viewer is further reassured about her role by the misfortunes which haunt the lives of the [female characters who work outside the home].

While trouble and crisis afflict all soap opera characters, a larger portion of each is allotted to the liberated female. The soaps imply that the liberated female brings her troubles upon herself by choosing to play other than the housewife role. The phrase "real woman" is constantly employed to describe the housewife, according to Ramsdell, and "real women" are always more sinned against than sinning.

Although they may be raped by lovers and even by brothers-in-law, they are innocent of complicity. Once they decide to have the baby rather than an abortion, they are rewarded until the next injustice overtakes them. On the soaps, conception is easy for the housewife but not for the [liberated woman] whose misfortune it may be to want both babies and a career outside the home. [Emphasis added.]

Note the values implicit in the programs viewed and described. The ultimate female good is child-production which is easy for the "real woman;"
the liberated woman is not deserving of the ultimate reward without some kind of struggle. Further, no matter what the circumstances surrounding conception are, abortion is not desirable.\(^5\)

One of the liberated females recently obtained an abortion and has been facing the dissolution of her marriage. She is in double jeopardy because she has also stated that she does not want children, preferring to practice law. The dual career is not an option the soaps are presenting prepared to handle sympathetically.\(^6\)

The career of housewife and mother, imply the soaps, is to be preferred over selfish and perhaps unnatural female aspirations to something other than a pre-ordained maternal role.

Nielson ratings show that the viewers of daytime television are primarily full-time housewives.\(^7\) Consequently, commercials telecast during this time period promote chiefly household products and products specifically designed for female and child consumption. These commercials, because of their very nature, are directed toward the playing up of the “homemaker” role of the American woman; the housewife is the target customer, and the advertised products are products which she either needs or can be persuaded that she needs.\(^8\) It is to the economic advantage of the manufacturers and advertisers that the housewife role be inflated, “puffed,” glamorized in order to preserve and enlarge the target market. Product commercials, as well as the daytime serials, therefore, assure the housewife of the importance of her functions and of the rewards she will reap if she continues to consume and perform as a full-time housewife and mother. Many commercials present as the highest values a fatuous and extreme dedication to cleanliness, cookery, and child care. The products being promoted, state the commercials, will facilitate these goals with the least possible effort on the part of the housewife-mother and will help her attain respect, admiration, and love from all those with whom she comes in contact. Thus, housewives who inhabit commercials are extra-ordinarily well-groomed and unruffled even while washing their floors and scrubbing their toilets. The children depicted in television-commercial land are well-scrubbed, attractive cherubs who are almost unnaturally polite, considerate and responsive to the ministrations of their mothers; infants do not spit up sour milk or have diarrhea, toddlers do not have temper tantrums, school-age children do not nag or get in trouble outside the home. All is serene. Homes are attractive, comfortable, and clean; children, no matter how many, are carefully attended to, immaculate, and loving; husbands are handsome, attentive, and appreciative. The message presented by these commercials is that so long as the housewife-mother behaves as a “proper” consumer, she has the best of all possible worlds. There is no question about what daytime television is saying. Clearly, motherhood pays.

Daytime serials (and the commercials which they carry) reach large audiences. Television networks estimate that twenty million viewers follow them.\(^9\) The enormous audience involvement in these programs is
evidenced *inter alia* by the fact that viewers send gifts and letters to serial characters from time to time.\textsuperscript{10} Characters are, after all, in people’s homes five days a week leading a continuous life so that they achieve a kind of reality, comments critic Louis Bolts. “The good people are thought of as friends.”\textsuperscript{11}

Although audiences are large there is a question as to the impact of the pro-natal message on the viewers. How much does the audience “learn;” how much influence in attitude-shaping do the shows exert; and how much and what kind of behavior, if any, results from the attempt at attitude-shaping? These questions have no definitive answers, but authorities and researchers have expressed a variety of opinions. While Nicholas Johnson, former member of the Federal Communications Commission, believes strongly that television has a unique and even critical influence on viewers,\textsuperscript{12} Louis Jaffe has pointed out that most research has established little to justify Johnson’s estimate.\textsuperscript{13} Jaffe points to the conclusions of a number of students of communications theory and he quotes Lazarsfeld and Merton: “It is our tentative judgment that the social role played by the very existence of the mass media has been commonly overestimated.”\textsuperscript{14}

In summing up his survey of mass communications theorists, Jaffe writes:

Students of communications theory believe that the possibility of persuasion bears a direct relation to both the latent and expressed resistance of the individual, and that his resistance is a function of his character, his experience, his loyalties, his values, his personal strengths and weaknesses. In persuading people to buy goods, the influence of broadcast advertising is probably great because resistance is low. But resistance to political persuasion is probably much higher. . .Most of the research findings point to the conclusion that television and other mass media reinforce pre-existing ideas rather than change them. . .Such field studies as have been devised suggest that individuals may blank out what they do not wish to hear. . .\textsuperscript{15}

Researchers Krugman and Hartley confirm these general findings and point to specific conditions under which individuals will not blank out what is being presented.\textsuperscript{16} They confirm that “effective” learning (in the sense of the receiving by the “target” of transmitted information and the acceptance of transmitted attitudes) will occur when the groups at whom the message is directed have a prior interest in the subject areas presented; when the message tends to reinforce some already existing opinion, there is little resistance to what is being presented and the information is “caught” by the receiver. This so-called passive or involuntary learning is just as “effective” as learning acquired by one who is actively and voluntarily attempting to gain information. Passive learning, according to Krugman and Hartley, is effortless, responsive to animated stimuli, and characterized by an absence of resistance to what is learned. From these criteria one may speculate that daytime television may indeed have a significant impact on its viewers in the sense of “getting the message across” and
crystallizing already-existing attitudes. Viewing of such escapist fare is, no doubt, effortless; the television show is, by definition, "animated stimuli;" and the homebound housewife, it may be argued, will offer no great resistance to the idea that her role is important and significant, even though the picture she sees of herself on the television screen is distorted. It is possible to hypothesize, then, that the pro-natal message is reinforcing a role and an image which the viewer has already conjured up. It is, of course, not possible to speculate on whether the viewer will act on this attitude and seek to enlarge her family. And whether she will pass pro-natal attitudes on to her own children will be dependent on several factors, including possibly the amount of discrepancy between the projected image and the reality, her personal levels of expectation, and her own initial subconscious acceptance of the role.

* * * * * *

It has been suggested that groups interested in population control might be able to gain access to the broadcast media by means of the Fairness Doctrine in order either to neutralize the pro-natal message or, more optimistically, to influence audiences to think in terms of alternative lifestyles. To assess the viability of this suggestion it is necessary to examine the doctrine in light of its history, development, and interpretation.

The Fairness Doctrine, as generally understood, places an affirmative duty on broadcast licensees to "encourage and implement the broadcast of all sides of controversial issues of public importance over their facilities. . . ."17 To do this they must provide a reasonable amount of time for presentation of programs devoted to the discussion and consideration of public issues.18 The doctrine has evolved from statutory recognition of public interest considerations, Federal Communications Commission reports and statements, and a series of cases which have modified and refined the initial concept.

The Communications Act of 1934 provided the Federal Communications Commission with the statutory authority to act in the furtherance of "public convenience, interest, and necessity."19 In 1940 the F.C.C. specifically enunciated this requirement:

In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussion of public questions.20

The definitive policy statement of the Fairness Doctrine appeared in the Commission’s 1949 Report on Editorializing by Broadcasting Licensees21 which sets forth the basic requirements of the doctrine and remains the keystone of the Commission’s policy today. This report was the result of a two-year proceeding in which members of the public, the broadcasting industry, and the Commission participated. It established
two obligations on the part of every licensee seeking to operate in the public interest: (1) that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so, he be fair—that he affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented. The licensee had an affirmative responsibility, it was stressed, to encourage and implement the broadcasting of controversial public issues; his obligation could not be met solely through the general policy of not refusing to broadcast opposing views where a demand was made of the station for broadcast time. However, the licensee was allowed discretion in regard to what subjects should be considered controversial issues of public importance, program formats, and selection of spokesmen for each point of view. And in determining, in an individual case, whether or not a licensee had complied with the doctrine, the Commission would look solely to whether the licensee had acted reasonably and in good faith. An honest mistake or error in judgment would not be penalized. The question of whether the licensee generally was operating in the public interest would be determined at the time of license renewal on an overall basis. The Report set forth the basic “fairness” considerations in the presentation of factual information concerning controversial issues:

The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news.

In the 1959 Amendment to Section 315 of the Communications Act, Congress explicitly accepted and affirmed the Fairness Doctrine by providing that exemption from equal-time requirements for news-type programs did not relieve broadcasters of the obligation imposed upon them to operate in the public interest and “to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” A Commission decision in 1963 made clear that adequate coverage of controversial public issues accurately reflecting opposing views must be given at the broadcaster’s own expense if paid sponsorship is unavailable. In 1964 the Commission issued the so-called Fairness Primer, a digest of the F.C.C.’s interpretive rulings on all aspects of the Fairness Doctrine to 1964. The rulings interpret the term “controversial issues of public importance,” articulate what constitutes the presentation of contrasting viewpoints and what limitations a licensee may reasonably impose, and discuss licensee editorializing and the personal attack principle.
Four important court decisions in the past few years have been directly concerned with the doctrine and illustrate an increasing state of uncertainty regarding the questions of scope and access. In Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), the District of Columbia Court of Appeals held that television cigarette advertising came within the reach of the Fairness Doctrine. Three years later this same court extended its ruling to apply to advertisements stressing the value of large automobile engines and high-test gasolines in Friends of the Earth v. F.C.C., 449 F.2d 1164 (D.C. Cir. 1971). Prior to these decisions no one had anticipated that product commercials could come within the reach of the Fairness Doctrine. However, these cases were decided on very narrow grounds, the court findings that very substantial scientific evidence proved that the advertised products constituted a danger to public health and that where public stakes were so high, a full airing of all sides of the controversy was required:

...where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance. 32

The Friends of the Earth Court noted, however, that the F.C.C. "is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine." 33 Two cases decided by the United States Supreme Court are of interest, the earlier one34 upholding the doctrine's constitutionality and seeming to promise future liberal access to the airwaves, the later one35 coming down heavily on the side of licensee judgment and discretion and hence limiting a right of access. In 1969 in Red Lion Broadcasting v. F.C.C., the U.S. Supreme Court upheld equal time provisions and the Fairness Doctrine. Broadcasters had challenged the doctrine by contending that the First Amendment protected their right to broadcast whatever they chose and to exclude whomever they choose from ever using a particular frequency. Basing its reasoning on the scarcity of the desired resource, that is, on the limited number of available broadcast frequencies, the Court replied:

When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridged First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. 36

Because of the scarcity of the resource, the Court, in balancing the interests of licensees as opposed to those of the public, declared that the latter was entitled to greater weight:

...the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It
is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.\textsuperscript{37} [Emphasis added.]

The goal of the First Amendment, reasoned the Court, is to produce an informed public. Giving an unlimited right to the licensee would give him an unlimited power to (1) make time available only to the highest bidder; (2) communicate only his own views on public issues, people, and candidates; and (3) permit on the air only those individuals with whom he agreed. "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."\textsuperscript{38}

In a case decided last May, \textit{Columbia Broadcasting System v. Democratic National Committee}, the Court reaffirmed the values of private journalism and the rights and interests of broadcasters in ruling that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. In deciding this case, the court found that (1) Congress had, in the past, rejected the argument that broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues, and that it had specifically provided that a broadcaster shall not be deemed a common carrier;\textsuperscript{39} (2) Congress intended to preserve the values of private journalism consistent with its public obligations;\textsuperscript{40} (3) license renewal proceedings would assure the carrying out of public obligations;\textsuperscript{41} (4) the Fairness Doctrine grants to the broadcaster the right to exercise editorial judgment and discretion in fulfilling its demands;\textsuperscript{42} (5) what the broadcaster does does not constitute governmental action.\textsuperscript{43}

The broad outlines traced by these cases indicate that the doctrine itself is constitutional in that it does not infringe upon any absolute First Amendment rights of broadcasters; that it requires the licensee to affirmatively seek ways to provide balanced programming so that all points of view of "responsible elements of the community" are aired on controversial issues of public importance; that the broadcaster has an enormous amount of discretion in deciding how to provide such balance; that the Fairness Doctrine may extend to product commercials if a strong showing is made that a question of public health is involved and only one side of the picture has been presented.

\* \* \* \* \* \*

While the purpose of the doctrine is to enhance the "profound national commitment that debate on public issues should be uninhibited, robust, and wide open,"\textsuperscript{44} various considerations make the practical working-out of the doctrine difficult.

First Amendment issues lurk in the background. The Commission must balance the tensions between the rights of the public as opposed to the rights of the broadcasters. While \textit{Red Lion, supra}, declared that the rights of listeners and viewers were paramount in the balancing-out of interests, the
Democratic National Committee case, supra, held that Congress had opted for a system of private journalism because of an aversion to governmental censorship and that private licensees had the right to limit access to the airwaves when they had provided full and fair coverage. Further, declared that court, limitation of access by the licensee does not constitute governmental action for purposes of the First Amendment. If the Commission had the power to order that reply time be made available every time it was demanded, the risk of governmental interference with the danger of ever-enlarging government control would be a reality; the F.C.C. would be required to oversee more and more daily operations of broadcasters. The Democratic National Committee case has limited this power, at least for the present.

Another spectre that has been raised involving the public's First Amendment rights is that of the possible "chilling" effect of the doctrine. It has been argued that if licensees are required to promote reply time for any controversial issue of public concern that is raised by a broadcast, even if it is only implicit in the message, timorous licensees will engage in a self-censorship detrimental to the national commitment to uninhibited debate.

Economic considerations can, and have, complicated working out the doctrine. Advertising does support most broadcasting, and extensions of the doctrine must take that into account. As Jaffe and others have pointed out, the logic of the Banzhaf case, supra, which put certain product advertising within reach of the Fairness Doctrine, can be extended to justify so many demands for free time as to threaten broadcasting's advertising base. "It can be argued that almost all advertising places a product in its most favorable light and does not communicate its significant and controversial countervailing costs." The "little" licensee, is particularly vulnerable to economic injury since he "may not be able to afford quite the same cutbacks as the immensely privileged and lucrative stations in the great markets. The cost of them [sic] must be balanced against the marginal benefits of the Fairness Doctrine in heightening political consciousness."46

There are inherent problems in the doctrine itself as it has been carved out by the Commission. For example, whether something is a "controversial issue" and/or of "public concern" may often become a matter of debate. In San Francisco Women for Peace, 24 F.C.C. 2d 156 (1970), the complainants alleged violation of the Fairness Doctrine by a licensee who carried army recruiting messages; the licensee refused to broadcast complainants' announcements presenting their opposing views on the Vietnam War and the draft. The Commission held that the messages did not raise a controversial issue, and, therefore, there had been no violation. The Commission would not acknowledge that implicitly a controversial issue might have been raised. As has been pointed out by Skelly Wright, in many cases one side of an issue may appear non-controversial, while its opposition may indeed be judged controversial.47 If the opposing view is kept off the air, the first message retains its presumed non-controversial
character, and the Fairness Doctrine does not require that the public hear
the other side. 48 Thus, only one-sided presentations may be made while
"controversies" may be implicit in the original message. A licensee is given
much discretion to determine what constitutes a "controversial issue of
public concern," and this discretion can lead to the kind of decision the
Commission made in the army recruitment case. On the other hand, if the
licensee did not have a broad discretion he would always have to scrutinize,
with the greatest care, everything to be aired in the event that a controversy
was implicit in the presentation. Such a requirement might ultimately
result in a "chilling" effect, whereby a licensee, to preclude having to give
reply time to an opposing point of view, would hesitate to air any message
that might possibly bring the doctrine into play. The Commission has been
extremely reluctant to allow "inferences" by listeners and viewers to
trigger the doctrine and continually reasserts its position that it will not
substitute its judgement for that of the broadcaster unless it is proven that
the broadcaster has abused his discretion.

What constitutes balanced programming and adequate past performance
by a licensee is another problem raised by the doctrine. Although licensees
are aware that they are required to present all representative points of view
on an issue, no definite standards exist to spell out how they are to dis-
charge their fairness obligations. When the Fairness Doctrine is triggered
the Commission looks only to the "reasonableness" and good faith of the
broadcaster in determining whether the station's past performance has
already satisfied the requirement of balance. "Reasonable compliance" is
the Commission's standard; what constitutes such compliance may vary
greatly from case to case.

Burden of proof problems make it difficult for complainants to make
their cases to the F.C.C. The burden of pleading detailed information
regarding a station's past and future performance rests with the com-
plainant 49 even though this information in many cases could more easily
be obtained by the Commission from the licensee. The complainant must
specifically plead that a particular licensee at a specific time and date broad-
cast one side of a controversial issue in the service area; he must provide the
basis for stating that the station has not adequately covered opposing view-
points and that the licensee does not plan to, and has not in the past, af-
forded reasonable opportunity for expression of contrary views. Only after
the complainant has met this burden will the Commission request the
licensee's comments or explanations. Thus, in a recent F.C.C. decision, the
Commission rejected a complaint by the Wilderness Society that the
American Broadcasting Company had violated the requirements of the
Fairness Doctrine in its airing of Weyerhaeuser commercials. 50 The Wilder-
ness Society complained that the commercials had been designed to con-
vince the public that clear-cutting forest areas was socially and environ-
mentally desirable and that the network had not presented the opposing
environmental point of view. The complainants were told that they had
the burden of proof to show specifically that the network had not pre-
viously discharged its obligation, this despite the fact that A.B.C. did not contest the allegations of "controversy" or the allegations that no opposing views had been presented. The broadcaster, stated the Commission, has no obligation to review all his past programming every time he receives a Fairness Doctrine complaint; the broadcaster need not provide the complainant with past programming information when the complainant has not made out a prima facie case for the Fairness Doctrine. Such reasoning, it is submitted, is circuitous, since a complainant such as the Wilderness Society cannot possibly make out a prima facie case without the information only the broadcaster can provide it with. The rationale behind this seemingly harsh rule is a result, again, of the fear of a chilling effect on debate and controversy: the burden on broadcasters might become so great as to "cause a timid broadcaster to think twice before taking on a controversial issue. We cannot believe that such a policy would further the central purpose of preserving an 'uninhibited marketplace of ideas in which truth will ultimately prevail. . .' Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969)."

In an investigation of actual Commission procedures John Swartz concluded that the F.C.C. is not consistent in its application of Fairness Doctrine law except in looking for anything that might be called reasonable behavior on the part of the licensee. Fairness complaints do not elicit hearings or investigations; they are conducted entirely by correspondence. According to Swartz, the F.C.C. inquiry is superficial, and deference to licensees in the resolution of whether a controversy was presented and whether an issue has been fairly covered, as well as lack of inquiry standards and burden of proof problems, have led to unsatisfactory and sometimes inconsistent rulings.

Finally, even if a licensee is found to be in violation of the Fairness Doctrine, remedies are of questionable value. Where the complainant has actually managed to present a prima facie case to the Commission, the F.C.C. will direct the licensee to file a written reply within a specified period of time and demonstrate compliance or denote his actual plans to comply in the future. How much actual satisfactory compliance results in the majority of cases is, for the most part, a matter of conjecture. Supposedly, an erring licensee faces his Judgment Day once every three years at license renewal time. However, specific violations will not by themselves cause license revocation; the review will be based on a broadcaster's overall performance. Jaffe and Nathanson note:

> There is, in fact, no instance where a renewal has been denied for a mere lack of balance, though in a very few cases renewal has been refused when the programs were positively offensive.

Fairness Doctrine violations, it would seem, are not easily deterred.

The most recent F.C.C. Fairness rulings reviewed indicate the extent to which the problems discussed above preclude resolutions in favor of complainants. During the summer of 1973 numbers of complaints were rejected
on grounds of "licensee discretion," and the fact that burdens of proof had not been met. In one case, *Accuracy in Media*, 56 complainants alleged that an interview with Alger Hiss raised controversial issues of public importance which called for public discussion; it was claimed that certain inferences might be made from the interview which were of present concern. The Commission rejected the complaint, stating that no such showing had been made.

The licensee has considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require an offsetting presentation. If every statement, or inference from statements of presentations, could be made the subject of a separate and distinct Fairness Doctrine requirements, the doctrine would be unworkable.57

In *Females Opposed to Equality*58 the allegation was made that the Helen Reddy television show had one-sidedly presented the issue of women's liberation and that this was a controversial issue of public importance. Rejecting the complaint, the Commission responded by stating that it was up to the licensee to determine whether what had been presented was such a controversial issue. "The Commission reviews to determine whether the licensee can be said to have acted reasonably and in good faith. . . [Further,] the burden is on the complainant to substantiate his conclusions that a station has been unreasonable in its coverage of an issue."59 Complainants had not provided the F.C.C. with specific information regarding the station's overall presentation of contrasting points of view. In an interesting case involving the airing of a two-part *Maude* telecast portraying Maude's discovery that she is pregnant and her subsequent decision to have an abortion, the Commission rejected the complainants' request for a pro-life reply program.60 Complainants had not, to the Commission's satisfaction, (1) resolved whether the program had presented one side of a controversial issue of public importance within the meaning of the Fairness Doctrine; or (2) provided it with information indicating that the station had presented only one side of such issue in its overall programming. In fact, stated the F.C.C., "In light of the obviously fictional and satirical context of the series," the program in question were "solely intended for entertainment and not for the discussion of viewpoints on controversial issues of public importance."61 The programs, therefore, did not raise any obligations under the doctrine. Such a narrow view of the contexts in which fairness claims may be raised would seem, by itself, to predict failure for anti-natalist groups attempting to combat pro-natal attitudes crystallized in any dramatic presentation.

In the past few years environmental groups have attempted to utilize the doctrine as a tool by which to create increasing public awareness of environmental problems. It was thought that the extension of the Fairness Doctrine to product commercials (which raise controversial issues by implication) in *Banzhaf*, *supra*, and *Friends of the Earth, supra*, would open wide the doors to environmental counter-advertising. These groups,
however, have met with only limited success, and decisions seem inconsistent because of the problems inherent in the doctrine and the fact that environmental controversies are more often implicit than expressed. In the so-called *Chevron* case, 62 decided before *Friends of the Earth*, complaint had been made to the Commission of gasoline commercials which allegedly made deceptive and misleading claims with respect to the product's capacity to minimize air pollution. The Commission took no action because, it said, the commercials did not suggest that automobile emissions do not contribute to the dangers of air pollution; rather, they urged that the advertised gasoline was designed to reduce those dangers. Moreover, the advertisements were then the subject of a pending Federal Trade Commission proceeding on a charge of false and deceptive advertising. The complaint was reconsidered and again rejected by the F.C.C. following the Court of Appeals decision in *Friends of the Earth*:

*Friends of the Earth* does not hold that all advertisements for gasoline raised controversial issues... The Chevron F-310 advertisements... raise no public health issues [such as were raised in *Banzhaf* and *Friends of the Earth*], and the question is whether or not the product will perform as claimed... Public Health considerations aside, the Fairness Doctrine does not require broadcasting of views in opposition to the advertising. The ads do not argue a position on a controversial issue of public importance, but merely advance a claim for product efficacy. A critical consideration here is that the Commission not substitute its judgment for the reasonable programming judgments of the licensees. There is no showing here that the licensees have not acted 'reasonably and in good faith' in determining that the F-310 advertising claims do not constitute a discussion of a controversial issue of public importance. 63 [Emphasis added]

The Commission seemed to have disregarded the fact that a misleading claim could also be a controversial one, and, following the strict dictates of its previous interpretations of the doctrine, deferred once again to licensee discretion. The F.C.C. had stated, however;

This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would come into play. 64

The following month in the *Esso* case, 65 the Commission sustained a Fairness Doctrine complaint involving commercials which allegedly implied that oil companies could develop Alaskan oil reserves quickly without
inflicting environmental damage. Yet it is interesting to note that on a
rehearing the National Broadcasting Company was able to convince a
majority of the Commission that it had presented and was fairly present-
ing opposing views in its general programming.66

There are a number of similarities between fairness problems raised in
the environmental area and those raised by the “pro-natal” programming
discussed in the first part of this paper. In both, because of the pervasive
and subtle nature of the respective problems, issues are most typically
raised by implication rather than by overt statement. As has been noted,
the F.C.C. has been extremely reluctant to respond to implicitly expres-
sed issues in most cases. However, where it has so responded, it often will
subsequently declare, as in the Esso case, that the broadcaster’s past per-
formance constituted reasonable and good faith compliance; this again is
a function of the subtle nature of the problems and the consequent dif-
ficulty of determining what constitutes satisfactory performance. The task
of making out a Fairness Doctrine case in both areas is particularly dif-

cult because of the burden of proof requirement put on the complainant.
It is hard for him to produce evidence of past unbalanced programming by
a licensee when issues are raised by implication. In both areas, while some
issues are acknowledged to be controversial (such as cigarette smoking or
the desirability of large-engine cars and high lead gasolines or abortion),
many television presentations considered controversial by special interest
groups would not be so considered by the Commission (the advertising
of detergents or the promotion of forest clear-cutting or the repetitive
portrayal of the good woman as housewife).

There is no question that the Commission faces a dilemma in adminis-
tering the doctrine. The necessity to avoid disrupting of broadcasting and
the “chilling” of discussion, as well as frequent governmental interference
and a kind of negative censorship, argues for the discretion granted licen-
sees. And it is true that if the public had absolute rights of access with
minimal burdens of proof in every case, broadcasters would be in the posi-
tion of having to offset every “message,” no matter how remote the con-
nection, from which controversial “inferences” might be drawn. On the
other hand, it is equally true, that many presentations which do not
explicitly present controversial issues carry such messages implicitly,
and fairness would seem to dictate that reply time ought to be given. Also
true is the fact that F.C.C. requirements militate against many just com-
plaints being successfully pursued.

The F.C.C., in 1971, plagued by the opposing tensions and difficulties
involved in the administering of the doctrine, launched an inquiry to col-
lect information and comments from interested parties in an atempt to
improve the coverage and presentation of public issues on the broadcast
media.67 This inquiry, which is still being pursued, is delving into (1)
questions raised generally by the doctrine; (2) the problem of access to
the broadcast media as a result of carriage of product commercials; (3)
access generally to the broadcast media for a result of carriage of product
commercials; (3) access generally to the broadcast media for the discussion
of public issues; and (4) application of the doctrine to political broadcasts.

Of particular interest to groups concerned with population control is the Commission's declared intention to investigate access to the broadcast media as a result of the carriage of product commercials. This aspect of the inquiry, declared the Commission, was "prompted by a recent court decision and several complaints in which very broad-ranging policy questions appear to be raised."68

Two of the Court's basic considerations—that product commercials can carry implicit messages and that pertinent national policies should be taken into account—have very wide applications indeed. For example, we might consider the national policy of avoiding environmental pollution...a great number of products commonly advertised over the broadcast media have pollution consequences. ...Commercials urging use of these products or services thus can be argued to raise implicit ecological questions. Other product commercials, similarly, could be argued to raise significant national policy questions: ...commercials depicting women in a manner charged to be offensive to the national policy of equal rights and equal treatment of the sexes...69 [Emphasis added]

While the Commission's specific reference to the treatment of women in television commercials seems, at first glance, to be a hopeful portent for the future, it should be remembered that this inquiry has been dragging on since 1971; nothing has yet been changed, and F.C.C. decisions do not reflect the concern articulated in the Notice of Inquiry.

Thus, the Fairness Doctrine as interpreted and refined by the F.C.C. presents still, too many insurmountable obstacles for anti-natalist groups to hurdle. First Amendment problems and economic considerations strongly suggest that licensee discretion with respect to the balancing of programming will continue to be paramount. Therefore, until the attitudes of broadcasters themselves undergo change, potential anti-natalist complainants will bear the difficult burdens of proof demanded by the Commission as well as the currently almost impossible task of convincing the Commission that a pro-natalist bias is implicit in certain presentations, and that this bias constitutes a controversial issue of public concern. The F.C.C. continues to insist upon a clear-cut and visible nexus between presentation and controversy. Considering its unwillingness to find those connections in complaints brought by environmental groups, it seems highly unlikely that it would be amenable to Fairness Doctrine complaints brought by groups interested in population control.
FOOTNOTES

1. While it is true that several programs have recently appeared portraying career women or women committed to different sets of values than their homebound counterparts, these characters constitute a distinct minority in the television microcosm, and, more often than not, appear in situation comedy programs where they are not really taken very seriously. Some product commercial advertising have also attempted to break the stereotype, but such attempts are still sporadic, and for the most part, ill-conceived.


3. *Id.* at 300, 301.

4. *Id.*

5. Ramsdell notes, however, that while abortion is not accepted on the soaps, there seems lately to be some "serious rethinking and reevaluation" on the subject. Abortion has been considered and discussed by some soap characters. *Id.*

6. *Id.*

7. Smaller numbers of other housebound adults such as invalids and older citizens as well as a fair number of pre-school children constitute the rest of the viewing audience. *Id.* at 299.

8. It should be noted that one advertiser, however, the maker of Tang breakfast drink, has been airing a series of commercials which depict the housewife as both mother and career woman. In one such commercial a marine biologist and "the mother of two" offers Tang to her children. The commercial is implicitly grounded upon the superior knowledge of the career mother and her ability to provide her children with the best possible nutrition. *Ramsdell* at 299.

9. Ramsdell at 299.

10. *Id.* at 299.


15. *Id.*


17. 13 F.C.C. 1246, 1251 (1949).

18. *Id.* at 1249.

19. 47 U.S.C. 307(a)(d) (1970). The F.C.C. is authorized to make rules and regulations in the furtherance of this goal. 47 U.S.C. § 303 (r). Both the Federal Radio Act of 1972 and the 1934 Act established that the American system of broadcasting should be carried on through a large number of private licensees upon whom rested the sole responsibility for determining the content and presentation of program material. But the Congress made clear by its language that the responsibility must be exercised in accordance with the paramount public interest.


22. *Id.* at 1249.

23. *Id.* at 1247, 1250.

24. *Id.* at 1251.

"The legislative history of the Communications Act and its predecessor, the Radio Act of
51. Id. at 108, 109.
52. Id. at 108.
54. Id.
57. Id. at 429.
59. Id.
60. Diocesan Union of Holy Name Societies of Rockville Center, 41 F.C.C. 2d 297 (1973).
61. Id. at 298.
64. 29 F.C.C. 2d at 812.
65. 30 F.C.C. 2d at 812.
68. Notice of Inquiry at 29.
69. Id. at 30, 31.