

The Commission's personal attack doctrine imposes governmental sanctions on licensees for statements that might reflect adversely upon the character of individuals or groups, even though those statements are made in the context of a discussion of an issue of public importance. Instead of imposing civil damage liability, however, which obviously it may not do, the Commission compels the broadcaster to carry the reply of the person attacked.

To the extent that the sanction is to be imposed, even if the statement involved is entirely true or, if false, is made without malice, this right of reply goes much further than the remedy struck down by the Supreme Court. Thus, the "personal attack" rules impose burdens as onerous as many that have been held unconstitutional on the ground that they encroach on constitutionally protected rights of speech or press.

I would like to turn now from legal questions to the practical application of the Fairness Doctrine.

The purpose of the doctrine is to stimulate discussion of important issues and to insure that all views are heard. In its application to broadcasting, however, it operates in just the reverse.

The application of the doctrine requires the FCC to make subjective judgments involved in determining what is controversial and what is not, in determining who and how many have the standing to reply to a controversial issue, in determining what is "fair" and what is not.

The regulatory process operates as follows: The FCC examines any suspect broadcasts. First, it must determine whether the broadcast is of a controversial nature—no easy task. Then it tests the program content, examining the substance, to determine whether the correct degree of fairness was present. Finally, it tells the licensee whether he was right or whether he was wrong. Any errors are entered on his record to be considered at renewal time.

Thus, the basic problem with the Fairness Doctrine is that it has the effect of discouraging the use of broadcasting for the expression of opinion. There is a basic inconsistency in a policy that purports to encourage the voicing of controversy on the air while at the same time closely supervising and policing its execution and punishing mistakes.

The mere idea of this policing will discourage some broadcasters. The complex thicket of rules which necessarily grow out of such a policy will discourage many more. The penalty for being wrong will discourage more. And if that isn't enough, the inevitable harassment from various groups who feel that they are entitled to free time will just about discourage the rest.

This bears emphasis. Other media of expression and entertainment—for example, the newspaper or the theater—can be vigorously independent of the views of Government as to what is good for the people. But the broadcaster, faced with Government's power to decree life or death for his enterprise at a maximum of every 3 years, with judicial review a gamble against longest odds, does not have the same independence. The views—even the hinted views—of the FCC can prevail to such a degree that its power, practically speaking, has become known as the power to regulate by the lifted eyebrow.

Few would disagree with the objectives of the Fairness Doctrine. Fairness is, indeed, a quality desired by all. But it is a quality that can rarely be defined or measured to the satisfaction of all. When a