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REPORTING THE OFFICIAL TRUTH: THE REVIVAL OF THE FCC'S NEWS DISTORTION POLICY

LILI LEVI*

I.	INTRODUCTION.....	1007
II.	HISTORY OF THE FCC'S NEWS STAGING AND DISTORTION POLICY	1014
A.	<i>The Doctrine Prior to Serafyn v. FCC</i>	1015
1.	<i>The 1940s</i>	1015
2.	<i>Development of the Policy in the 1960s</i>	1016
B.	<i>The Recent Judicial Transformation of News Distortion: Serafyn at the FCC and the D.C. Circuit</i>	1031
1.	<i>Procedural History</i>	1031
2.	<i>Situating the Issue: A Transcript of The Ugly Face of Freedom</i>	1033
3.	<i>The FCC's Decision</i>	1039
4.	<i>The D.C. Circuit's Expansion of the News Distortion Policy</i>	1042
III.	CRITIQUE OF THE "NEW" NEWS DISTORTION POLICY.....	1043
A.	<i>The Enhanced Dangers of the D.C. Circuit's New Model of News Distortion</i>	1043
1.	<i>Insufficient Deference to the Commission's Hearing Standard</i>	1043

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2.	<i>A New Requirement: Unwarranted Inferences from Evidence of “Obvious or Egregious” Factual Inaccuracies.....</i>	1054
a.	<i>The Translation of “Zhyd”: An Instance of the Translator’s Dilemma</i>	1055
3.	<i>Second-Guessing Editorial and Production Choices.....</i>	1064
a.	<i>Decisions on the Selection of Experts</i>	1064
b.	<i>Investigative Obligations for “Inflammatory” Statements.....</i>	1067
4.	<i>Judicial Revision of the Extrinsic Evidence Standard as Applied.....</i>	1068
a.	<i>Privileging Certain Types of Reaction Evidence: After-the-Fact Complaint Letters</i>	1069
b.	<i>Improperly Inferring General Patterns of Distortion: Public Statements on Newsgathering and the Presence of Written Policies on Distortion..</i>	1073
B.	<i>Lessons from Defamation Law</i>	1078
1.	<i>The Meaning of Meaning and Truth.....</i>	1079
2.	<i>Comparison with Reckless Disregard.....</i>	1080
3.	<i>The Administrative End-Run Around Tort Limitations: The Conflict Between News Distortion and Group Libel Doctrines</i>	1083
IV.	<i>TWO UNSATISFACTORY FALLBACK POSITIONS</i>	1088
A.	<i>Weaknesses of the “Traditional” News Distortion, Slanting, and Staging Policy.....</i>	1088
B.	<i>The Narrowing “News Staging” Alternative</i>	1095
V.	<i>NEWS DISTORTION AND THE PUBLIC INTEREST: OF CONFLICTING DEMOCRATIC VALUES.....</i>	1098
A.	<i>Policy Arguments in Support of Regulating News Distortion</i>	1098
1.	<i>The FCC’s Regulatory Values—Truth and Press Integrity.....</i>	1099
2.	<i>The Modern Reality of the Press: Public Ambivalence and Structural Pressures on Press Objectivity.....</i>	1101
3.	<i>Possible Interventionist Rationales</i>	1105
B.	<i>Policy Arguments in Favor of FCC Retreat</i>	1109
1.	<i>The Democratic Harms of “Official Truth”</i>	1109
2.	<i>News Distortion Regulation as More Harmful to Speech Norms than the Fairness Doctrine.....</i>	1111
3.	<i>Factors Skewing Governmental Accounts of Truth: Chilling Interest Group Strategies.....</i>	1114

4. <i>The Illusion of Neutrality and Accuracy</i>	1116
C. <i>The Democratic Value of Different Press Traditions</i>	1121
VI. CONCLUSION.....	1129
APPENDIX: APPLYING THE “OBVIOUS” NEWS DISTORTION	
STANDARD.....	1133
A. <i>Close Analysis of Claimed Factual Inaccuracies in the 60 Minutes Broadcast</i>	1133
1. <i>The Galicia Division of the Waffen SS</i>	1134
2. <i>Events in Lviv</i>	1138
a. <i>The Pre-occupation “Killing Spree”</i>	1139
b. <i>The Pogroms in Lviv</i>	1140
c. <i>Historical Footage of Ukrainian Brutality</i>	1142
d. <i>The Time Magazine Photograph</i>	1144
3. <i>The Ukrainian “Boy Scouts”</i>	1145
4. <i>CBS’s Alleged Slander of Ukrainian “National Heroes”</i>	1146
a. <i>Stefan Bandera</i>	1146
b. <i>Simon Petlura</i>	1147
c. <i>Roman Shukhevych</i>	1148
B. <i>On Perspective: Multiple Readings of The Ugly Face of Freedom</i>	1151

I. INTRODUCTION

What obligations should the media have to promote the public interest in their programming decisions? The advent of digital television has occasioned a fresh look at this question.¹ While fierce controversy has broken out over proposals to require broadcasters to give political candidates free airtime during election contests, little critical examination has attended a key

1. The report of the President’s Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (known colloquially as the “Gore Commission” or the “Advisory Committee”) recommended voluntary industry action. Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, available at <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf>, at 44 (December 18, 1998) [hereinafter Advisory Committee]. More recently, the Federal Communications Commission (FCC) requested public debate on the question. Public Interest Obligations of TV Broadcast Licensees, 14 F.C.C.R. 21,633, available at 1999 WL 1211119, ¶ 8 (Dec. 20, 1999) (notice of inquiry) [hereinafter Public Interest Obligations]. See also Press Release, Federal Communications Commission, FCC Chairman Kenard Identifies Eleven Principles for Broadcasters in Serving the Public Interest (Jan. 18, 2001) (on file with author).

question: Should the Federal Communications Commission (FCC) use its regulatory powers directly to try to improve the *quality* of news reporting by the broadcast media?

Historically, the FCC's most well-recognized discourse-enhancing content regulation was the fairness doctrine, which required every broadcast licensee to provide balanced coverage of controversial issues of public importance.² The Commission jettisoned the doctrine in the 1980s, opining that although fairness and balance in reporting were legitimate goals, government regulation of the broadcast media to achieve those ends was unwise as a matter of policy and irreconcilable with the First Amendment.³

One might have thought that direct content regulation of news and informational reporting would be laid to rest with the demise of the fairness doctrine. But CBS's long travails arising out of its 1994 broadcast on anti-Semitism in post-Soviet Ukraine—only recently settled in 1999 after litigation before the Commission and the Circuit Court of Appeals for the District of Columbia⁴—raise the question again of whether the FCC should revive content-based regulation designed to improve the quality of news reporting. The complaint against CBS by a group of Ukrainian-Americans that a *60 Minutes* program had exaggerated the extent of Ukrainian anti-Semitism drew upon the Commission's long-standing but largely overlooked policy against news distortion.⁵ Under that policy—which was not eliminated with the fairness doctrine—proof of deliberate news distortion, staging, or slanting may adversely affect a broadcast licensee's ability to renew or transfer its license.

In the course of CBS's legal battle, the D.C. Circuit interpreted the news distortion doctrine very expansively in *Serafyn v. FCC*.⁶ Although the FCC

2. For the Commission's descriptions of the doctrine, see, for example, Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317, 20,317-344 (May 14, 1984); The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Fairness Report), 48 F.C.C.2d 1 (1974), *recon. denied*, 58 F.C.C.2d 691 (1976), *aff'd in part and remanded in part sub nom.* National Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

3. Syracuse Peace Council, 2 F.C.C.R. 5043, 5052 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). See also Inquiry into Section 73.1910 of the Commission's Rules and Regulation Concerning the General Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 143, 148-53 (1985) (analyzing the constitutional reasons and policy rationales for repealing or modifying the fairness doctrine).

4. *60 Minutes: The Ugly Face of Freedom* (CBS television broadcast, Oct. 23, 1994). See Roma Hadzewycz, *CBS and Ukrainian Americans Sign Settlement Agreement Regarding "The Ugly Face,"* UKRAINIAN WEEKLY, available at <http://www.ukrweekly.com/Archive/1999/189902.shtml> (May 2, 1999).

5. See *Serafyn v. CBS*, 149 F.3d 1213 (D.C. Cir. 1998).

6. See *id.*

had summarily rejected the complaint in 1995,⁷ the D.C. Circuit vacated the Commission's decision and remanded the matter, suggesting that the agency revise its entire approach to news distortion. Under the D.C. Circuit's plaintiff-friendly method, much that had been heretofore excluded as evidence of distortion would be rehabilitated. The parties' settlement of the CBS matter leaves on the books an invitation for virtually plenary review of news content by the FCC whenever somebody armed with a contending version of events complains to the authorities that a news or informational program was inaccurate.

Although the Commission did not traditionally define the scope of the news distortion doctrine or historically display great zeal in its enforcement against licensees, its decisions reiterated the principle that news distortion was "a most heinous act against the public interest."⁸ Particularly in light of the expansive interpretation of the doctrine in the D.C. Circuit's recent *Serafyn* decision, there is reason to think that CBS's experience may not prove exceptional.

Historically, the FCC has justified its interest in regulating news quality by reference to democratic norms. The assumption of the news distortion policy is that democracy requires an informed citizenry armed with accurate information and faith in press integrity. Critics claim that both such needs are currently unmet. There is much public grousing by both conservatives and liberals about news bias in the mass media. New developments—ranging from the sensationalism of tabloid and "reality" television programming to the increasing consolidation of media entities—also inspire regulatory intervention. For those with the impulse to perfect public discourse, the elimination of the fairness obligation has created a regulatory void asking to be filled by a revived and invigorated news distortion policy designed to address the current critiques of news bias.

This Article seeks to expand the current debate over broadcasters' obligations by examining the news distortion doctrine and ultimately proposing that it be eliminated. Ideally, of course, the policy would do no more than deter broadcasters from presenting reenactments and staged events as the real thing. However, the policy is highly unlikely to operate ideally. Indeed, at best it could involve the Commission in investigating and second-guessing editorial judgments made by the media in presenting the news. At worst, the policy could provide the basis for punishing deviations from an "official" version of events established by courts and administrative agencies.

7. *WGPR, Inc. and CBS, Inc.*, 10 F.C.C.R. 8140, 8146-48 (1995) (application procedure), *vacated and remanded sub nom. Serafyn*, 149 F.3d at 1225.

8. CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 (1969).

The D.C. Circuit's newly revived news distortion prohibition—generated by insufficient deference to the Commission—would extend the traditional doctrine in three problematic ways. First, it would allow a governmental agency to draw inferences of a broadcaster's subjective intent to distort from “obvious” or “egregious” errors⁹—without recognizing that such judgments in virtually any controversial case entail the authoritative selection of “truths”. In an irony the court simply did not recognize, the *Serafyn* case itself presents an object lesson in the harms of the new approach to news distortion: the very points the court suggests may have been “obvious” or “egregious” errors, such as the supposed mistranslation of an ethnic reference to Jews from Ukrainian to English,¹⁰ are neither. Instead, they implicate both the harrowing history of the Holocaust and the cultural contextualism that makes translation so difficult an enterprise.

Second, the new version of the policy would permit courts and administrative agencies to second-guess broadcasters' editorial choices in news programming, allowing negative inferences to be drawn from reporters' refusals to consult an interested party's proffered expert.¹¹ The FCC and the courts would find a deliberate intent to distort from a broadcaster's failure to “assure” itself of the accuracy of an “inflammatory” charge,¹² although no one could define what would make a charge inflammatory nor what would be necessary to assure accuracy.

Third, the new approach would give undue weight to certain types of circumstantial evidence such as highly manipulable after-the-fact indicia of viewer reactions. The new judicial gloss on the news distortion policy would also lead too easily to inferences of general patterns of distortion from thin circumstantial evidence of slanting regarding a single program.

In sum, the reinvented news distortion doctrine would undermine the very democratic norms marshaled in its defense. Particularly in light of the complex relation between news and the exercise of democratic citizenship, we should hesitate to support a regulatory policy that effectively grounds government censorship on an unrealistic view of news production.

Few of us today believe that there is only one version of any particular news story. Perspective is inherent in any account of events. At a minimum, error is inevitable. Yet the *Serafyn* court's approach could well suggest that the FCC should concern itself with whether a particular broadcaster gave the “right” slant to a particular news story. This expansive interpretation of the

9. *Serafyn*, 149 F.3d at 1222.

10. 149 F.3d at 1222-24.

11. *Id.* at 1223.

12. *Id.* at 1224.

news distortion rule is a far more dangerous precedent, in terms of state censorship, than the fairness doctrine in its traditional guise ever would have been.

By particularly threatening the investigative and newsmagazine formats of electronic journalism, the court's interpretation of the news distortion rule also undermines the democratic value of a diversity of press traditions.

The call for regulating news programming to enhance public discourse could receive support from second-generation regulatory rationales justifying an active FCC. While attention to the justification for FCC content regulation at first focused on whether the constitutionally disparate treatment of broadcast and print media could be justified by reference to the scarcity of the spectrum as a resource,¹³ the conclusion that scarcity could not bear the regulatory weight spawned not complete regulatory abdication, but a second generation of regulatory analysis. In this postscarcity era, the issue became whether and to what extent content regulation is justified (regardless of the form of media) on the basis of regulatory rationales other than scarcity.¹⁴

Media theorists of the second generation have attempted to resuscitate the regulatory enterprise, whether relying on a theory of broadcasting as a public forum, a notion of media impact (particularly on children), a principle that the free allocation of spectrum by the government should entail a *quid pro quo*, or an argument about correcting market failure. Many have justified such an approach on an affirmative theory of the First Amendment.¹⁵ The Clinton-era FCC itself observed that “[g]iven the impact of their programming and their use of the public airways, broadcasters have a special

13. For descriptions of the scarcity rationale and its critique, see generally THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* (1994); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983); Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking and the First Amendment*, 97 COLUM. L. REV. 905 (1997); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998).

14. See generally RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Corn-Revere ed., 1997); Lili Levi, *On the Mixed Cultures of Regulation and Deregulation*, 38 JURIMETRICS J. 515 (1998) (reviewing RATIONALES & RATIONALIZATIONS, *supra*); Logan, *supra* note 13.

15. See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* 52-78 (1996) [hereinafter FISS, *THE IRONY*]; OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 154-58 (1996) [hereinafter FISS, *LIBERALISM DIVIDED*]; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 366-72 (1997); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795-98 (1981); Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 373 (1993).

role in serving the public.”¹⁶ Thus, what is currently at stake is the second generation question of what kinds of content regulations should be considered both constitutional and good policy in the postscarcity world.

Media observers who decry such obligations point to the extraordinarily expanded marketplace of informational offerings.¹⁷ They doubtless take solace in the deregulatory turn portended by Michael Powell’s recent appointment to the FCC chairmanship by the Republican White House.¹⁸ Yet, those who support regulatory requirements will bide their time, insisting that the importance of television requires democracy-enhancing rules to promote informed public debate.¹⁹ This Article contends that even these new regulatory rationales should not be read to support an invigorated policy of penalizing news distortion. To the extent that they do support such a policy, this Article demonstrates the danger of their openness and expansiveness.

Part II.A of this Article describes the Commission’s traditional news distortion policy. Part II.B describes the D.C. Circuit’s extension of the news distortion policy in its recent decision in *Serafyn v. FCC*.

Part III.A argues that the D.C. Circuit’s judicial reinterpretation errs both procedurally, in failing to accord adequate deference to the FCC’s application of its news distortion doctrine, and substantively, in adopting significantly expanded definitions of extrinsic evidence of deliberate news distortion. This Part contends that the court’s invigorated and extended interpretation of the news distortion doctrine necessarily entails judicial establishment of official truth in the most controversial and contested of situations.²⁰ Part III.B argues that a news distortion policy functions as an unjustifiable extension of administrative power that allows an end-run around the constitutional and common law limitations of defamation law. The Part

16. Public Interest Obligations, *supra* note 1, ¶ 1.

17. See, e.g., PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 75-76 (1997); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 103-74, 237-75 (1994); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1419-20 (1996); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 401-03 (1989); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 133-35 (1990) [hereinafter Hazlett, *Rationality of U.S. Regulation*]; Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 220 (1996) [hereinafter Hazlett, *Explaining the Telecommunications Act*]; Hazlett, *supra* note 13, at 905-08.

18. Stephen Labaton, *Bush Appoints Powell’s Son to Lead F.C.C.*, N.Y. TIMES, Jan. 23, 2001, at 1; Stephen Labaton, *New F.C.C. Chief Would Curb Agency Reach*, N.Y. TIMES, Feb. 7, 2001 at C1.

19. See, e.g., SUNSTEIN, *supra* note 15.

20. The Article provides an Appendix with a detailed analysis of the *Serafyn* complainants’ specific claims of distortion as a concrete method of illustrating the difficulties posed by the court’s proposed new approach to FCC control of news distortion.

compares the news distortion policy to the evidentiary standards in defamation law and demonstrates that an administrative prohibition on news distortion cannot be positioned as an acceptable analog to the actual malice rule of constitutionalized defamation law.

Part IV examines the costs and benefits of two possible fallback positions: one, a regulatory recommitment to the traditional news distortion doctrine, and the other, a narrowed regulatory alternative limited to clearly staged news. The argument concludes that the doctrine should be abandoned even as traditionally limited, and that a news rigging fallback is not likely to be administrable.

Having concluded the explicitly doctrinal analysis of the specific news distortion policies of the FCC and the D.C. Circuit, Part V addresses the underlying policy question by setting out the contending democratic values implicated by the issue. Part V.A lays out the policy arguments in support of regulating news distortion, focusing on the modern reality of public ambivalence toward the press and the argument that systemic structural constraints on the media will inevitably lead to news distortion unless the FCC steps in to improve television news. Part V.B also observes that the expansive, postscarcity regulatory rationales developed by the Clinton-era FCC could in theory serve to bolster interventionist impulses.

Part V.B then contends that, regardless of the value of accurate news reports to an informed public in a democracy, administrative attempts to prohibit news distortion present far more serious dangers for democracy than permitting news reporting to develop without regulatory content review. Specifically, Part V.C explains the ways in which the news distortion doctrine presents a greater threat to a free press than did the fairness doctrine. It describes the ways in which the news distortion policy impels the government to intrude into the editorial process and select a particular reading of a news account and to propose an authoritative account of events. It argues that these results are both doctrinally problematic under the First Amendment and also run the risk of inaccuracy, particularly with regard to contested historical events. The Part warns against media regulations that provide only the illusion of neutrality without substantively ensuring press integrity. The argument characterizes structural factors that are likely to skew governmental accounts of the truth, including strategic uses of the administrative process by parties seeking to suppress speech. Shifting focus from the harms of regulation to the affirmative democratic benefits of diverse press traditions, Part V.C contends that conscientious application of the news distortion policy is likely to have a particularly chilling effect on certain kinds of news reporting. While the Article recognizes the democratic values that may be undermined by slanted news reports, it ultimately concludes that

those democratic values are better served by a free press constrained only by structural regulation, evolving journalistic norms, and the willingness of competing media to monitor their industry.

II. HISTORY OF THE FCC'S NEWS STAGING AND DISTORTION POLICY

For years, the FCC has quietly maintained on its books a policy prohibiting broadcast licensees from engaging in news distortion, rigging, and slanting.²¹ Adopted in response to criticisms of news distortion by the electronic press, the policy purports to target deliberate slanting and rigging of news reports.²² Such a policy would clearly contravene the First Amendment if applied in the context of the print press. Yet this explicitly content-based regulatory tool has received little critical attention in the broadcast context both because of the constitutionally distinct role of electronic media and because of the FCC's relative reticence in enforcing the policy.

The constitutionally different role of the electronic press is by now an old story.²³ As for the minimalist scope of FCC enforcement, the account below will explain that the high burden imposed on complainants (to show deliberate news slanting or staging) led to a small number of news distortion hearings since the 1940s.²⁴

Recent judicial developments at the D.C. Circuit cast doubt on the continuing viability of such a moderate regulatory approach. The FCC today faces a choice. Under one option, the Commission could revise and aggrandize the news distortion policy along the invasive lines of the new judicial model. Under another option, the FCC could attempt (vainly) to craft an extremely narrow doctrine focused only on fabricated news events. Under

21. See *infra* Part II.A.

22. See *infra* notes 34-48 and accompanying text.

23. Since the Supreme Court's 1943 decision in *NBC v. United States*, 319 U.S. 190 (1943), the scarcity of broadcast frequencies has been used to justify lesser First Amendment protections for the broadcast than the print media. See *supra* note 13 for a review of scarcity as a justification for broadcast regulation. Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (using scarcity as a rationale for defending FCC's fairness doctrine against constitutional attack) with *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974) (rejecting economic concentration as a rationale for upholding right of reply obligation for print press). While scarcity as a regulatory justification has been the subject of much criticism, see *supra* note 13, and while the FCC has undertaken numerous deregulatory initiatives since the 1980s, see, e.g., Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 582-92 (2000) (describing some deregulatory initiatives), First Amendment arguments have not displaced the regulatory impulse entirely. Scarcity has been eclipsed by other regulatory rationales under which various degrees of regulatory intervention into the electronic media have been proposed and justified. See discussion *infra* Part V.A.

24. See *infra* Part II.A.

still another possibility—one recommended in this Article—the FCC could eliminate the policy altogether.

A. *The Doctrine Prior to Serafyn v. FCC*

1. *The 1940s*

The Commission never formally adopted a rule prohibiting news staging and distortion. Instead, its policy was almost glancingly inaugurated in its seminal *Report on Editorializing by Broadcast Licensees*²⁵ and was then developed by common law method. Amidst the extensive discussion of the need for fairness in broadcasting and the goal of developing “an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day,”²⁶ the FCC in the *Report on Editorializing by Broadcast Licensees* warned: “A licensee would be abusing his position as a public trustee . . . 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.”²⁷

Although there doubtless have been instances of news distortion and suppression since radio's inception,²⁸ the first major case to reach the Commission's attention was *KMPC, Station of the Stars*.²⁹ The Commission there ordered a hearing about the Radio News Club of Hollywood's complaint that G.A. Richards, a “hard-shell conservative,” had forced KMPC's news staff to distort and suppress news and had fired noncomplying employees.³⁰ This was not a case about indirect news slant or failure to cover the implicit story underlying an event. The evidence collected during the *KMPC* hearing reflected an extraordinarily clear and explicit scenario of ‘news management’ for particular ideological ends.³¹ If ever there was a case

25. 13 F.C.C. 1246, 1254-55 (1949).

26. *Id.* at 1249.

27. *Id.* at 1254-55.

28. In his book about the FCC, long-time FCC division chief William Ray recounts that WLW, Cincinnati, the most powerful station in the United States in the 1930s, fired its news writer because he challenged the station management's directive that labor disputes not be mentioned in the news. WILLIAM RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 13 (1990).

29. 7 Rad. Reg. (P & F) 788 (1951); see RAY, *supra* note 28, at 11-13.

30. RAY, *supra* note 28, at 11-12. See also Nat'l Broad. Co., 14 F.C.C.2d 713, 720 n.5 (1968) (recounting KMPC story in context of conflict of interest opinion).

31. Richards' directives to the staff required them to slant all news in favor of Republicans, present Douglas MacArthur in “the most favorable light,” “refer to President Truman as a ‘pipsqueak,’” link the name of 1948 Progressive party candidate Henry Wallace to communism, “use no favorable news” about the Roosevelt family and “‘certain minority groups’ (meaning Jews, who Richards believed were ‘susceptible to communism’),” “make no unfavorable mention of the KKK,”

calling for FCC denial of a licensee's renewal request for content reasons, this was it. Although the case never reached a final decision because Richards' death mooted the matter, the concurring opinions of Chairman Coy and Commissioner Hennock made clear that the FCC would consider denying a license renewal on grounds of news suppression or distortion:

We recognize that the personal equation inevitably enters into the selection and broadcasting of news items, but conduct which manifests a disregard of the goal of objectivity in news presentation cannot help but adversely effect character qualifications under the Communications Act.³²

2. *Development of the Policy in the 1960s*

The FCC waited until the 1960s and 1970s—against a background of congressional hearings about news bias and distortion³³ and complaints from viewers about the liberal slant of network news coverage³⁴—to articulate a

and use the newspaper editorials and conservative columns Richards selected as items of hard news. RAY, *supra* note 28, at 12.

32. *KMPC, Station To the Stars*, 7 Rad. Reg. (P & F) at 798 (Comm'rs Coy and Hennock, concurring). William Ray found *KMPC* to be of "considerable significance since it indicated that the FCC would consider denying license renewal to a station if the owner suppressed or distorted news to serve private interests or prejudices." RAY, *supra* note 28, at 12-13.

33. See, e.g., *Inquiry into Alleged Rigging of Television News Programs: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. (1972) (regarding allegedly staged news reports); *House Comm. on Interstate & Foreign Commerce Proceeding Against Frank Stanton and Columbia Broad. Sys., Inc.*, H.R. Rep. No. 349, 92d Cong. (1971); *Subpoenaed Material re: Certain TV News Documentary Programs, Hearings Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., ser. 16, 20-150 (1971) (regarding CBS program, *The Selling of the Pentagon*); *The Columbia Broad. Sys. Television Program on "Hunger in America": Hearings Before the Subcomm. on Dep't of Agric. and Related Agencies Appropriations of the House Comm. on Appropriations*, 91st Cong. 53 (1969) (regarding CBS program, *Hunger in America*); *Deceptive Programming Practices: Hearings Before the Special Subcomm. on Investigations of House Comm. on Interstate and Foreign Commerce*, 90th Cong. (1968) (regarding CBS program, *Pot Party* on WBBM); STAFF OF SPECIAL SUBCOMM. ON INVESTIGATIONS OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 91ST CONG., STAFF OF HOUSE COMM. ON REPORT ON PM TELEVISION COVERAGE OF THE DEMOCRATIC NATIONAL CONVENTION, CHICAGO, ILLINOIS 1968 (Comm. Print 1969) (regarding the three television networks' coverage of the 1968 Democratic national convention). See also Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625 (1987) (cataloguing hearings about accuracy and fairness of broadcasts); Note, *The First Amendment and Regulation of Television News*, 72 COLUM. L. REV. 746, 751-52 (1972) (noting proposed congressional bills to control news staging).

34. See, e.g., *Pacifica Foundation*, 95 F.C.C.2d 750, 755-56 (1983) (rejecting argument that WPFW deliberately distorted its news coverage "to conform to its 'ultra-leftist political philosophy'"); *Henry Buchanan*, 42 F.C.C.2d 430 (1973) (applying the fairness doctrine to respond to news distortion complaint against *CBS Evening News* report on Nixon money-laundering that purported to rest claim

news distortion and staging policy. As the D.C. Circuit recounted approvingly in *Galloway v. FCC*,³⁵ the Commission articulated a policy against rigging, slanting, staging, and distorting the news in a series of cases involving network news coverage in the late 1960s.³⁶ The policy was part of the Commission's attempt to "particularize" broadcasters' general statutory duty to operate in the public interest.³⁷

In a challenge to a CBS investigative news program in which the network had erroneously identified a baby's death as resulting from malnutrition, the Commission took the position that "[r]igging or slanting the news is a most heinous act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs."³⁸ While it adopted the policy of acting to protect the public interest in connection with such staging, the Commission also recognized that "in this democracy, no government agency can authenticate the news, or should try to do so."³⁹

Thus, the Commission insisted that it could only act against "deliberate distortion," rather than simply "mere inaccuracy or difference of opinion."⁴⁰ The FCC assured broadcasters that it would not "question the legitimate editorial decisions of the broadcaster."⁴¹ The Commission made clear that disagreement with a licensee's news judgment was not sufficient for a finding of distortion.⁴² This approach applied both to the licensee's news

of news distortion on the "common knowledge" of CBS's liberal and anti-Administration bent).

35. 778 F.2d 16 (D.C. Cir. 1985).

36. *Id.* at 19.

37. *Id.* at 23. As the *Galloway* court pointed out, the policy is not grounded on a more specific statutory duty not to distort news.

38. CBS program "Hunger in America," 20 F.C.C.2d 143, 151 (1969) (involving claim that CBS news documentary about malnutrition misdescribed a child as having died from hunger rather than from complications attendant on premature birth).

39. *Id.*

40. *Galloway*, 778 F.2d at 20; CBS Program "Hunger in America," 20 F.C.C.2d 143, 150-51 (1969) ("[W]e do not consider it appropriate to enter the area where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event (i.e., a claim that the true facts of the incident are different from those presented.) The Commission is not the national arbiter of truth."). See also Christopher William Jones, Note, *FCC Regulation of Broadcast News: First Amendment Perils of Conflicting Standards of Review*, 48 *FORDHAM L. REV.* 1226 (1980) (describing doctrine and arguing that the FCC should use the stringent news distortion standard for fairness doctrine complaints as well).

41. *Galloway*, 778 F.2d at 20.

42. See, e.g., *Storer Broad. Co.*, 41 F.C.C.2d 792, 814 (1973); *Radiohio*, 38 F.C.C.2d 721, 741 (1973), *aff'd sub nom. CBS v. FCC*, 505 F.2d 320 (D.C. Cir. 1974); Nat'l Citizens Comm. for Broad. (NCCB), 32 F.C.C.2d 824, 825 (1971); Complaint Concerning the CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150, 152 (1971); *Universal Communications Corp.*, 27 F.C.C.2d 1022, 1025-26 (1971); *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650, 654 (1969).

As the Commission put it in *Howard L. Gifford*, 50 F.C.C.2d 125, 125 (1974), the licensee "'is . . . constantly called upon to make choices between types of programming, and then, within each type, to choose a format and content.'" (quoting Citizens Communications Center, 25 F.C.C.2d 705, 707

judgment with regard to scope of coverage and its judgments about newsgathering techniques.⁴³ In an often-quoted declaration, the Commission rejected any role in truth-assessments:

[T]he Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the 'truth' of an event as the Commission might see it. The question whether a news medium has been fair in covering a news event would turn on an evaluation of such matters as what occurred, what facts did the news medium have in its possession, what other facts should it reasonably have obtained, what did it actually report, etc. . . . [H]owever appropriate such inquiries might be for critics or students of the mass media, they are not appropriate for this Government licensing agency. . . . We do not sit as a review body of the 'truth' concerning news events.⁴⁴

Most significantly, the Commission took the position that the distortion or

(1970)). The Commission has taken this position even when one political candidate charges that the station's coverage has unfairly promoted the candidacy of his or her opponent. *See, e.g.*, Penny Manes, 38 F.C.C.2d 308, 312 (1972), *recon. denied*, 42 F.C.C.2d 878 (1973); Charles L. Smith, 36 F.C.C.2d 690, 690 (1972) (rejecting a news distortion claim based on the station's failure to cover petitioner's candidacy—even though the father of the petitioner's opponent owned the station); WTAR Radio-TV Corp., 31 F.C.C.2d 812, 829-30 (1970) (denying an attempt to enlarge issues to include news distortion in a mutually exclusive renewal application proceeding because of lack of evidence of station directive to reduce coverage of public figure for station's economic benefit).

43. *Nat'l Citizens Comm. for Broad.*, 32 F.C.C.2d at 824-25. Indeed, the Commission denied NCCB's request for reconsideration of its proposal that programming alterations made in direct and proximate response to government pressure would be considered to violate the terms of license. The Commission stated that "there is nothing inherently 'wrong'" with pressure exerted on broadcasters by "outside sources—by government officials, public figures, private groups, etc., all urging the importance of some development or emphasis on some particular viewpoint or spokesmen in making a news or public affairs presentation." *Id.* Were the Commission to meddle in that process, the agency stated, it:

would be placed in an intolerable position in trying to determine whether any decision to broadcast certain material should be construed as "capitulation to government pressures . . ." etc. Adoption of your proposal would seriously affect the freedom of licensees in deciding what material to broadcast, particularly material suggested by government officials the broadcast of which may well be in the public interest.

Evaluation of news "pressures," from whatever source, is for the journalistic judgment of the licensee. The Commission does not interfere with that journalistic judgment . . . We thus will not hold evidentiary hearings here to determine, perhaps largely on credibility grounds, exactly what a public official said to a broadcast journalist and whether the latter "distorted" the news. This is a quagmire where Government intervention is far worse than any abuse involved.

Id. at 825.

44. *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d at 655 (addressing charges that the network coverage of the convention was staged and produced to reflect an antigovernment and anti-Vietnam war bias).

staging must be deliberate and intentional⁴⁵ and the complainant must be able to produce “substantial”⁴⁶ or “significant”⁴⁷ extrinsic evidence of such deliberate and knowing distortion.⁴⁸ The Commission has defined extrinsic evidence as evidence other than the broadcast itself, including written or oral instructions from station management to fabricate or distort the news.⁴⁹ While the Commission has never sought to articulate a general definition of “extrinsic” evidence, it has provided examples: “evidence that a newsman had been given a bribe, or had offered one to procure some action or statement,”⁵⁰ outtakes,⁵¹ written memoranda “readily establishing whether there has been a rigging of news,”⁵² or “testimony, in writing or otherwise, from ‘insiders’ or persons who have direct personal knowledge of an intentional attempt to falsify the news.”⁵³

The Commission made clear early on that it “did not mean the type of situation, frequently encountered, where a person quoted on a news program complains that he very clearly said something else. The Commission cannot appropriately enter the quagmire of investigating the credibility of the

45. As the *Galloway* court puts it: “The key elements of this standard are, first, that the distortion or staging be deliberately intended to slant or mislead.” *Galloway*, 778 F.2d at 20.

46. See *Jones*, *supra* note 40, at 1237 & n.74 (citing relevant cases therein).

47. See *id.*

48. See, e.g., *KMAP Inc.*, 72 F.C.C.2d 241, 244 (1979); *Jim Myers*, 69 F.C.C.2d 963, 965 (1978); *Melvin Pulley*, 58 F.C.C.2d 1224, 1226-27 (1976); *Northwestern Ind. Broad. Corp.*, 57 F.C.C.2d 686, 694 (1975), *applic. denied*, 65 F.C.C.2d 73 (1976), *aff’d as modified*, 65 F.C.C.2d 66 (1977); *Sun Newspapers, Inc.*, 41 F.C.C.2d 988, 989 (1973); *The Evening News Assoc.*, 35 F.C.C.2d 366, 394 (1972); *Letter to Mrs. J. R. Paul*, 26 F.C.C.2d 591, 591-92 (1969); *CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 150 (1969).

49. See, e.g., *Pacifica Foundation*, 95 F.C.C.2d 750, 755-56 (1983).

50. *Hunger in America*, 20 F.C.C.2d at 151.

51. The term “outtakes” refers to material videotaped in connection with a story but not ultimately broadcast in the aired program.

As discussed below, the Commission did not use the potential evidentiary weight of outtakes to confer a right on complainants to obtain outtakes from broadcasters. The statement in the text merely refers to the potential evidentiary value of outtakes obtained by complainants without compulsion. Aside from public domain evidence or materials provided by a disgruntled employee, complainants often receive outtakes from other participants in a story. For example, a person who has been interviewed by a broadcaster may have the tape of her interview and may independently choose to share it with a news distortion complainant.

52. *Hunger in America*, 20 F.C.C.2d at 151.

53. *Jim Myers*, 69 F.C.C.2d at 965; *Mrs. J.R. Paul*, 26 F.C.C.2d at 592. In *Star Stations of Ind., Inc.*, 51 F.C.C.2d 95, 105-09, *aff’d sub nom.* *Star Broad. Inc. v. FCC*, 527 F.2d 853 (D.C. Cir. 1975), the Commission denied a renewal application because, inter alia, the general manager of the station testified that the station’s principal owner instructed him to slant news reporting in favor of a senatorial candidate. In *Michael D. Bramble*, 58 F.C.C.2d 565, 577-78 (1976), the Commission rejected a news suppression complaint after the agency’s own field investigation had not adequately supported a former newsman’s claims that the station’s top management had directed the suppression of news.

newsman and the interviewed party in such a type of case.”⁵⁴ Nor did the Commission find generalized suggestions of media bias to suffice under the extrinsic evidence standard to lead to an inference of news distortion in a particular case.⁵⁵ Nor are claims of past history⁵⁶ or inferences from competitive positions⁵⁷ or claims of “news management” to further the station’s economic interests in a “news war”⁵⁸ sufficient for an inference of

54. *Hunger in America*, 20 F.C.C.2d at 151.

55. *See, e.g.*, Henry M. Buchanan, 42 F.C.C.2d 430, 430-33 (1973) (rejecting complainant’s attempt to rely on prior charges of CBS’s anti-Administration liberal bias to substantiate news distortion complaint). Ulster-American Heritage Foundation, 96 F.C.C.2d 1246, 1246-48 (1984) (rejecting news distortion claims in connection with coverage of Ireland, including claim of inevitable pro-British bias because the station aired a program produced by anti-Ulster governments).

56. For example, in *Sun Newspapers, Inc.*, 41 F.C.C.2d 988 (1973), the complainant argued that WCCO had distorted its news coverage to help its affiliated newspaper and hurt the competitive newspaper in town. *Id.* at 988. The Commission rejected the claim of anticompetitive news distortion because the complainant did not present extrinsic evidence. The Commission did not give credence to the argument that WCCO’s prior anticompetitive activities in other contexts should be viewed as extrinsic evidence. *Id.* *Sun Newspapers* can be read narrowly as relying on the fact that WCCO adequately answered those anticompetitive news distortion charges in the previous license renewal proceedings. However, the fact that the Commission did not choose to give any weight to the “serious public interest questions,” *id.* at 989 (quoting Midwest Radio-Television, Inc., 24 F.C.C.2d 625 (1970)), that had been raised in the renewal proceeding is, at least, suggestive of the Commission’s stringent approach to inferences about extrinsic evidence.

In *Yellow Freight System, Inc.*, 73 F.C.C.2d 741 (1979), *aff’d*, 656 F.2d 600 (10th Cir. 1981), the Commission addressed distortion claims about NBC news coverage of truck safety programs. *Id.* at 741. Yellow Freight claimed that the reporter, who had previously written articles for a dissident teamster’s group newsletter, had a conflict of interest that established a motive for intentional distortion. *Id.* at 757. The Commission credited the reporter’s affidavit specifically denying those charges, but said that, even if he had written such articles in the past, such activity should not constitute the kind of “stake which must be brought to public attention.” *Id.* “[I]ndeed, to do so would involve the Commission in making impossible judgments as to whether a reporter already has an opinion on a subject he is covering.” *Id.* This dictum is particularly instructive because, as is discussed below, the Commission does have a policy of requiring disclosure of economic conflicts of interest.

57. *See, e.g.*, Telegraph-Herald, Inc., 59 F.C.C.2d 1233, 1233-35 (1976) (rejecting argument that rival station’s sensationalized and unflattering news reports about complainant were undertaken to damage the competing station’s good will). In *Telegraph-Herald*, the Commission rejected the complainant’s inferences that its competitor “must have had knowledge” of matters affected by its programming. *Id.* at 1234. That claim is very close to the standard that the D.C. Circuit seems to have adopted in *Serafyn*, however.

58. *See Am. Broad. Cos. (KGO-TV)* 56 F.C.C.2d 275 (1975), *recon. denied*, 60 F.C.C.2d 509 (1976). In *KGO-TV*, petitioners, to deny the station’s application for renewal, argued that the licensee had adopted news editorial policies that amounted to news management because it was involved in a “news war.” *Id.* at 275. These policies included airing tabloid news stories and “happy talk” preferred by the general population. *Id.* at 1275-76. Petitioners asserted that such programming, designed to improve ratings and advertising revenues, promoted the station’s individual economic interest above its duty to program for the public interest. *Id.* at 276. The petitioners presented “extrinsic evidence” in the form of quotes from news clippings detailing the degree to which the station used news consultants and promised testimony from employees if the matter were set for hearing. *Id.* The Commission noted that the petitioners had not identified any specific instances or situations where the station “ignored a news event or distorted the news to achieve its own selfish ends. . . . [M]uch of petitioners’ evidence does not relate specifically to KGO-TV but to the news practices generally at many stations.” *Id.* at

deliberate distortion. The Commission has refused to set cases for hearing—even if they concern broadcasts full of mistakes—if there is no significant extrinsic evidence that the errors were something more than “honest mistakes.”⁵⁹ At points, the Commission has flatly stated that it “will not infer an intent to distort.”⁶⁰

The Commission has also eschewed inquiry into the editing practices of broadcasters. In a decision involving a CBS program that prompted a congressional hearing into news practices,⁶¹ the agency opined:

It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray. . . . Any presumption [to being the national arbiter of truth] on our part

276. The Commission then held the following:

We will not interfere with the exercise of the licensee's news judgment where, as here, there is no showing that it consistently and unreasonably ignored important matters of public concern.

Also, absent a showing that the licensee has surrendered its news and programming discretion to another party, the Commission finds no issue raised by the fact that ABC uses a news consultant or that it seeks primacy in its market. Broadcasting is a competitive business, and the Commission would not make it otherwise, believing that the public is best served by having its problems, needs, and interests met by a variety of presentations, all competing to give the most preferred and beneficial service.

Id. at 276-77. *See also* Florida Power & Light Co., 95 F.C.C.2d 605, 605-12 (1983) (denying complaint alleging that a radio station engaged in news distortion to boost ratings).

59. *See, e.g.*, Vincent P. Dole, M.D., 54 F.C.C.2d 508, 513-14 (1975) (rejecting news distortion claim despite numerous apparent errors in documentary on methadone because the Commission found nothing to suggest that the errors were not due to “honest mistakes”).

60. Pacifica Foundation, 95 F.C.C.2d 750, 756 (1983). *See also* Peter Gimpel, 3 F.C.C.R. 4575 (1988) (refusing to find that complainant's assertion of nationwide news blackout of anti-Shah reports could be supported by putting two and two together). The *Gimpel* Commission stated:

[Y]ou have merely provided a comparative survey of American and European press coverage of the Black Friday massacre, congressional testimony concerning government disinformation programs, and various facts which you hypothesize support your theory of a nationwide cover-up. These fall short of actual “insider” information concerning this specific news story, *e.g.*, affidavits from employees of the networks attesting to orders from top management to intentionally distort the number of victims of the Black Friday massacre. Without such “insider” information, Commission intervention in such matters would pose a significant intrusion upon the broadcaster's First Amendment rights

Id. at 4576.

61. The CBS program “The Selling of the Pentagon,” 30 F.C.C.2d 150 (1971). The controversial documentary won a Peabody Prize and an Emmy Award, but garnered harsh criticism by Vice President Agnew. *Id.* at 165-68 (separate statement of Comm'r Nicholas Johnson) (describing and citing sources about political controversy regarding program). *See also* Dyk & Goldberg, *supra* note 33 (arguing that Congress has overstepped the boundaries of its investigative authority in violation of the First Amendment). It should be noted that the *Selling of the Pentagon* case involved editing practices rather than the broadcast of false statements. 30 F.C.C.2d at 151-52. For similar representative holdings about the limits of the news distortion policy, *see*, for example, CBS “Hunger in America,” 20 F.C.C.2d 143, 150-52 (1969); Network Coverage of the Democratic Nat'l Convention, 16 F.C.C.2d 650, 656-58 (1969).

would be inconsistent with the First Amendment and with the profound national commitment to the principle that debate on public issues should be “uninhibited, robust, [and] wide-open.” . . . It would involve the Commission deeply and improperly in the journalistic functions of broadcasters.

This function necessarily involves selection and editorial judgment. And, in the absence of extrinsic evidence, documentary or otherwise, that a licensee has engaged in deliberate distortion, for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion.⁶²

Thus, short of “situations where the documentary evidence of deliberate distortion would be sufficiently strong to require an inquiry—for example, where a ‘yes’ answer to one question was used to replace a ‘no’ answer to an entirely different question,”⁶³—the Commission declared its desire to “eschew the censor’s role,” because its intervention might well be “a remedy far worse than the disease.”⁶⁴ Given the apparent “splicing” of questions and

62. See *The Selling of the Pentagon*, 30 F.C.C. 2d at 152-53.

63. *Id.* at 152-53 (internal citations omitted).

64. *Id.* at 153 (citations omitted). The Commission refused to find a policy violation even when a station deleted the remarks of a controversial guest speaking about the Vietnam war. See Mark Lane, 37 F.C.C.2d 630, 634 (1972) (refusing to find that station’s act in deleting audio portion of guest’s comments, pursuant to legal counsel’s instructions to avoid a libel suit, should be treated as impermissible censorship under § 326 of the Communications Act). Reiterating that a licensee’s programming decisions must be based on his obligation to serve community needs, the Commission stated that it would be “concerned if a licensee rejected ‘a presentation of views on the basis of a policy that he never presented views with which he disagreed.’” *Id.* at 633 (quoting Letter to Honorable Richard L. Ottinger, available at 31 F.C.C.2d 847 (1971)). Nevertheless, the agency found that the decision to delete “does not appear to have been arbitrary, capricious or based upon a policy of excluding views with which it disagreed.” *Id.* at 634. In a strongly worded dissent, Commissioner Nicholas Johnson chastised the Commission for ignoring the station’s “policy on program discrimination” and forgiving the station for its misleading statement that technical difficulties caused the bleeping out of the audio. *Id.* at 634-35.

In *The Selling of the Pentagon*, the Commission did effectively rebuke CBS for its editing practices, noting:

[The network] failed to address the question raised as to splicing answers to a variety of questions as a way of creating a new “answer” to a single question. The very use of a “Question and Answer” format would seem to encourage the viewer to believe that a particular answer follows directly from the question preceding.

30 F.C.C.2d at 153. Thus, the Commission encouraged broadcasters to “examine their own processes, to subject them to the kind of hard critical analysis that is characteristic of the best traditions of the journalistic profession.” *Id.* at 153-54.

Yet, the Commission staff has rejected complaints of biased editing leading to misimpressions about interviewee statements. See, e.g., Citizens for Abraham D. Beame, 41 F.C.C.2d 155, 159 (1973).

answers in the *Selling of the Pentagon* case itself, this approach suggests a rather narrow ambit for the news distortion policy.⁶⁵

Moreover, to violate the news distortion policy, the distortion must be about a significant matter and not merely something trivial or incidental.⁶⁶ The Commission has explicitly stated that it “tolerates . . . practices [such as staging and distortion] unless they “affect[] the basic accuracy of the events reported.”⁶⁷ The Commission made clear that peripheral acts of puffery and “window dressing” would not materially deceive the public and therefore would not be characterized as distortion.⁶⁸

In addition, the Commission has explained that even if there is extrinsic evidence of deliberate distortion or staging, it will not threaten the license unless it involves “the licensee or its top management.”⁶⁹ The involvement of “news employees of the station,” without more, might lead to further Commission inquiry “in appropriate cases,” but “unless our investigation reveals involvement of the licensee or its management there will be no

Also, the Commission found that discrepancies between a broadcast report and a newswire account was not evidence of distortion because the reporter did not unreasonably ascribe the discrepancies to a different newswire story by the same service. *RKO General, Inc.*, 51 F.C.C.2d 367, 369 (1975). *See also Jones, supra* note 40, at 1237-41 & nn.78-99 (summarizing the FCC’s various categories of news distortion and describing the application of the extrinsic evidence standard in each context).

65. Presumably, the Commission would conclude otherwise were the editing practices to lead to a significant alteration of the statements from those broadcasts.

66. *See Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

67. *Id.* (quoting *WPIX, Inc.*, 68 F.C.C.2d at 381, 386 (1978)).

68. *See, e.g., WPIX, Inc.*, 68 F.C.C.2d at 386 (1978) (distinguishing “props or attempts at window dressing which concerned the *manner* of presenting the news without affecting the basic accuracy of the events reported”) (emphasis in original); *Oscar B. White*, 87 F.C.C.2d 954, 960 (1981) (rejecting news staging claim regarding a program about a then-pending jail bond issue which included a segment of a documentary prepared by bond proponents in which county employees were depicted as prisoners because segment was “relatively minor” and incidental to the entire program); *Ubiquitous Corp.*, 51 F.C.C.2d 780, 794 (1975) (granting only short-term renewal as a result of nonprogramming problems, but expressly refusing to set limits on broadcaster’s use of “hyperbole” in programming); *Hon. Harley O. Staggers*, 25 Rad. Reg.2d (P & F) 413, 420 (1972).

69. *The Black Producer’s Ass’n*, 70 F.C.C.2d 1920, 1922 (1979). *See also Mrs. J.R. Paul*, 26 F.C.C.2d 591, 592 (1969) (“We would be particularly concerned were the extrinsic evidence to reveal orders to falsify the news from the licensee, its top management, or its news management.”); *CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 150 (1969) (no hazard to license status if management not involved).

In *Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650, 657 (1969), the Commission stated the following:

[T]o place the license in jeopardy for the occasional isolated lapse of an employee would be unjust where the licensee has adequately discharged its responsibilities, might tend to discourage broadcast journalism, and might thus be at odds with the very reason for our allocation of so much scarce spectrum space to broadcasting—our realization of the valuable contribution it can make to an informed electorate. . . . Accordingly, in the absence of licensee direction or an abdication of licensee responsibility, a hearing on the license renewal would not be called for.

Id. (internal citations omitted).

hazard to the station's licensed status."⁷⁰ Under those circumstances, "[t]he matter should be referred to the licensee for its own investigation and appropriate handling."⁷¹

Finally, the Commission has refused to hold evidentiary hearings when there is conflicting testimony:

In these circumstances [where there are different recollections], it is, we believe, inappropriate to hold an evidentiary hearing and upon that basis (i.e., credibility or demeanor judgments), make findings as to the truth of the situation. The truth would always remain a matter open to some question, and unlike a tort or contract case, where a judgment must be made one way or another, that is not the case here.⁷²

The distortion and staging cases that the Commission heard during this period may best be classified into two categories: claims about staging or rigging, and claims about news suppression or slanting. The staging or rigging complaints consist of two subcategories: (1) fabricated news or hoaxes and (2) news obtained at the news organization's request or behest.⁷³

70. *Black Producer's Ass'n*, 70 F.C.C.2d at 1922. See *Columbia Broad. Sys., Inc.*, 45 F.C.C.2d 119, 128 (1973) (refusing to take further action on instances of staging by CBS stations because top management was not involved). However, even if licenses are not placed in jeopardy, a threshold showing of undisclosed conflicts of interest may be considered in a mutually exclusive application context as "relevant to [the station's] past broadcast record." *Nat'l Broad. Co. (KNBC)*, 21 F.C.C.2d 195, 203 (1970), *pet. granted in part*, 21 F.C.C.2d 611 (1970).

71. *Hunger in America*, 20 F.C.C.2d at 151. The Commission requires broadcasters to investigate news staging claims thoroughly. In the infamous *Pot Party* case—in which Congress held a hearing on a CBS program about pot smoking on college campuses in the 1960s—the Commission rebuked the station for its reliance on an inexperienced reporter and its inadequate investigation of staging charges. *Inquiry into WBBM-TV's Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (Pot Party)*, 18 F.C.C.2d 124, 137 (1969). See also *Columbia Broad. Sys., Inc.*, 45 F.C.C.2d at 128 (chiding CBS for failing to investigate and unearth information on its own about staging claims in connection with six programs and for only discovering significant facts after being confronted with facts by FCC); *Am. Broad. Co.*, 45 F.C.C.2d 41, 47 (1973) (characterizing ABC as "remiss" in one of its investigations of staging claims in connection with a school disturbance).

72. *Hunger in America*, 20 F.C.C.2d at 147. See also *RKO Gen. Inc.*, 51 F.C.C.2d 367, 371 (1975) (declining to add news falsification and lack of supervision issues to hearing because factual conflict existed between complainant and station personnel in addition to a lack of evidence that management was involved); *Student Ass'n of the State Univ. of N.Y. at Buffalo, N.Y.*, 40 F.C.C.2d 510, 518 (1973) (refusing to issue declaratory ruling that ABC's refusal to air an anti-Vietnam program during football half-time was censorship and finding it inappropriate to hold a hearing when there is conflict of memory). Cf. *Black Producer's Ass'n*, 70 F.C.C.2d at 1927-28 (avoiding discussion of the effect of conflicting testimony as to whether ABC news personnel had asked gang members to fight in connection with *Youth Terror: The View from Behind the Gun* because staged scenes were not "significant" and there was no indication that staging was attributable to management).

73. By "fabricated news," I refer to events made up by the media. The emblematic example of this is *Washington Post* reporter Janet Cooke's Pulitzer prize-winning fabricated story, *Jimmy's World*. See, e.g., John Leo, *Bloopers of the Century*, COLUM. JOURN. REV., Jan. 1, 1999, at 38. For more recent examples, see, for example, Judith Sheppard, *Playing Defense*, AMER. JOURN. REV., Sept. 1998,

The slanting cases involved claims that the station's news programming gave viewers the wrong idea about the truth of events reported. In turn, the slanting claims were made in two sorts of contexts: (1) claims of suppression of news and lack of coverage of newsworthy events for either ideological or economic reasons, and (2) claims that the coverage, when it did occur, was misleading, unfair, or incomplete.⁷⁴

Specifically with regard to staging or rigging, the Commission attempted to carve out a narrow and identifiable definition for its enforcement. The agency was most consistently harsh in imposing sanctions for the broadcast of entirely fabricated information and broadcast hoaxes.⁷⁵ With regard to the

at 48. By contrast, news staging refers to situations in which reported events really happen but only because the news media have prompted or requested them.

74. For claims of news slanting in the licensee's private interests, see, for example, Miami Valley Broad. Corp., 78 F.C.C.2d 684 (1980) (regarding suppression of Fonda promotion of antinuclear movie because of GE's nuclear power interests); Tri-State Broad., 59 F.C.C.2d 1240, 1244 (1976) (regarding allegation that broadcaster "delayed, altered, distorted, or censored important news stories that might displease commercial advertisers or threaten [the broadcaster's] relationship with the business and political community"); Messrs. S.J. King, Joe Faison, and Thomas Bagley, 51 F.C.C.2d 65, 65 (1975) (regarding complaint that licensee broadcast "auditorials" advocating licensee's position in litigation with local government); Mr. Clifford H. Wilmath, 43 F.C.C.2d 1266 (1973) (regarding complainant's allegation that CBS slanted *60 Minutes* piece on mobile homes because CBS owned 49% of a Florida development corporation); Gross Telecasting, Inc., 14 F.C.C.2d 239 (1968) (regarding complaint that licensee slanted editorials against opposing party in a business dispute); Nat'l Broad. Co., 14 F.C.C.2d 713 (1968) (regarding complaints that NBC reporter Chet Huntley slanted reports against the meat industry); KIRO, 36 Rad. Reg. 2d (P & F) 673 (1976) (propagandizing for Mormon Church during ostensibly objective news programming).

75. See, e.g., FCC Letter of Admonishment to Radio Station WALE-AM, 7 F.C.C.R. 2345 (1992) (admonishing station for false report that employee had been shot); FCC Letter of Admonishment to Radio Station KROQ-FM, 6 F.C.C.R. 7262 (1991) (admonishing station for murder confession hoax); Walton Broad., Inc. (KIKX), 78 F.C.C.2d 857, 866 (1980) (rejecting a station's license renewal application because the station broadcast a "cynical hoax" consisting of false announcements and promotions regarding the imaginary kidnapping of a disc jockey which "needlessly shocked KIKX's listening audience and interfered with police operations"), *recon. denied*, 83 F.C.C.2d 440 (1980), *aff'd*, 679 F.2d 263 (D.C. Cir. 1982); Action Radio, Inc., 51 F.C.C.2d 803, 809 (1975) (granting short-term renewal to station that, inter alia, broadcast suburban temperatures without knowing the temperature). See also WMJX, Inc., 85 F.C.C.2d 251, 266 (1981) (refusing renewal for hoax and fraudulent billing). In *WMJX*, the Commission stated:

This case . . . falls beyond the 'core area' of licensee discretion (journalistic decisions regarding what is news, the editing process, and news commentary). Where, as here, the danger is manipulation of the news to further the licensee's business interests, rather than the manipulation of the news to create a biased or one-sided impression upon public issues, there is less potential for censorship and the Commission need not be as hesitant in imposing a sanction. Even under the more demanding standard, however, there is ample evidence to support the finding of an intent to deceive. The record discloses that Hamill authored the four news items in question, and that he did so with knowledge of their falsity.

85 F.C.C.2d at 266. Cf. *KWK Radio Inc. v. FCC*, 337 F.2d 540 (D.C. Cir. 1964) (affirming license revocation for fraudulent treasure hunt). The Commission has even adopted a specific rule prohibiting broadcast hoaxes that are harmful to the public. Amendment of Part 73 Regarding Broad. Hoaxes, 7 F.C.C.R. 4106 (1992) (summarized at 57 Fed. Reg. 28,638-02 (June 26, 1992) (codified at 47 C.F.R.

more subtle forms of staging, the Commission explicitly recognized three realities: (1) that news events can be—and, in the instance of news conferences, are by definition—staged by participants in order to trigger press scrutiny; (2) that the subjects of news reporting often modify their behavior because of television coverage; and (3) that news production often requires “stage managing”⁷⁶ as a result of technological needs. Bowing to those realities, the Commission sought to distinguish those types of staging from the kind of heinous news manipulation it sought to inhibit.⁷⁷ The Commission “viewed its proper area of concern to be with those activities which are not a matter of journalistic judgment or gray area, but rather constitute the deliberate portrayal of a significant ‘event’ which did not in fact occur but rather is ‘acted out’ at the behest of news personnel.”⁷⁸

Even if the event were “real” and not acted out at the behest of news personnel, improper staging would also occur if the event had been induced to occur by the press.⁷⁹ Otherwise, said the Commission, “the matter would

§ 73.1217)) (adopting section 73.1217 Broadcast Hoaxes, which permits the Commission to levy fines against violators, in addition to issuing letters of admonition or instituting revocation proceedings available under the traditional news distortion policy). *See also* Justin Levine, *A History and Analysis of the Federal Communications Commission’s Response to Radio Broadcast Hoaxes*, 52 FED. COMM. L.J. 273 (2000); Letter to KSLX-FM (MMB, Oct. 2, 1989) (admonishing station for false report that station had been taken hostage), *cited in* Broadcast Hoaxes, 57 Fed. Reg. 28,638 (June 26, 1992) (codified at 47 C.F.R. § 73.1217).

76. *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985).

77. As the FCC stated in *Network Coverage of the Democratic National Convention*:

We are not considering “staging” in the sense that persons or organizations may engage in certain conduct because of television—whether a press conference or a demonstration. . . . In a sense, every televised press conference may be said to be “staged” to some extent; depiction of scenes in a television documentary—on how the poor live on a typical day in the ghetto, for example—also necessarily involves camera direction, lights, action instructions, etc. The term “pseudo-event” describes a whole class of such activities that constitute much of what journalists treat as “news”. Few would question the professional propriety of asking public officials to smile again or to repeat handshakes, while the cameras are focussed upon them. In short, while there can, of course, be difficult gray areas, there are also many areas of permissible licensee judgment in this field.

The staging of the news with which we are here concerned is neither an area coming clearly within the licensee’s journalistic judgment nor even a gray area.

16 F.C.C.2d 650, 656 (1969). *See also* *The Black Producer’s Ass’n*, 70 F.C.C.2d 1920, 1921-22 (1979) (describing staging policy).

78. Hon. Harley O. Staggers, 25 Rad. Reg. 2d (P & F) 413, 414 (1972); *Democratic Nat’l Convention*, 16 F.C.C.2d at 657.

79. *Inquiry into WBBM-TV’s Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (Pot Party)*, 18 F.C.C.2d 124, 134 (1969).

WBBM-TV could . . . properly use television coverage of a pot party to point up graphically the widespread nature of this drug violation on college campuses. But it had to be a pot party which was being held, whether or not WBBM-TV was there to televise it—one to which it was truly invited. The licensee could not properly induce the holding of a pot party.

But see *Taft Broad. Co.*, 2 F.C.C.R. 6622, 6624 (1987) (finding no extrinsic evidence of news staging where reporter advised complainant’s dissatisfied customers that station would be filming the filing of

again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which [the FCC] must eschew.”⁸⁰

With respect to claims about slanting or distortion, the Commission has given the shortest shrift to arguments regarding overall programming suppression and bias.⁸¹ Even with regard to claims that particular programs

lawsuits at the courthouse on a particular day, invited customers to join others at the courthouse, and “encouraged and assisted the disgruntled customers to file their complaints”), *recon. denied*, 3 F.C.C.R. 6489 (1988).

The Commission seems to envision a distinction between staging on the one hand and permissible news coverage of a future event on the other hand. The distinction may be something like the difference between a reporter asking, “Please hold a pot party for us,” and “We heard you’re having a pot party tomorrow and would love to be invited.” This distinction is somewhat problematic, however. The media’s request to be invited to the pot party might affect the “when, where, and if” of the participants’ decisions if their planned event could benefit from public exposure. Moreover, the agency also prohibits media inducement of events, without defining the parameters of such inducement and where it fits in the staging and news coverage continuum. It is at least partly because of the impossibility of drawing clear lines among these notions that this Article argues for the complete elimination of the news distortion doctrine rather than an attempt to craft a narrower news staging alternative. *See* discussion *infra* Part IV.

80. *Democratic Nat’l Convention*, 16 F.C.C.2d at 657-58.

81. Thus, the Commission has not credited claims of overall liberal media bias without significant extrinsic evidence. *Cf.* Am. Security Council Educ. Found. Against CBS, Inc., 63 F.C.C.2d 366, 370 (1977), *aff’d*, 607 F.2d 438 (D.C. Cir. 1979) (rejecting claim of fairness doctrine violation by CBS news in connection with national security coverage). In most instances, the Commission has similarly rejected arguments that coverage of (and programs of interest to) the station’s African American community or women viewers has been suppressed for ideological reasons. *See, e.g.*, Nat’l Org. for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977); Dr. Paul Klite, 12 Comm. Reg. (P & F) 79 (1998), *available at* 1998 WL 208060 (rejecting contention that racial and gender stereotyping constitute evidence of intent to distort); The Providence Journal Co., 12 F.C.C.R. 2883, 2890 (1997) (rejecting petition to deny transfer grounded on claims of biased reporting of campaign issues and the African American community in general); Am. Broad. Cos., Inc., 83 F.C.C.2d 302 (1980) (same), *recon. dismissed*, 86 F.C.C.2d 1 (1981); License Renewal Applications of Certain Broad. Stations Licensed to and Serving the District of Columbia, 77 F.C.C.2d 899 (1980) (rejecting claim that the licensee’s structuring of its newsgathering process led to a result that would, by definition, reduce the coverage of issues of interest to the community’s minority residents); Field Communications Corp., 68 F.C.C.2d 817 (1978); WSM, Inc., 66 F.C.C.2d 994, 996-97 (1977) (rejecting petition to deny renewal despite allegations of programming tending to “perpetuate a perceived link between blacks and crime” because complainant presented no evidence of abuse of professional news judgment); N.Y. Times Broad. Service, Inc., Station WREG-T.V., 63 F.C.C.2d 695, 703-06 (1977) (regarding news coverage of Memphis’ African American community), *recon. denied*, 66 F.C.C.2d 340 (1977); Newhouse Broad. Corp., 61 F.C.C.2d 528, 532 (1976) (charging, inter alia, “gross misrepresentation and distortion of the coverage of news, especially for the Black community”), *modified by* 73 F.C.C.2d 186 (1979); KSD/KSD-TV, Inc., 61 F.C.C.2d 504 (1976), *recon. granted in part*, 73 F.C.C.2d 186 (1979); Radio Station WKRA, Inc., 61 F.C.C.2d 727 (1976) (refusing to deny renewal despite allegations that the station failed to cover events of interest in the African American community); CBS, Inc., 57 F.C.C.2d 505 (1976) (rejecting news distortion claim based on station’s failure to program for women viewers), *remanded on other grounds sub nom.* Los Angeles Women’s Coalition for Better Broad. v. FCC, 584 F.2d 1089 (D.C. Cir. 1978); Cosmos Broad. of La., Inc., 56 F.C.C.2d 320, 325-27 (1975) (finding no extrinsic evidence to support claims about news suppression, including charges of inadequate programming for African American community); Wichita County Human Relations

demonstrate ideological bias, the Commission has taken a rather skeptical approach:

[T]he complaint is frequently received that “Commentator X has given a biased account or analysis of a news event” or that the true facts of

Comm., 50 F.C.C.2d 322 (1974) (rejecting news suppression claims based on station’s failure to broadcast complainant’s city council appearance); Columbia Broad. Sys., Inc., 46 F.C.C.2d 903 (1974) (denying complainant’s petition to deny renewal alleging station’s failure to serve the needs of Philadelphia’s African American community); Cmty. Coalition for Media Change, 45 F.C.C.2d 1051 (1974) (rejecting news distortion claim in connection with negative portrayal of African Americans in news programming and a misleading partial broadcast of an interview with an African American congressman), *aff’d*, 50 F.C.C.2d 304, 306-07 (1974) (criticizing general manager’s lack of candor but concluding that it “would be inappropriate for this Commission to take action on the basis of a broad and vague claim that a station has portrayed a particular ethnic group negatively”); Universal Communications Corp., 27 F.C.C.2d 1022, 1026 (1971) (rejecting allegation of suppression of news of interest to African American community on ground that charges merely evidenced disagreement with broadcaster’s news judgments). *See also* Rudolph P. Arnold, 52 F.C.C.2d 405 (1975) (rejecting claims that suppression of news about women candidates violated the fairness doctrine).

In *Screen Gems Stations, Inc.*, 46 F.C.C.2d 252 (1974), *recon. denied*, 51 F.C.C.2d 557 (1975), complainants claimed that ABC suppressed news about a controversy over the racism of the Sugar Bowl sponsors to protect the station’s own economic interests in airing the game. *Id.* at 253-54. The Commission stated:

Any time a producer, news director or editor decides not to print or broadcast a news story, he is, in a sense, “suppressing” news. However, the “news suppression” we are concerned with arises where the licensee’s decision is based on private rather than public interests, a determination that must rest largely on questions of intent or motive. Because of First Amendment considerations, we believe it is inappropriate for us to make inquiry into this sensitive area in the absence of extrinsic evidence that a licensee has not been guided by the public interest standard.

Id. at 257. *Cf.* Alabama Educ. Television Comm’n, 50 F.C.C.2d 461 (1975) (rejecting renewal because programming ignored needs of African American community, but inviting station to reapply because of post-license reforms); Radio Station WSNT, Inc., 27 F.C.C.2d 993, 995 (1971) (designating for hearing a petition to deny renewal to a station that systematically suppressed news of the civil rights movement because “news coverage of these marches and demonstrations would invite outside agitators both black and white to take part and would serve to promote discord and violence among the citizens of the community”), *recon. granted*, 31 F.C.C.2d 1080 (1971).

One commentator suggests that during this period, the Commission generally resolved “claims of bias and advocacy” under the fairness doctrine standard and claims of “inaccuracy, news management manipulation, and distortion” under the extrinsic evidence standard. Jones, *supra* note 40, at 1242 (citing to relevant cases therein). The commentator also complains quite sensibly that the Commission has “provided little explanation of how it determines which standard will be applied to a particular complaint.” *Id.*

Admittedly, the FCC’s dictum in *WSNT* did make clear that extrinsic evidence of a policy of exclusion would trigger inquiry into slanting or distortion. In that case, the Commission required a showing that the licensee “consistently failed to respond to issues or news events of public importance it could not reasonably or in good faith ignore.” *WSNT*, 27 F.C.C.2d at 995. *See also* Nat’l Org. for Women v. FCC (*NOW*), 555 F.2d 1002 (D.C. Cir. 1997) (citing this proposition in *WSNT* and upholding FCC’s refusal to order evidentiary hearing on charges of insufficient coverage of women’s issues news). However, *WSNT* and *NOW* did not call for application of this principle and it is thus unclear what events would fall into the narrow category of issues the station could not “reasonably or in good faith ignore.” *WSNT*, 27 F.C.C.2d at 995. From the facts of cases in which the FCC found that there had not been intentional news distortion as a result of suppression, one could conclude that the category of unavoidable issues was small indeed.

the news event are different from those presented. You will appreciate that in a democracy, dependent upon the fundamental rights of free speech and press, no Government agency can authenticate the news, or should try to do so. Such an attempt would cast the chill of omnipresent government censorship over the newsmen's independence in news judgment. Were this the case a newsman might decide to "play it safe," and not broadcast a valuable news story or documentary for fear he might later be held up to censure. This Commission is thus not the national arbiter of the "truth" of a news event. It cannot properly investigate to determine whether an account or analysis of a news commentator is "biased" or "true."⁸²

On occasion, the Commission has affirmatively deployed its news distortion policy, by requiring disclosure of reporter conflicts of interest.⁸³ Even here, however, nondisclosure has not led to severe sanctions.⁸⁴ Further,

82. Mrs. J.R. Paul, 26 F.C.C.2d 591, 592 (1969); *see also* Polly Sowell, 48 F.C.C.2d 494, 495 (1974) (quoting Mrs. J.R. Paul, 26 F.C.C.2d 591 (1969)). Some early FCC precedent suggests that the fairness doctrine would address the issue of "truth" by prompting the broadcast of contrasting views which challenge the accuracy of broadcast material. *See, e.g.,* Mobile Home News, Inc., 41 F.C.C.2d 603, 604 (1973) (rejecting mobile home industry's fairness and news distortion complaints about *60 Minutes* program on problems with mobile homes and finding that program contained enough balance). *See also* Accuracy in Media, Inc., 40 F.C.C.2d 958, 961-62 (1973) (rejecting news distortion claim but recognizing the possibility of a fairness doctrine claim about NBC's program critical of private pension plans because allegations of omitted information "challenge only the 'truth' or accuracy of broadcast material"), *vacated and remanded sub nom.* Nat'l Broad. Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974), *vacated as moot*, 58 F.C.C.2d 361 (1976). One commentator notes that the traditional justification for different standards of review under the fairness doctrine precedent and the news distortion policy is that, while it may be the proper role of a regulatory agency to oversee the "fairness" or "balance" of news reporting, it is not a proper role to become an insurer of its "accuracy" or "truth". Jones, *supra* note 40, at 1241 n.103 (citing to relevant cases therein).

83. *See, e.g.,* Ubiquitous Corp., 51 F.C.C.2d 780, 795 (1975) (suggesting that station might exercise more care to insure no conflict of interest issue could arise with respect to use of stringers); Practices of Licensees and Networks in Connection with Broad. of Sports Events, 48 F.C.C.2d 235, 237-38 (1974) (Report and Order) (requiring licensees to disclose when sports announcers are paid and controlled by parties other than the licensees and to require such personnel not to engage in intentional distortion of sports news); Nat'l Broad. Co., 14 F.C.C.2d 713, 715-17 (1968) (finding NBC responsible for Chet Huntley's failure to disclose his financial interest in cattle ranching in connection with his on-air criticism of the Wholesome Meat Act of 1967); Gross Telecasting, Inc., 14 F.C.C.2d 239, 240 (1968) (holding that licensee who editorialized on controversy about airport concession had obligation to disclose extent of financial interest in the matter); Crowell-Collier Broad. Corp., 14 F.C.C.2d 358 (1966).

A licensee has an obligation to exercise special diligence to prevent improper use of its radio facilities when it has employees in a position to influence program content who are also engaged in outside activities which may create a conflict between their private interests and their roles as employees of the station.

14 F.C.C.2d at 358.

84. For example, the short-term renewal the Commission granted the station in *Ubiquitous Corp.* was not grounded on programming matters, and the *NBC* decision only required the network to revise

while claims that licensee management has attempted to influence the news in order to advance its own separate private interests has led to significant Commission interest,⁸⁵ the agency has subjected the purported evidence for such claims to very searching review.⁸⁶ Although the Commission has stated in dictum that government intervention in news staging and distortion cases might be acceptable “in the unusual case where the matter can be readily and definitely resolved,”⁸⁷ it has never given guidance on how to define such unusual circumstances and does not seem to have encountered any in its history of news distortion cases.

Thus, as the D.C. Circuit has noted, the FCC’s practice—regardless of the passion of its rhetoric—“has given its policy against news distortion an extremely limited scope.”⁸⁸ In the few cases in which the Commission required hearings or imposed sanctions for news programming practices, complainants presented evidence of conscious staging, hoaxes, and failures to disclose conflicts of interest.⁸⁹ Because the Commission may “set the scope of broadcast regulation,” the D.C. Circuit has historically deferred to the Commission’s decisions in this area.⁹⁰ In *Galloway*, the court specifically articulated the rather unexceptionable view that, while the Commission has established a narrow scope for the news distortion doctrine, “it is not the role of this court to question the wisdom of [the FCC’s] policy choices” so long as they fall within the constraints of the Constitution and the agency’s broad governing statute.⁹¹

its procedures. *See also* Am. Broad. Cos. (KGO-TV), 90 F.C.C.2d 395 (1982) (rejecting Synanon’s petition to reject KGO-TV’s renewal application on grounds of news distortion, including claim that reporter had violated conflict of interest policy by not disclosing his own status as a litigant in a civil suit involving Synanon). Moreover, the Commission did not interpret its conflict of interest policy as broadly as it might have—or as Commissioner Johnson recommended in the *NBC* case. *See* 14 F.C.C.2d at 718-33 (Comm’r Johnson, dissenting). In other words, the Commission did not take the opportunity presented by the *NBC* case to opine more generally on the subtle pressures that corporate owners with non-news economic interests may exert on news operations. Commissioner Johnson would have initiated a general Commission inquiry into the effects of conglomerate corporate ownership on broadcast licensees’ news programming. *Id.* at 731-32.

85. *See, e.g.*, Tri-State Broad. Co., 59 F.C.C.2d 1240 (1976) (rejecting accusation that station slanted news in favor of its advertisers).

86. In some cases, for example, claims have been made that news was suppressed or sensationalized because the broadcaster desired to improve its ratings. *See, e.g.*, Florida Power & Light Co., 95 F.C.C.2d 605 (1983) (rejecting FPL’s claim of news distortion in connection with coverage of proposed utility rate increase). Particularly when the complainant has a point of view tied to its own economic interests, the Commission does not appear to be too quick to credit news distortion claims unsupported by significant evidence.

87. CBS Program “Hunger in America,” 20 F.C.C.2d 143, 147 (1969).

88. *Galloway v. FCC*, 788 F.2d 16, 21 (D.C. Cir. 1985).

89. *See supra* text accompanying notes 75-83.

90. *Galloway*, 788 F.2d at 21.

91. *Id.*

It has been argued that the FCC's onerous threshold requirements are excessive and effectively nullify the news distortion policy.⁹² However, the *Galloway* court quickly dismissed this argument. In the court's view, the Commission's policy of requiring a "substantial prima facie case" before proceeding against a broadcaster "reflect[ed] an appropriate respect for First Amendment values."⁹³

Thus, prior to *Serafyn*, the D.C. Circuit took an extremely deferential approach to the FCC's application of the news distortion policy. In *Galloway*, for example, while the court implied that it did not necessarily approve of CBS' *60 Minutes* "production techniques"—and while it opined that "[p]erhaps the broad public interest standard would justify a stricter policy"—it nevertheless affirmed the FCC's choice of approach to the issue.⁹⁴ Because none of the "playacting" CBS used affected the "basic accuracy of the events reported,"⁹⁵ the *Galloway* court found no violation of the FCC's policy.

B. The Recent Judicial Transformation of News Distortion: Serafyn at the FCC and the D.C. Circuit

The Commission's conservative approach to the regulation of news distortion recently came under the D.C. Circuit's disapproving judicial scrutiny in connection with another *60 Minutes* broadcast. The following section describes the story of the program's judicial travails in detail in order to demonstrate the significant shift in content-regulation policy portended by the D.C. Circuit's opinion. The section also provides a transcript of the broadcast to situate the reader and to serve as an object lesson in the difficulties entailed by an attempt to apply an invigorated news distortion policy.

1. Procedural History

On October 23, 1994, CBS broadcast a *60 Minutes* segment entitled *The Ugly Face of Freedom* about the resurgence of anti-Semitism in post-Soviet Ukraine. Shortly thereafter, the Ukrainian Congress Committee of America (UCCA) and two Ukrainian-Americans—Alexander Serafyn and Oleg Nikolyszyn—filed petitions seeking to block various CBS ownership

92. For example, this was one of the plaintiff's arguments in *Galloway*. *Id.* at 22-23.

93. *Id.* at 23.

94. *Id.*

95. 788 F.2d at 21 (quoting *WPIX, Inc.*, 68 F.C.C.2d 381, 386 (1978)).

changes on the ground that the program demonstrated CBS's news distortion, personal attacks, and failure to program in the public interest.⁹⁶ The FCC denied all the complainants' claims, and the appeal of some of those denials formed the basis for the D.C. Circuit's unprecedented extension of the Commission's news distortion doctrine in *Serafyn v. FCC*.⁹⁷

On remand from the D.C. Circuit, the parties jointly requested that the FCC's proceedings be stayed pending settlement discussions. Ultimately, the

96. On November 10, 1994, the Ukrainian Congress Committee of America, Inc. (UCCA) filed a "personal attack" rule complaint with the FCC regarding *The Ugly Face of Freedom*. The FCC's Mass Media Bureau rejected the personal attack complaint on February 8, 1995. See Joint Pet. for FCC Approval of Settlement Agreement at 2, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). The Commission denied the UCCA's application for review of the Mass Media Bureau's decision on July 10, 1995. Ukrainian Congress Comm. of Am., 10 F.C.C.R. 11,948, 11,949 (1995).

On October 27, 1994, CBS filed an application with the FCC to approve the assignment of WGPR-TV (now WWJ-TV), Detroit, Michigan, from WGPR, Inc. to CBS. On December 22, 1994, while the UCCA personal attack complaint was still pending, Alexander Serafyn filed a petition to deny CBS's application for consent to the assignment of WGPR-TV on the basis of the *60 Minutes* segment. Oleg Nikolyszyn filed a similar petition to deny CBS's proposed acquisition of WPRI-TV, a television station in Providence, Rhode Island, on the same basis. The FCC's staff granted the WPRI-TV application, subject to the Commission's action in the WGPR-TV application. See Joint Pet. for FCC Approval of Settlement Agreement at 2, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). When the FCC rejected Serafyn's petition to deny the WGPR-TV application in *WGPR, Inc.*, the Commission also removed the condition on the grant of the WPRI-TV application. See *WGPR, Inc.*, 10 F.C.C.R. 8140, 8146 nn.15-16, 8149 (1995). Serafyn and Nikolyszyn both appealed the FCC's decision in the D.C. Circuit. See Joint Pet. for FCC Approval of Settlement Agreement at 3, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

In the meantime, CBS and Westinghouse Electric Corporation entered into a merger agreement and filed an application with the Commission on August 3, 1995, to approve the transfer of control of CBS's broadcast licenses to Westinghouse. On September 1, 1995, Serafyn filed a petition to deny that application, followed by a "petition to defer action" filed on November 2, 1995. This was presumably because on October 25, 1995, both Serafyn and UCCA jointly filed a "petition to revoke or set for hearing" all of the CBS station licenses. The FCC denied all three pending Serafyn, UCCA, and Nikolyszyn petitions in its decision approving the CBS/Westinghouse transfer application. *Stockholders of CBS, Inc.*, 11 F.C.C.R. 3733 (1996), *recon. dismissed*, 11 F.C.C.R. 19,746 (1996).

Serafyn and UCCA then appealed this denial to the D.C. Circuit, which consolidated the appeal with the earlier filed appeals. See Joint Pet. for FCC Approval of Settlement Agreement at 3, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

On July 22, 1996, Westinghouse and Infinity Broadcasting Corporation filed an application with the FCC for approval of the transfer of Infinity's radio stations to CBS. In response, Serafyn and UCCA filed a petition to deny and a motion to stay pending appellate review on August 26, 1996. The Commission denied the Serafyn/UCCA claims relating to the Infinity transfer in its December 26, 1996 decision approving the transfer of the stations. *Stockholders of Infinity Broad. Corp.*, 12 F.C.C.R. 5012 (1996). Serafyn and UCCA did not appeal that decision.

The D.C. Circuit considered the three consolidated appeals involving *The Ugly Face of Freedom* and issued a decision on August 11, 1998, vacating and remanding the Commission's decision in *WGPR, Inc.* and affirming its decision in *Stockholders of CBS*. *Serafyn v. FCC*, 149 F.3d 1213, 1225 (D.C. Cir. 1998).

97. Serafyn filed a "Request for Order to Cease and Desist Unlicensed Operation of Television Station WWJ-TV and Motion for Sanctions" on January 4, 1999. CBS filed its opposition to that request on January 14, 1999. See Joint Pet. for FCC Approval of Settlement Agreement at 3, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

parties agreed to settle their disputes on April 21, 1999 and the Commission approved their proposed settlement.⁹⁸ The terms of the settlement call for CBS to pay the complainants' \$328,000 of legal fees and expenses.⁹⁹

2. *Situating the Issue: A Transcript of The Ugly Face of Freedom*

In order best to illustrate the dangers of an enhanced news distortion doctrine, the transcript of the CBS 60 Minutes segment follows:

MORLEY SAFER, co-host: The collapse of communism, the breakup of the Soviet Union has brought independence and a measure of freedom to more than a dozen new states. The most powerful is Ukraine, a nation of 52 million people, the world's third largest nuclear power, and now free after 300 years of outside rule. But Ukraine is hardly a unified entity. The south, Crimea, wants independence. The eastern part feels the pull to Russia. And the west, where we go tonight, is on a binge of ethnic nationalism. "Ukraine for Ukrainians" can have a frightening ring to those not ethnically correct, especially in a nation that barely acknowledges its part in Hitler's final solution.

[Footage of Flower Garden Square]

SAFER: *[Voiceover]* In a flower-garden square in the city of Lvov, just about every day of the week, the sounds of freedom can be heard, men and women giving voice to their particular view of how the new independent Ukraine should be governed. They disagree about plenty, but do have two things in common: their old enemy, Russian communism, and their old, old enemy, the Jews.

Unidentified Man #1: *[Through translator]* We Ukrainians not have to rely on American and kikes.

[Footage of men studying]

SAFER: *[Voiceover]* Yaacov Bleich left the United States five years ago to take over as the chief rabbi for the Ukraine.

Rabbi YAACOV BLEICH [Ukraine]: There is, obviously, a lot of hatred in these people that are—that are expounding these things and saying, you know—obviously if someone, you know, screams, "Let's

98. See Hadzewycz, *supra* note 4.

99. *Id.*

drown the Russians in Jewish blood,” there really isn’t much love lost there.

[Footage of men studying; a march; war footage of Jews being rounded up; a photograph of children; Simon Wiesenthal; a photograph of bodies]

SAFER: *[Voiceover]* The Jews of Lvov have reason to be concerned. These are the kinds of scenes they’ve been seeing lately, Ukrainian ultra-nationalist parties asserting themselves now that Soviet communism is gone. Their chants and banners mimic another more fearsome time. The place they’re marching in was once called “Adolf Hitler Square.” The same square greeted Hitler’s troops 50 years ago as liberators. Thousands of Ukrainians joined the SS and marched off to fight for Nazism. In the process, they helped round up Lvov’s Jews, helped march more than 140,000 of them to extinction, virtually every Jew in Lvov. Among those who watched in horror was a young man who was to become the world’s number one Nazi hunter, Simon Wiesenthal. Now living in Vienna, he remembers that even before the Germans arrived, Ukrainian police went on a three-day killing spree.

WIESENTHAL *[Nazi Hunter]*: And in this three days in Lvov alone, between 5000 and 6000 Jews were killed.

SAFER: I get the impression from people that the actions of the Ukrainians, if anything, were worse than the Germans.

MR. WIESENTHAL: About the civilians, I cannot say this. About the Ukrainian police, yes.

[War footage; footage of an SS reunion]

SAFER: *[voiceover]* Many of the Ukrainian men of Lvov who marched off as members of the SS never returned, killed fighting for Hitler. But last summer, a good number of the survivors, veterans of the SS Galician Division, did return for a reunion laid on by the Lvov City Council. Ukrainian SS veterans now living in Canada, the United States, and Ukraine. Nowhere, certainly not in Germany, are the SS so openly celebrated. And for this reunion, Cardinal Lubachivsky, head of the Ukrainian Catholic Church, gave his blessing, just as a predecessor did to the SS more than 50 years ago. Did you not hold a ceremony here for the Galician SS?

CARDINAL LUBACHIVSKY *[Head of Ukrainian Catholic Church]*: Yes.

SAFER: For the—the men who fought with the Germans.

CARDINAL LUBACHIVSKY: Yes.

SAFER: And—and they—you held a Mass for these people.

CARDINAL LUBACHIVSKY: No. See, we didn't fight anybody here. We fought against the Russians in Austria and Yugoslavia, and we were under Germans. We had to do whatever they want. We could not—we couldn't do anything that we want ourselves, really.

SAFER: But even before the Germans entered Lvov . . .

CARDINAL LUBACHIVSKY: Yes.

SAFER: The Ukrainian militia, the police, killed 3,000 people in 2 days here.

LUBACHIVSKY: It is not true.

[War footage]

SAFER: *[voiceover]* It's horribly true to Simon Wiesenthal. Like thousands of Lvov Jews, his mother was led to her death by the Ukrainian police. These are remnants of a film the Germans made of Ukrainian brutality. The German high command described the Ukrainian behavior as "praiseworthy."

MR. WIESENTHAL: *[voiceover]* My wife's mother was shot to death because she could not go so fast.

SAFER: *[voiceover]* She couldn't keep up with the rest of the prisoners?

MR. WIESENTHAL: Yes. She was shot to death by a Ukrainian policeman because she could not walk fast.

[Footage of a train; a photograph of two women]

SAFER: It was the Lvov experience that compelled Wiesenthal to seek out the guilty, to bring justice.

MR. WIESENTHAL: Because I feel guilty that I survived. Why you and why not the others? Was people that was—better than you, they was more intelligent than you, they could give the society more than you are doing. And this complex was so that I must speak—speak in the name of these people, they cannot speak more because they was murdered.

[Footage of barbed-wire fences]

SAFER: [voiceover] The names Auschwitz and Belsen and Buchenwald may be better known, but this place, the Janowska Road Camp in the city of Lvov, barely a mile from the opera house, has its share of infamy.

Two hundred thousand Jews from the city and surrounding communities were killed here. Today, it serves as a prison for common criminals. Nothing marks what happened here.

[Footage of a large rock; a ravine; dogs; people carrying flowers; a woman cleaning a grave]

SAFER: [voiceover] There is a stone next door to the camp. This was a place called the Sands, a killing ground where 200,000 bodies were dumped into a ravine. It's been filled in, and is now used as a school for training police dogs. In Western Ukraine at least, Hitler's dream had been realized. It was juden-frei, free of Jews. In the 50 years since, Jews have drifted in from other parts of the old Soviet Union, about 7,000 now in Lvov. For some Ukrainians, that's 7,000 too many.

RABBI BLEICH: Yeah. Well, that's not a secret. They're saying that they want the Jews out. They want the Jews out, they want the Russians out, and they want everybody else out that's not an ethnic Ukrainian.

[Footage of Una Unso marching; a ceremony]

SAFER: [Voiceover] The group marching is Una Unso, a political party whose motto is 'force and order.' Three of its members, including the man shouting orders, were elected members of Ukraine's national parliament. A sister party, the Social Nationalists, calls for the need to liquidate certain people. Most of the parties had their own newspapers. The most popular, and the only daily, is called *For a Free Ukraine*. It blames the Jews for Ukraine's current economic condition. The editor-in-chief says his paper is not anti-Semitic, but he also says:

UNIDENTIFIED MAN #2: [Through Translator] Ukrainian villagers who represent the spirit of the Ukraine have long considered the Jews to be exploiters, and this is reflected in jokes and anecdotes. In terms of the Soviet Union, which is abbreviated SSSR, that stands for "three kikes and one Russian."

RABBI BLEICH: There's an article that came out just two weeks ago

where they tried to prove that Lenin was really Jewish and his real name was really Heim Goldman. But there was an article by Cherbatuk calling for mass murder and extermination of all Jews or Russians who don't leave the country by a certain time. People here have been trained to believe the press, so they'll believe that Lenin was Jewish. And they'll believe that—you know—anything else that they're told because they read it and they saw it in print. So they are frightening.

[Footage of men studying]

SAFER: *[Voiceover]* The message is clear to Lvov's Jews. They're leaving as quickly as they can get exit permits. There have been incidents. Rabbi Bleich's apartment was firebombed.

RABBI BLEICH: There have been a number of physical attacks. In a small town, two elderly Jews were attacked at knifepoint and stabbed because they are Jews and because of the myth that all Jews must have money hidden in their homes. The same thing was in west Ukraine, the Carpathian region. These are very, very frightening facts, because it's—again, that stereotype that we mentioned before, when that leads someone to really—to—to stab an older couple and leave them helpless, and—you know, they left them for dead, that means that we have serious problems.

[Footage of women dancing]

SAFER: *[Voiceover]* As troubling to Jews as nasty incidents and verbal abuse are the heroes and symbols chosen by this new nation. Street names have been changed. There is now a Petlyura Street. To Ukrainians, Simon Petlyura was a great general, but to Jews, he's the man who slaughtered 60,000 Jews in 1919.

[Footage of a statue of Roman Shukeyavitch, a ceremony; statue of Stephan Bandera, street name signs; plaques]

SAFER: *[Voiceover]* Roman Shukeyavitch is also memorialized. He was deputy commander of the SS Division Nightingale. And then there's Stephan Bandera. To Ukrainians, Bandera is the father of the modern state. Peace Street in Lvov has been renamed Bandera Street. He's considered a great patriot, even though the Jews remember him as the leader of a notorious army of murderers.

RABBI BLEICH: Now when someone puts up as his hero someone who we consider a murderer, and you respect them even though you

understand you are not respecting him because he was a murderer, whatever, that does send shivers down—you know, down your spine.

[Footage of a farmer working his field; women working a field; nuclear weapons; troops marching]

SAFER: *[Voiceover]* The western Ukraine is fertile ground for hatred. Independence only underlines its backwardness; uneducated peasants, deeply superstitious, in possession of this bizarre anomaly: nuclear weapons capable of mass destruction thousands of miles away, the Soviet legacy Western Ukraine also has a long, dark history of blaming its poverty, its troubles, on others.

MAN #2: *[Through Translator]* Kikes have better chances here than even the original population.

SAFER: Than the Ukrainians.

MAN #2: *[Through Translator]* Yes. This newspaper considers the government's chief task should be the well-being of the Ukrainian population, first and foremost.

[Footage of a church]

SAFER: *[Voiceover]* The cardinal's deputy, Monsignor Dacko, denies traditional anti-Semitism in the Ukraine, but in his next breath, he tries to explain it.

Monsignor DACKO *[Deputy Cardinal]*: The Jews in—in our history predominantly identified themselves the ruling class. For example, in the city of Lvov itself, before 1939, one-third of the population was Jewish, and practically the entire businesses were in their hands. And in the eyes of the peasants, to strong—some extent, the Jews was—was looked upon as an exploiter of this population. Nevertheless, Ukrainian—Ukraine, as a political force, never had the means or the strength, if I could put it brutally, to—to combat or to even—to persecute the Jews. What happened during World War II is a sad history and there were also Ukrainians who were guards or perhaps persecuted the Jews. But identifying the Ukrainians as a strictly anti—anti-Semitic society is an injustice.

[Footage of a church service; men praying; marchers]

SAFER: *[Voiceover]* The church and government of Ukraine have tried to ease people's fears, suggesting that things are not as serious as they might appear; that Ukrainians, despite the allegations, are not genetically anti-Semitic. But to a Jew living here, or to one who only

remembers the place with horror, such statements are little comfort among the flickering torches of Lvov.

MR. WIESENTHAL: Not to believe . . .

SAFER: What's your reaction to this?

MR. WIESENTHAL: They have not changed.¹⁰⁰

3. *The FCC's Decision*

In keeping with its traditional approach, the *WGPR* Commission commenced with the explanation that the Commission “will not attempt to judge the accuracy of broadcast news reports or to determine whether a reporter should have included additional facts” because “[s]uch authentication by the Commission would ‘cast the chill of omnipresent government censorship’ over the broadcasters’ independent news judgment,” and then limited its jurisdiction to consideration of extrinsic evidence of intentional news distortion.¹⁰¹ The Commission reiterated that its assessment of news distortion allegations would “focus[] on evidence of intent of the licensee to distort, not on the petitioner’s claim that the true facts of the incident are different from those presented.”¹⁰²

The FCC characterized Serafyn’s complaint in his petition to deny CBS’s application for assignment of *WGPR-TV* as resting on twelve instances of alleged news distortion in *The Ugly Face of Freedom*:

(1) [T]he out-of-context comments from an interview with Rabbi Yaakov Bleich; (2) the decision “not to accept any help” from a Professor Luciuk, who offered his services to the program editor and producer; (3) the “hundreds” of post-broadcast letters sent to CBS by various persons; (4) the “intentional mistranslation” of the Ukrainian word for “Jew” as “kike;” (5) the false claim that the Galicia Division was responsible for the killing of Jews in Ukraine; (6) the questionable war footage and “discredited” photograph; (7) the footage of Boy Scouts as “evidence” of Nazism in the Ukraine; (8) the militaristic soundtrack over the footage of Ukrainian Boy Scouts; (9) the “falsely stated” representations that Ukrainian peasants are in possession of nuclear weapons; (10) the “slandering” of the memories of former

100. *60 Minutes: The Ugly Face of Freedom* (CBS news broadcast, Oct. 23, 1994) (on file with author) [hereinafter *60 Minutes*].

101. *WGPR, Inc.*, 10 F.C.C.R. at 8147 (internal citations omitted).

102. *Id.*

Ukrainian leaders; (11) the “falsely” stated representations that Jews are leaving Ukraine because of the anti-Semitism of the Ukrainians; (12) the lack of basis for the allegation that Ukrainians are “genetically anti-Semitic.”¹⁰³

In rejecting Serafyn’s request for a hearing, the Commission asserted that the proffered evidence had not satisfied the “threshold extrinsic evidence standard in order to elevate its allegations to the level of ‘substantial and material’ questions of fact.”¹⁰⁴ The Commission acknowledged that this burden of pleading was “quite heavy,” but asserted that it had “intentionally made it so” because any lesser burden “would thrust the Commission into ‘an impenetrable thicket’ of reviewing editing processes and adjudging editorial judgment, a function inconsistent with the First Amendment and with the national commitment to the principle that debate on public issues should be ‘uninhibited, robust, [and] wide-open.’”¹⁰⁵

Specifically, the Commission dismissed nine of the twelve enumerated instances of alleged news distortion as not constituting extrinsic evidence.¹⁰⁶

103. *Id.* at 1846-47. The initial Serafyn petition to deny argued that CBS failed to program for the needs of the Ukrainian-American community; that the program constituted news distortion in violation of the news distortion policy; and that the Commission should not act on the assignment application until the Commission had resolved the pending personal attack complaint against CBS (about the same program). In making these arguments, the Serafyn petition relied on generalized conclusions about news distortion in the program; it did not contain the specific twelve allegations of news distortion listed by the Commission. Effectively, the details of the complaint were laid out in two appendices to the petition: one, under the letterhead of the Ukrainian Heritage Defense Committee, characterizing the “CBS allegations countered by the facts,” Petition to Deny Ex. 8, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027); and the other, a thirty-eight page letter from Lubomyr Prytulak to Laurence A. Tisch, then-President of CBS, dated November 15, 1994, Petition to Deny Ex. 9, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). What is puzzling about the FCC’s list of the twelve alleged inaccuracies quoted above is that they appear to be a compilation based on the two exhibits to the petition to deny. However, the exhibits to the petition include several claims of inaccuracy not mentioned in the list compiled the Commission. For example, the exhibits to the petition took umbrage with the following claims in addition to those set out by the Commission: The portrayal of Ukraine as being “on a binge of ethnic nationalism;” that Ukraine is “a nation that barely acknowledges its part in Hitler’s final solution;” reference to “an unnamed leader of the Ukrainian Catholic Church who gave his blessing to the SS;” and numerous direct and indirect allegations about the accuracy of Simon Wiesenthal’s account of his experiences during the Holocaust. Petition to Deny Ex. 9, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

104. *WGPR, Inc.*, 10 F.C.C.R. at 8147. The Commission characterized Serafyn as arguing that a hearing should be designated because his petition produced sufficient information to raise a “substantial and material question of fact.” *Id.* In response, the Commission determined that an allegation of news distortion would raise a “material question” only if the complaint were accompanied by extrinsic evidence of possible deliberate distortion of the news. *Id.*

105. *Id.* (citations omitted).

106. *Id.* The Commission said: “The remaining nine instances either constitute disputes as to the truth of the event, that is, that the facts of a given incident are different from those presented, or ‘embellishments concerning peripheral aspects’ of news reports, or ‘attempts at window-dressing which concern the manner of presenting the news.’” *Id.* (citations omitted).

The remaining three items that the Commission addressed as extrinsic evidence were: (1) the comments of Rabbi Bleich; (2) CBS's prebroadcast refusal to utilize complainants' proposed expert Professor Luciuk; and (3) the letters of protest to CBS sent by "hundreds" of persons. The Commission first rejected the contention that outtakes of his entire interview showed Rabbi Bleich's broadcast comments to have been distorted and taken out of context.¹⁰⁷ It found that the context in which the Rabbi's negative remarks were used—including framing comments by Morley Safer and the overall focus of the program—were sufficiently limiting.¹⁰⁸ Nor did the Commission find an intent to distort because CBS did not include the positive statements that Rabbi Bleich made in his interview: "We believe that the determination of what to include and exclude from a given interview constitutes the legitimate 'journalistic judgment' of a broadcaster, a matter beyond the Commission's 'proper area of concern.'"¹⁰⁹ In sum, the Commission held that "the outtakes of the rabbi's interview failed to demonstrate CBS's intent to distort."¹¹⁰

The Commission concluded that the other two remaining pieces of external evidence also fell far short of demonstrating intent to distort:

Neither the Professor nor the letter-writers are "insiders," that is, employees or members of management of CBS. Nor are they persons with direct personal knowledge of intent to falsify. Moreover, determinations as to which experts to utilize is a decision solely within the province of the broadcaster. And letters sent by viewers subsequent to the broadcast is evidence clearly incapable of going to intent, because intent is a state of mind accompanying an act, not following it. Serafyn's extrinsic evidence in total, therefore, does not satisfy the standard for demonstrating intent to distort.¹¹¹

The Commission also rejected Serafyn's claim that *The Ugly Face of Freedom* was "an indicator of [CBS's] inability to meet public interest

107. According to Serafyn, the outtakes "show that CBS expunged Rabbi Bleich's preliminary comments indicating that anti-Semitism in Ukraine is a trait of only 'the nationalists, the negative nationalists, or the rightists,' but left in the actual broadcast only his [negative] follow-up comments." *Id.*

108. *WGPR, Inc.*, 10 F.C.C.R. at 8147-48.

109. *Id.* at 8147 (citations omitted).

110. *Id.* at 8147-48. Indeed, the Commission stated that although it could conceive of situations of news distortion where the documentary evidence of deliberate distortion would be sufficiently strong to call for an inquiry—for example, where a "yes" answer to one question was used to replace a "no" answer to an entirely different question—this type of situation "clearly" was not presented in the Serafyn context. *Id.* at 8148.

111. *Id.*

programming responsibilities,” concluding that he had not shown “a pattern of prejudice” in the network’s programming.¹¹²

4. *The D.C. Circuit’s Expansion of the News Distortion Policy*

The D.C. Circuit, effectively assuming the truth of all the claims made by the complainants,¹¹³ vacated the FCC’s order and remanded the matter to the agency “[b]ecause the Commission neither applied the correct standard nor provided a reasoned explanation in its decision [not to designate a hearing on Serafyn’s petition to deny CBS’s license application].”¹¹⁴ The court read the appeal both as charging the Commission with improper application of its news distortion standard¹¹⁵ and as implicitly objecting to the news distortion standard itself insofar as it imposes “an impossible burden” on complainants.¹¹⁶ Accepting that approach, the *Serafyn* opinion criticized the FCC’s evidentiary standard, its analytic method, its narrow interpretation of extrinsic evidence, and its dismissive handling of the evidence it deemed proper to consider.

In finding arbitrary and capricious the Commission’s decision not to set CBS’s license application for a hearing,¹¹⁷ the court chastised the agency for giving “illogical or incomplete” reasons for finding the complainant’s extrinsic evidence nonprobative.¹¹⁸ Although the *Serafyn* court did not purport to articulate a general news distortion standard in the Commission’s stead, the opinion’s detailed discussion of the evidence submitted in the case and the court’s criticism of the FCC’s dismissive handling of the complaint in fact reveal the outlines of a model for a new type of news distortion policy, crafted by the D.C. Circuit as an alternative to the Commission’s traditional approach.

The D.C. Circuit’s new model has four elements. First, under this new approach, extrinsic evidence of intent to distort is transformed for the first time from a subjective to an objective test by permitting inferences of distortive intent to be drawn from “obvious and egregious” factual

112. *Id.*

113. *Serafyn v. FCC*, 149 F.3d 1213, 1217 (D.C. Cir. 1998).

114. *Id.* at 1216.

115. *Serafyn* argued that “the Commission misapplied the extrinsic evidence standard by mischaracterizing some evidence as non-extrinsic, failing to discuss other evidence he presented, analyzing each piece of extrinsic evidence separately rather than cumulatively, and requiring him to prove his case rather than simply to raise a material question.” *Id.* at 1219.

116. *Id.*

117. *Id.* The court vacated the Commission’s decision, having “conclude[d] that the agency has failed adequately to explain its decision not to set the application of CBS for a hearing.” *Id.*

118. *Id.* at 1221.

inaccuracies. Second, the court's approach permits the FCC and courts to second-guess broadcasters' editorial choices in their sources and the depth of their research. Indeed, it imposes affirmative obligations on broadcasters, enforceable by administrative sanctions, to investigate truth whenever a story involves "inflammatory" claims. Third, it gives increased evidentiary weight to certain kinds of indirect evidence such as complaint letters and parties' expectations and reactions. Fourth, it both permits inferences of a general pattern of distortion from a single program whose claimed inaccuracy is established by circumstantial evidence, and relies on such circumstantial evidence of general patterns of distortion to justify inferences of deliberate distortion in particular programs. This is a radical new direction for news distortion policy.

III. CRITIQUE OF THE "NEW" NEWS DISTORTION POLICY

The D.C. Circuit's new approach is inconsistent with the First Amendment, administrative law norms, and the traditional tort law of group libel.¹¹⁹ The court's approach, as applied to the facts of *Serafyn* itself, ironically demonstrates the inevitability of embroiling the administrative agency and courts in the authoritative selection of truth.

A. *The Enhanced Dangers of the D.C. Circuit's New Model of News Distortion*

Because the D.C. Circuit's vision of an appropriate news distortion policy must be extracted from the fact-intensive analysis in the opinion (and because the *Serafyn* facts themselves undermine the opinion) the following analysis explores much of the evidentiary detail in *Serafyn*.

1. *Insufficient Deference to the Commission's Hearing Standard*

The D.C. Circuit's approach to reviewing FCC decisions has varied over the years from skeptical to extremely deferential. The court's refusal to defer in this case sounds a particularly troubling note regarding the present judicial and administrative relationship. The court's nondeferential attitude is particularly puzzling when the policy at issue is the administrative agency's own creation, the agency's application is consistent with its prior history, and

119. For an early critique of the constitutional and policy problems of regulating news inaccuracy beyond the traditional FCC approach to news distortion, see Note, *The First Amendment and Regulation of Television News*, 72 COLUM. L. REV. 746, 759-63 (1972).

the result promotes First Amendment values.

From the agency's "muddled discussion," the *Serafyn* court concluded that the Commission had not applied the appropriate hearing standard¹²⁰ but, instead, had effectively required the complainant to prove his case at the complaint stage (rather than merely showing enough evidence then to raise a substantial question whether a hearing should be granted).¹²¹ The court stated:

Although we do not propose to determine just how much evidence the Commission may require or whether *Serafyn* has produced it, which are matters for the Commission itself to determine in the first instance, we can safely say that the quantum of evidence needed to raise a substantial question is less than that required to prove a case.¹²²

With respect to the Commission's method of analyzing the proffered evidence, the court expressed concern that the agency had improperly failed to consider all the evidence together but, rather, appeared to have "analyzed each piece of evidence in isolation only to determine, not surprisingly, that no item by itself crossed the threshold."¹²³

While the Commission's opinion may not be a model of clarity on the evidentiary issue, the D.C. Circuit erred in second-guessing the agency's application of its policy in *Serafyn*. Under section 706 of the Administrative Procedure Act, courts must uphold agency action unless the administrative decision is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹²⁴ Such judicial review is

120. The court characterized the proper standard as consisting of whether the petitioner's allegations: (a) made out a prima facie case; and (b) raised a substantial and material question of fact regarding the licensee's ability to serve the public interest. *Serafyn*, 149 F.3d at 1220.

121. *Id.*

122. *Id.* The court interpreted the Commission's decision to have "requir[ed] *Serafyn* to 'demonstrate' that CBS intended to distort the news rather than merely to 'raise a substantial and material question of fact' about the licensee's intent[.]" *Id.* This was seen effectively as the Commission saying "'that it will look into the possible existence of a fire only when it is shown the existence of a fire'" rather than simply "'when it is shown a good deal of smoke.'" *Id.* (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1987)). In rejecting this approach, the court reiterated the following definition of prima facie sufficiency:

[T]he degree of evidence necessary to make, *not* a fully persuasive case, but rather what a reasonable factfinder *might* view as a persuasive case—the quantum, in other words, that would induce a trial judge to let a case go to the jury even though he himself would (if nothing more were known) find against the plaintiff.

Id. (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1987)) (emphasis in original).

123. *Serafyn*, 149 F.3d at 1220.

124. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).

“tolerant,”¹²⁵ “highly deferential,” and “presume[s] the validity of agency action.”¹²⁶ The court plays only a “limited” role in its review of FCC denials of petitions to deny license applications filed pursuant to section 309(d) because “‘the Commission’s discretion and expertise [are] paramount’ in this sphere.”¹²⁷ Indeed, there is “no doubt that Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings.”¹²⁸

Instead of engaging in this deferential review, however, the *Serafyn* court substituted its own judgment for that of the agency and—even more improperly—rejected the agency’s expert decision not to infer deliberate intent to distort from “objective” evidence of “obvious and egregious” error.¹²⁹ Whatever the outer limits of judicial deference to agency action, the court’s decision to revise the news distortion doctrine usurped the Commission’s administrative role.

To the extent that *Serafyn*’s problematic lack of deference to the Commission’s process evinces a more general tolerance of judicial second-guessing of risk-averse administrative decisions in the sensitive context of speech regulation, such tolerance is unnecessary and, indeed, ironic. Rather than reversing speech-suppressive acts by administrative agencies, the court, in the context of the news distortion policy, has adopted an inevitably speech-suppressive procedural approach.

Under section 309(d) of the Communications Act of 1934, any interested party may petition the FCC to deny a broadcast license application.¹³⁰ The petition, which must be supported by an affidavit of a person with personal knowledge, must contain “specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].”¹³¹ If the FCC finds that the petition to deny presents “a substantial and material question of fact,” it must designate the case for hearing.¹³²

According to the *Serafyn* court, the Commission interprets section 309 as

125. *Sarasota-Charlotte Broad. Corp. v. FCC*, 976 F.2d 1439, 1442 (D.C. Cir. 1992).

126. *Sarasota-Charlotte Broad. Corp.*, 976 F.2d at 1442. *See also* *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994).

127. *David Ortiz Broad. Corp. v. FCC*, 941 F.2d 1253, 1257 (D.C. Cir. 1991) (quoting *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)).

128. *Gencom Inc.*, 832 F.2d at 181 (quoting *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965)).

129. *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998).

130. Federal Communications Act of 1934, 47 U.S.C. § 309(d) (1999).

131. *Id.*

132. *Id.* §§ 309(d)-(e) (1999).

erecting a “two-step barrier to a hearing.”¹³³ First, a petition to deny must contain specific allegations of fact that, taken as true, establish a prima facie case that grant of the application would not serve the public interest. This inquiry is akin to a judge considering a motion for a directed verdict: “[I]f all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”¹³⁴ Second, the petition’s allegations, when taken together with opposing evidence before the Commission, must raise a substantial and material question of fact as to whether grant of the application would serve the public interest.¹³⁵ At this step, such a substantial and material question is raised when “the totality of the evidence arouses sufficient doubt on the [question whether grant of the application would serve the public interest] that further inquiry is called for.”¹³⁶

The apparent complexity and technicality of this standard are largely due to the fact that both courts and the FCC often use short-hand phrases to describe the section 309 hearing standard. In simply quoting statutory elements such as “prima facie case”¹³⁷ and “substantial and material question of fact,”¹³⁸ the judicial and administrative reformulations lose sight of, and even misdefine, the ultimate fact at issue at each step of the inquiry.

In the first step of the analysis, the Commission must decide, given all the facts in the complainants’ pleading, whether there would be a prima facie case to deny the license application. In a news distortion case like *Serafyn*, then, the first question must be whether the complainant established a prima facie case that the FCC should revoke the licenses or should reject the transfer applications on the basis of the claim of news distortion in the petition. If not, there is no need to engage in the expense of a hearing. If, on the other hand, a finding of intentional news distortion in the *60 Minutes* program could trigger the revocations and license denials, then the inquiry must go to the second level.

At the second level, the Commission must look at all the evidence—including the licensee’s responsive affidavits—to determine whether there is sufficient evidence of a substantial and material factual dispute as to warrant further investigation. The “ultimate fact” at issue at this stage would be whether there is substantial evidence of deliberate and intentional distortion.

133. *Serafyn*, 149 F.3d at 1216.

134. *Id.* at 1216 (quoting *Gencom, Inc.*, 832 F.2d at 181).

135. *Id.*

136. *Id.* (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

137. *See, e.g.*, *Dr. Paul Klite*, 12 Communications Reg. (P & F) 79, available at 1998 WL 208060 (F.C.C. Apr. 30, 1998) (describing standard in such terms).

138. *Id.* (quoting hearing standard in § 309(e) of the Communications Act).

The FCC has decided that the kind of evidence it will assess to determine whether there is substantial evidence of intentional distortion is extrinsic evidence of intent to falsify, and not speculative inferences from circumstantial evidence.¹³⁹

Pursuant to this standard, one could argue that the FCC would have saved itself a lot of trouble by simply deciding the case in CBS's favor at the first level of the *Serafyn* court's two-pronged standard rather than going on to the second prong. As to the first element of the hearing standard, hearings on license petitions should only be designated if the petitioner's claims, taken as true, would justify rejection of the license application. Given the limited scope of the news distortion doctrine as applied, however, it is difficult to conclude that the Commission would use a single finding of news distortion to reject a license application. Such a result is unlikely, particularly when the Commission has dismissed news distortion claims even in light of evidence of repeated failings.¹⁴⁰ The complainants' own lawyer admitted in oral argument before the D.C. Circuit that license revocation would not realistically result from the distortion in a single program.¹⁴¹ The Commission could well find that admonishment and monitoring would be the appropriate sanctions.¹⁴² It is reasonable to assume on the basis of Commission precedent that a single instance of news distortion—particularly

139. See *supra* text accompanying notes 45-60.

140. For example, news distortion claims have frequently been made regarding network programming. See *supra* Part II.A and cases cited therein.

141. See Transcript of Oral Argument at 10-11, *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998) (No. 95-1385) (statement of Arthur Belendiuk).

The Commission has lesser standards that it can apply that can punish CBS. There is no pattern. . . .

Distortion is distortion. If they intended to do it, . . . one option is for the Commission to take CBS' licenses away. But let's be realistic. That's not going to happen, okay? The Commission can sanction. For our purposes, that's enough. We want the record clear. We want to be able to have our day in Court and say look, these things that you said are lies [I]f the Commission comes out with a finding that says that they clearly distorted the news and admonishes them to go no further, we'll be satisfied.

Id.

142. There are examples of letters of admonishment sent to broadcasters regarding news content. See, e.g., *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1047-48 (5th Cir. 1982) (pointing to example in *WBBM-TV*); *KMAP, Inc.*, 63 F.C.C.2d 470, 477 (1977), *recon. denied*, 72 F.C.C.2d 241 (1979); *supra* note 54 (citing relevant cases therein). See also *WMJX, Inc.*, 85 F.C.C.2d 251, 275 (1981) (denying license renewal to station that aired numerous hoaxes and suggesting that "[a]lthough any single deceptive broadcast here, standing alone, may not justify denial of renewal, together the improprieties demonstrate . . . callous disregard of licensee responsibility"). Even in *Pot Party*, one of the seminal cases in the news distortion area, the Commission required the station to revise and publicize its policies regarding staging. See *Inquiry into WBBM-TV's Broad. on Nov. 1 and 2, 1967, of a Report on a Marijuana Party (Pot Party)*, 18 F.C.C.2d 124, 140 (1969). See also *Columbia Broad. Sys., Inc.*, 45 F.C.C.2d 119 (1973) (admonishing CBS for performing inadequate internal investigations following accusations of slanting and distortion).

without the kind of extrinsic evidence on which the Commission traditionally relies—would not place CBS’s overall programming proposals into question.¹⁴³ The FCC’s opinion did not make this point clearly enough, however, and led to the *Serafyn* court’s erroneous conclusion that the Commission “conflated the first and second steps [and] applied the wrong standard in judging the sufficiency of the evidence.”¹⁴⁴

In any event, the court also misinterpreted the second prong of the Commission’s standard, regarding the substantiality and materiality of the factual question triggering a hearing.¹⁴⁵ The Commission’s hearing-triggering requirement of “substantial extrinsic evidence or documents that on their face reflect deliberate distortion”¹⁴⁶ is not, as the *Serafyn* court thought, an unreasonable requirement that a petitioner wholly prove his case prior to hearing. Rather, it is an entirely supportable administrative decision that the news distortion policy should have “an extremely limited scope,”¹⁴⁷ applied only in the most egregious cases in which there is significant, explicit evidence of the licensee’s intent to distort. The *Serafyn* court only found the Commission’s approach unreasonable because of an improper conclusion, implicit in the opinion, that the Commission should have found enough “smoke” in the particular evidence presented to justify the administrative search for “fire.”¹⁴⁸ The court made a substantive determination that the

143. See *supra* Part II.A.2. See also *infra* Part III.A.4.b (discussing the *Serafyn* court’s assessment of the evidence supporting a claim of generalized programming distortion).

144. *Serafyn*, 149 F.3d at 1220.

145. CBS’s refusal to submit affidavits responding to the *Serafyn* complainants’ charges may well have exacerbated the court’s (and the FCC’s) confusion when applying the hearing standard. Even if the Commission had progressed to the second stage of the analysis, the court might have found it more difficult to second-guess the agency’s weighing of the conflicting affidavit evidence in the event CBS had filed such explanatory responses. While CBS’s concern about opening the door to editorial review by the Commission is understandable, the history of the Commission’s traditional approach to news distortion suggests that much more press-friendly consequences would have followed than those suggested in the D.C. Circuit’s opinion. See *supra* notes 142–43 and accompanying text.

146. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Fairness Report), 48 F.C.C.2d 1, 21 (1974), *recon. denied*, 58 F.C.C.2d 691 (1976), *aff’d in part and remanded in part sub nom.* Nat’l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

147. *Galloway v. FCC*, 778 F.2d 16, 21 (D.C. Cir. 1985).

148. The court suggests that the Commission here:

misapplied its standard in a way reminiscent of the problems in *Citizens for Jazz*: “The statute in effect says the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the possible existence of a fire only when it is shown the existence of a fire.”

Serafyn, 149 F.3d at 1220 (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 755 F.2d 392, 397 (D.C. Cir. 1985)).

The court’s reference to *Citizens for Jazz* is inapposite. *Citizens for Jazz* involved a claim that the parties to a transfer application lied to the Commission when they stated in their application that they would continue the station’s jazz format and then changed their programming to country and western

inferential evidence in the case was sufficient to trigger a hearing. This finding in *Serafyn* is far from the court's purported deference to the Commission's role in weighing evidence. The court's approach challenges the Commission's evidentiary standard, despite its admission of the Commission's discretion to make prudential decisions in the area.¹⁴⁹

The key issue in news distortion cases is intent. Other than the disagreement as to the ultimate question, there were no factual disputes regarding intent in *Serafyn*. The petitioners did not adduce any direct evidence of CBS's intent to distort. The court relied on "objective"—that is to say, indirect and inferential—evidence, requiring the petitioner effectively to show only "obvious" inaccuracy. The "objective" evidence simply involved claimed inaccuracies in the *60 Minutes* broadcast.¹⁵⁰ This does not

within six months of the transfer. *Id.* at 393. All parties agreed that allegations of misrepresentation were material to the license renewal, so the only issue was the substantiality of the disputed facts. *Id.* at 394. Moreover, there was both extrinsic evidence—an affidavit by a former employee—and circumstantial evidence of pretransfer plans to change format. *Id.* at 393-94. Even so, the court did not find the circumstantial evidence so strong as to justify reversing the Commission's decision: "None of them is necessarily inconsistent with an innocent view of events, and the inference of guilt was directly refuted by sworn affidavits of no intent to change format, which the Commission was required to weigh in the balance." *Id.* at 396. The court's only difficulty with the Commission's decision was that the agency had required the evidence to establish clear, precise, and indubitable proof of misrepresentation, rather than simply raising a substantial question concerning that proposition. *Id.* Effectively, the Commission had applied the "merits of decision" standard rather than the hearing standard. *Id.* at 397. It was in that context that the court concluded: "It would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish (in the face of the applicant's contrary affidavit evidence) what it is the very purpose of the hearing to inquire into . . ." *Id.* at 397.

That was not the situation in *Serafyn* at all, however. Correctly interpreted, the Commission in the *Serafyn* cases simply imposed on complainants the burden of showing the agency "a good deal of smoke." *Serafyn*, 149 F.3d at 1220 (quoting *Citizens for Jazz*, 775 F.2d at 397 (emphasis added)).

Even more importantly, there is a significant difference between petitions to deny for misrepresentation to the Commission and those for news distortion. An applicant's intentional misrepresentation to the Commission is virtually always factually verifiable. The representations at issue are usually of a factual nature and pertain to the applicant's own past or future activities. The Commission could rationally change the misrepresentation standard to a "material inaccuracy" standard. See Brian C. Murchison, *Misrepresentation and the FCC*, 37 FED. COMM. L.J. 403, 450-54 (1985). It does not matter whether the misrepresentations are about a significant or insignificant matter; knowing lies to the Commission, even about unimportant matters, impeach the character of the license applicant. See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). By contrast, news distortion is a much vaguer notion, requiring the complainant to establish both the truth of the underlying statement and the deliberateness of the licensee's false portrayal. The issue of the proper standard to apply is only relevant when it concerns something significant. Given the unavoidable perspectivalism of news reporting and the inevitable substantive disagreements about truth in contested situations, news distortion presents a completely different situation than misrepresentation. Moreover, First Amendment and free speech policies are not directly implicated in the misrepresentation context in the same fashion as in the news distortion area.

149. The court noted: "[W]e do not propose to determine just how much evidence the Commission may require or whether *Serafyn* has produced it, which are matters for the Commission itself to determine in the first instance . . ." 149 F.3d at 1220.

150. To the extent that the *Serafyn* complainants relied on *Citizens for Jazz* to support the notion

meet the statutory standard of substantial and material factual disputes. There was no factual evidence, of the kind traditionally required by the Commission in news distortion cases, of CBS's deliberate intent to distort. The Commission has explicitly rejected the proposition that it should infer an intent to distort from evidence allegedly showing that a program contained factual inaccuracies.¹⁵¹

that the Commission must draw inferences of distortive intent from circumstantial evidence of factual inaccuracies in deciding whether to hold a hearing, the precedent does not stretch so far. First, the court in *Citizens for Jazz* admitted that hearings were not “invariably required” when the disposition of a petition to deny depends on inferences drawn from undisputed facts, rather than a dispute as to the facts themselves. 775 F.2d at 395. In the court's view, “[a] weak inference can no more raise a substantial question regarding the ultimate fact than can a weak factual showing.” *Id.* The court's point was that the Commission erred in concluding that no hearing should be designated when circumstantial evidence was uncontested. A hearing should be designated so long as the totality of the evidence—including uncontested circumstantial evidence—supported the possibility that the licensee had engaged in intentional misrepresentation.

Second, there was conflicting extrinsic evidence of intent to misrepresent in *Citizens for Jazz*. It is logical for the Commission to address inferences from circumstantial evidence in such circumstances. This is completely different from the facts in *Serafyn* where there was no parallel extrinsic evidence.

Third, the *Citizens for Jazz* court did not suggest that “obvious and egregious error” should be considered evidence of intent to misrepresent. Although the format change occurred very shortly after the license transfer in that case, two executives with expertise in country and western music had been recently promoted, and the economic circumstances the transferee used to justify the format change were known for a number of years before the transfer. Nevertheless, the court agreed with the Commission that such evidence led only to “weak” inferences of intent to misrepresent. 775 F.2d at 395.

Finally, the *Citizens for Jazz* opinion made clear that “nothing in our opinion is meant to cast doubt upon the validity of past Commission decisions denying evidentiary hearings, or to establish a new and more stringent standard for such denials.” *Id.* at 398. See also *Gencom Inc. v. FCC*, 832 F.2d 171, 183 (D.C. Cir. 1987) (noting that “the drawing of inferences from undisputed facts is the Commission's province” and finding that the agency's decision not to draw an inference of misrepresentation in that case was reasonable).

151. In *Central Intelligence Agency*, 58 Rad. Reg. 2d (P & F) 1544, 1549 (1985), the complaining party asked the Commission to “hold that deliberate distortion is evident because material broadcast . . . was false, and that circumstantial evidence indicates [that the licensee] must have known it to be so.” The Commission held that “[t]he fact that elements of a news story may have been wrong is irrelevant for purposes of appropriate Commission scrutiny The Commission will simply not infer an intent to distort.” *Id.*

The Commission did not designate a hearing in the *Anti-Defamation League* case, in which a licensee broadcast programming included anti-Semitic statements and specific personal attacks. See *Complaint of Anti-Defamation League of B'nai B'rith*, 7 Rad. Reg. 2d (P & F) 565, 565 (1966), *reh. denied*, 6 F.C.C.2d 385 (1967), *aff'd sub nom.* *Anti-Defamation League of B'nai B'rith, Pac. Southwest Reg'l Office v. FCC*, 403 F.2d 169 (D.C. Cir. 1968). The Commission did not impose any burden of verification on the station, arguing that such a rule would be inconsistent with the First Amendment. *Id.* The agency simply renewed the station's license despite its finding that such programming technically violated the then-applicable fairness doctrine. *Id.* The reasoning behind this result was grounded in First Amendment policy. The Commission deemed a hearing unnecessary because there was no dispute as to the facts, but simply one as to the proper inferences to be drawn from uncontested facts. For purposes of the statutory requirement of a substantial factual dispute, the Commission did not define “factual dispute” as going to the question of whether the licensee intentionally broadcast knowingly false statements. It interpreted the “factual dispute” requirement

News distortion claims raise particularly thorny issues because application of the doctrine necessarily implicates First Amendment concerns. It is entirely proper for the Commission to decide that it should strongly resist administrative hearings in the context of such claims because of the obvious chilling effect on expression—a chilling effect not directly at issue in the context of hearings for different kinds of petitions to deny.¹⁵² The *Serafyn* court's approach to the evidence required to trigger hearings in news distortion cases is inconsistent with First Amendment norms.

There is nothing inherently improper in an administrative decision to adopt different trigger points for hearings in different contexts. Different Commission rules and policies implicate different balances between First Amendment concerns and regulatory objectives. It stands to reason that the agency can tailor its approach to hearings differently depending on the balance of First Amendment concerns. The agency must have the discretion to do so, particularly when applying an administratively-adopted policy rather than a statutorily mandated rule. If the *Serafyn* plaintiffs could show, for example, that they had been treated differently than plaintiffs in other news distortion cases, then the court's concerns would be justifiable. But if, for example, all the plaintiffs can point to is the agency's adoption of a particularly high threshold for a prima facie case in the context of all news distortion complaints, then the court's second-guessing of the agency's

narrowly, focusing only on whether the petitioner and licensee agreed that the offending programs and language had actually been aired. *Id.* The D.C. Circuit affirmed the Commission's licensee-protective approach on appeal. 169 F.2d at 172.

The same approach should apply in the *Serafyn* context. *Serafyn* and CBS agreed that *The Ugly Face of Freedom* had aired and contained the statements to which *Serafyn* objected. They disagreed on two points: (1) whether the statements were substantially accurate, and (2) whether, even if the statements were inaccurate, CBS deliberately and intentionally aired knowingly false statements to deceive the public. The second issue is the relevant one under news distortion policy. As to that issue, there was no extrinsic evidence of deliberate intent to distort of the kind the Commission traditionally required in news distortion cases. The *Serafyn* court could only find that declining to designate a hearing was reversible error if it assumed that CBS's "obvious" error resulted from deliberate deception. The Commission has rejected such an approach in the past. Moreover, if obvious anti-Semitic falsity was insufficient to trigger Commission sanction in *Anti-Defamation League* because of fundamental First Amendment principles, a hearing would be unjustified in the *Serafyn* context as well.

152. Indeed, the D.C. Circuit has previously stated that Congress intended to vest in the FCC "a large discretion to avoid time-consuming hearings." *Gencom*, 832 F.2d at 181 (quoting *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965)). If the FCC is empowered to avoid hearings merely because they are time-consuming, it must necessarily be empowered to resist them when they would entail much more constitutionally significant costs. The D.C. Circuit itself has opined that the "limited scope" of the news distortion policy "is consistent with the principles of the First Amendment and congressional intent to allow licensees the maximum editorial freedom consistent with their role as public trustees." *Galloway*, 778 F.2d at 18.

decision seems inconsistent with basic principles of administrative law.¹⁵³

The effect of the *Serafyn* court's interpretation of the requisite evidentiary standard is to increase the number of news distortion hearings, to enhance the chilling effect of FCC intervention into broadcast content, and ultimately to minimize the willingness of news organizations to comment on contested and controversial issues.

Clearly, the Commission has chosen to subject news distortion complainants to an onerous evidentiary burden. That burden is unlikely to be met because the necessary evidence is almost always under the defendant's control. It is admittedly difficult for complainants to obtain extrinsic evidence about broadcasters' subjective intent without the opportunity for discovery. In addition, a highly discretionary standard admittedly gives the FCC a tremendous amount of power—in principle, if not in application—to wield against broadcasters with whom members of the agency disagree.¹⁵⁴

But the solution to these effects is not necessarily to second-guess the Commission's judgment about the scope of the news distortion policy or to insist that the FCC make the policy more stringent and invasive. The Commission has the authority to decide that it should not regulate news distortion at all. Its choice to regulate only the clearest and most provable examples should not be, under those circumstances, subject to searching

153. The news distortion policy is wholly a creation of the FCC—a policy designed to effectuate the goals of the Communications Act, but nowhere required by the statute. In any event, *Chevron* establishes that if the enabling statute is silent or ambiguous with respect to a specific issue before an administrative agency, a reviewing court must give deference to the agency's interpretation of the statute so long as that interpretation is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837 (1984). The Supreme Court's apparent and recent retreat from *Chevron* deference in the context of informal agency statutory interpretations in *Christensen v. Harris County*, 529 U.S. 576 (2000), is not particularly relevant here. In *Christensen*, the Court faced the issue of whether deference was due to an unreasonable statutory interpretation in a Department of Labor opinion letter. Five members of the Court refused to grant anything more than "Skidmore deference" to such an opinion letter—according respect to the interpretation only to the extent the interpretation had the "power to persuade." *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The majority also held that, although an agency's interpretation of its own regulation is entitled to deference, such deference is only warranted when the language of the regulation is ambiguous. *Id.*

Whatever its effect on the reach of *Chevron* in general, *Christensen* would not excuse the reviewing court from deferring to the FCC's interpretation of its news distortion policy or the agency's standard for holding a hearing in connection with a claim under that policy. The news distortion context is entirely distinct from the statutory interpretation at issue in *Christensen*. Ultimately, it could be said that the *Christensen* Court thought that the single opinion letter at issue in that case was simply wrong in its statutory interpretation; *Chevron* should not apply because the statute was insufficiently ambiguous. Here, the FCC's interpretation of its own policy is far more consistent with First Amendment strictures than a less deferential standard of review would be in the news distortion context.

154. This is not to say that the FCC would not have even more power over broadcasters if it adopted a standard—as the D.C. Circuit suggested in *Serafyn*—that would make news distortion hearings more common.

review by the D.C. Circuit.

The Commission's traditional approach to news distortion can best be explained by remembering that its policy is not designed simply to enhance truth.¹⁵⁵ Rather, the news distortion policy is supposed to balance two important interests—press freedom and the availability of unbiased information to the public.¹⁵⁶ The Commission's rationale for a high evidentiary burden is thus press-protective. By setting a high standard for a hearing, the Commission enhances the press's editorial independence even though its rule allows more actual distortion to go unremedied. If the agency were to adopt an evidentiary standard other than the high standard it has chosen, a much greater degree of intrusion into the editorial processes of the press would necessarily follow. Such an alternative standard would then become another example of situations in which subjective intent standards *as applied* interact with procedural requirements to produce results much less press-protective than suggested by the courts' value rhetoric.¹⁵⁷ If the door to automatic discovery were to be opened as a result of the argument that the current standard ties complainants' hands excessively, an analogously press-suppressive effect may be predicted.

Moreover, the *Serafyn* court's suggested lowering of the threshold amount of extrinsic evidence required to trigger a hearing actually creates a trap for both complainants and broadcasters. Since the ultimate standard for the imposition of sanctions for news distortion is very stringent, a lowered standard at the prehearing stage simply invites all parties to engage in invasive discovery and expensive motion practice in circumstances in which the complainants would have little likelihood of ultimately prevailing. The net result would be to impose extensive governmental review of broadcast content without actually eliminating unsavory news practices that do not reach the high level of news distortion or staging under the Commission's policy.¹⁵⁸

155. See, e.g., *Network Coverage of the Democratic Nat'l Convention*, 16 F.C.C.2d 650 (1969); *supra* note 44 and accompanying text.

156. See, e.g., *Galloway v. FCC*, 778 F.2d 16 (D.C. Cir. 1985); CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150 (1971); Mrs. J.R. Paul, 26 F.C.C.2d 591 (1969); CBS Program "Hunger in America," 20 F.C.C.2d 143 (1969).

157. For example, in *Herbert v. Lando*, 441 U.S. 153, 177 (1979), the Supreme Court opened the door to invasive discovery in the defamation context. This may be a logical extension of the subjective standard for defamation of public officials. This access to the editorial process may have a more chilling effect on press operations than the original threat of libel damages under tort standards applicable in the days before *New York Times Co. v. Sullivan* constitutionalized defamation doctrine with its subjective intent standard. 376 U.S. 254, 292 (1964).

158. Admittedly, some ideological plaintiffs may find the prospect of an expensive proceeding to be a very powerful tool for settlement and programming coercion.

There is nothing in the Communications Act of 1934 (and certainly not in its 1996 counterpart) that would specifically require the Commission to adopt a news distortion policy.¹⁵⁹ There is also nothing in the Act that prohibits the Commission—if it decides to adopt such a policy—from choosing, as a prudential matter, a higher evidentiary standard for a finding of its violation. Thus, the *Serafyn* court can be faulted for suggesting that the news distortion policy have different substantive content than the Commission's interpretation of its own discretionary policy.

2. *A New Requirement: Unwarranted Inferences from Evidence of "Obvious or Egregious" Factual Inaccuracies*

One of the most significant consequences of the D.C. Circuit's refusal to defer to the FCC's application of its news distortion policy in *Serafyn* was the court's suggestion that the Commission revise its news distortion review process. The *Serafyn* court urged the Commission on remand to consider whether the broadcast contained any errors that were sufficiently "obvious and egregious to contribute to an inference about CBS's intent, and therefore to qualify as "extrinsic evidence."¹⁶⁰ Starting from the proposition that "the inaccuracy of a broadcast can sometimes be indicative of the broadcaster's intent,"¹⁶¹ the court suggested the following standard:

Without deciding whether *Serafyn*'s arguments about individual facts are correct, or even specifying what standard the Commission should use when analyzing claims of factual inaccuracy, we must point out that an egregious or obvious error may indeed suggest that the station intended to mislead. . . . Our point is only that as an analytical matter a factual inaccuracy can, in some circumstances, raise an inference of such intent. The Commission therefore erred insofar as it categorically eliminated factual inaccuracies from consideration as part of its determination of intent.¹⁶²

The leap from "obvious" error to intent to distort is the real D.C. Circuit error in *Serafyn*. This shift by the court substitutes a "clear error" standard for the traditional "intent to distort" standard. Regardless of the court's

159. See 47 U.S.C. § 151 *et seq.* (1994).

160. *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998).

161. *Id.* at 1223.

162. *Id.* at 1223-24. The court explained that it did not mean that the Commission had to investigate every claim of factual inaccuracy: "[I]f the broadcaster had to do historical research or to weigh the credibility of interviewees, for example, then any alleged inaccuracy is almost certainly neither egregious nor obvious." *Id.* at 1224.

continuing references to the extrinsic evidence standard, the shift to a clear error yardstick effectively makes extrinsic evidence of the usual sort irrelevant—or at least unnecessary—in most circumstances. The best “extrinsic evidence” of error is a set of well-known counter-sources (rather than letters from angry viewers, for example). Such counter-sources no doubt will be easily identified whenever the news report is about a controversial matter.

The *Serafyn* opinion itself serves as an object lesson in the futility of identifying “obvious” errors in the context of controversial news reports. By definition, controversial news reports are the very accounts that contain the most complexity, ambiguity, and interpretive possibility and that lead to the most heated opposition. They are the very stories that will likely be widely covered in the media.¹⁶³ People with conflicting ideologies can easily characterize contested issues as simply being inaccuracies about facts. Involving the Commission and the courts in an assessment of those sorts of claims is not only constitutionally suspect, but also simply a bad idea. It is particularly troubling when used selectively against one influential media source among many addressing a controversy.

a. The Translation of “Zhyd”: An Instance of the Translator’s Dilemma

As its “chief example” of the allegedly “obvious” error in *The Ugly Face of Freedom*, the court referred to:

the apparent mistranslation of “zhyd” as “kike.” Such a highly charged word is surely not used lightly. Of course, translation is a tricky business, and it is axiomatic that one can never translate perfectly. Nonetheless, a mistranslation that “affect[s] the basic accuracy” of the speaker is problematic under the Commission’s standard. . . . Changing “Jew” to “kike” may be as blatant a distortion as changing a

163. Discussions of rising anti-Semitism in post-Soviet Ukraine were common in news sources other than *60 Minutes* at the time as well. See, e.g., James F. Clarity, *Free Ukraine’s Nationalism: Will Pride Become Prejudice?*, N.Y. TIMES, Feb. 12, 1992, at A10; Marcia Kunstel & Joseph Albright, *The Holocaust: Many Say Extremists of 90s Feeding New Fires of Hatred*, ATLANTA CONSTITUTION, Mar. 20, 1994, at A6; Marcia Kunstel & Joseph Albright, *Ukraine’s Holocaust Story at Last Begins to See Light*, TIMES-PICAYUNE, Mar. 27, 1994, at A35; James Meek, *Ukraine Feels the Pain Contained in a Street Name*, THE GUARDIAN (LONDON), June 20, 1992, at 12; Bohdan Nahaylo, *Political Extremism in Ukraine Part II: The Move Toward Fascism*, UKRAINIAN WEEKLY, May 8, 1994, at 2; Daniel Sneider, *Jews Find Complex Ties with the New Ukraine*, CHRISTIAN SCIENCE MONITOR, Apr. 20, 1994, at 4; Daniel Sneider, *Parliamentary Poll Offers Platform for Ukraine’s Extreme*, CHRISTIAN SCIENCE MONITOR, Mar. 23, 1994, at 1; *Ukraine Experiences Ugly Resurgence of Anti-Semitism* (NPR radio broadcast, Apr. 1, 1994), available at 1994 WL 8690228.

“no” answer to a “yes,” so greatly does it alter the sense of the speaker’s statement; if so, then the basic accuracy of the report is affected.¹⁶⁴

In addition to its apparent acceptance of the inaccuracy of the translation, the court suggested that the simple use of an “inflammatory” word such as “kike” should trigger an investigative obligation for the licensee:¹⁶⁵ “[W]hen the word chosen by the translator is an inflammatory term such as ‘kike,’ the licensee could be expected to assure itself of the accuracy of the translation; if it does not do so, the Commission may appropriately consider that fact in reaching a conclusion about the broadcaster’s intent to distort the news.”¹⁶⁶

This position with respect to what we should infer from “obvious or egregious” errors is a very significant extension of the FCC’s traditional interpretation of the news distortion policy. The court’s reliance on FCC precedent for the point that the inaccuracy of a broadcast can be indicative of a broadcaster’s subjective intent to distort is unavailing.¹⁶⁷

164. *Serafyn*, 149 F.3d at 1224. The court’s unreflective move from “apparent mistranslation” to “mistranslation” in this single paragraph should be noted.

165. *Id.* at 1224.

166. *Id.*

167. The court cites to *WMJX, Inc.*, 85 F.C.C.2d 251 (1981) and *CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 147 (1969). In *WMJX*, however, the station admitted that it knew its broadcast to be false and intentionally aired it anyway. 85 F.C.C.2d at 266. The station simply contended that it did not intend to mislead the public. *Id.* at 269. The Commission held that the relevant intent was not the intent to mislead, but rather the intent to air knowingly false material and thus found the station, by its own stipulation, to have the required intent for news distortion. *Id.* at 269-70. The question was not (as the *Serafyn* court’s parenthetical suggests) whether the Commission “implicitly concluded from broadcaster’s knowledge of falsity that it intended to mislead the public.” *Serafyn*, 149 F.3d at 1223. Rather, the Commission took the position that intentional airing, despite knowledge of falsity—rather than an evil motive to mislead—was the meaning of “deliberate intention” to distort in the news distortion policy. *WMJX, Inc.*, 85 F.C.C.2d at 269-70. Nor does the court’s reliance on dictum in *Hunger in America* make the point. There, the Commission did say in dictum that it would intervene in the unusual case where the truth of the matter “can be readily and definitively resolved.” 20 F.C.C.2d at 147. The Commission was dealing with the immediately factually verifiable issue of a medical diagnosis to be found on a death certificate. *Id.* at 145.

Admittedly, there is language in *KTLK* that suggests some degree of comfort with a reckless disregard approach:

All that takes this licensee’s conduct from the core of the “wilful distortion” . . . is that there is no evidence that the licensee knew the actual temperatures and, for motive, warped that information, and although we have said that “[w]e do not sit as a review body of the ‘truth’ concerning news events” . . . where, as here, there is the clearest evidence of reckless disregard for truth in a licensee’s own news practices and the broadcast in no way smacks of a “commentary” type of presentation, public interest questions are raised. Since in this case, there is extrinsic corroboration of such reckless disregard of easily ascertainable facts and materials, the licensee’s conduct warrants censure.

Action Radio Inc. (*KTLK*), 51 F.C.C.2d 803, 807-08 (1975) (citations omitted). However, in *KTLK*, the issue was the licensee’s broadcast of suburban temperatures not based on any meteorological

The court's choice of the translation of "zhyd" as its "chief example" of a factual inaccuracy from which one may infer distortive intent is a perfect example of the problems with this extension of news distortion. The complainants claimed that the Ukrainian word "zhyd" is a neutral term for "Jew," and that CBS mistranslated it in the broadcast as "kike."¹⁶⁸ The support the complainants offered for this position consisted of (1) a page from a Ukrainian-English dictionary, partly written in Cyrillic, with no affidavit providing an explanatory translation;¹⁶⁹ (2) a letter from Rabbi David Lincoln of Park Avenue Synagogue, who stated that "in Western Ukraine 'Zhid' is the word for 'Jew';"¹⁷⁰ and (3) a letter from Lubomyr Prytulak who, while admitting that "in Russian 'zhyd' is derogatory for 'Jew' and 'yevrey' is neutral," and that "the same is true in heavily Russified Eastern Ukraine, and even in Central Ukraine," nevertheless contended that in Western Ukraine "old habits persist," and "especially among the common people 'zhyd' continues to be as it always has been the neutral term for 'Jew,' and 'yevrey' sounds Russian."¹⁷¹

information. The station simply made up the temperatures. *Id.* The Commission was trying to explain why the fabrication of this information should be sanctionable even though it did not constitute the broadcast of knowingly false information. In this situation, the temperatures were presumably based on total guesswork and would no doubt be correct sometimes. The Commission concluded that this is as much news staging as the knowing falsification of facts. *Id.* at 808. This is not an equivalent to the *Serafyn* court's adoption of the "obvious and egregious error" standard.

168. Reply to Opposition of CBS Inc. to Petition to Deny at 12 (Serafyn Reply Brief), WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). See also *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998) (discussing claim).

169. Serafyn Reply Brief Ex. 11, *WGRR, Inc.* (No. 94-1027); *Serafyn v. FCC*, 149 F.3d at 1218.

170. Petition to Deny Ex. 4, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). The word is sometimes spelled "zhid" and sometimes "zhyd" in the documents cited in this Article.

171. Petition to Deny Ex. 9, at 5-6, *WGPR, Inc.* (No. 94-1027). Lubomyr Prytulak's letter was apparently translated into Ukrainian and published in the anti-Semitic newspaper *For a Free Ukraine* accompanied by anti-Semitic cartoons in 1996, leading to a critical statement in *The Jewish Press Magazine*. See Lubomyr Prytulak, *Enemies of Ukraine anti-Semitize The Ugly Face of 60 Minutes* (on file with author). In a statement recounting the story on the Ukrainian Archives website, Mr. Prytulak asserts that he did not give the newspaper permission to print his article. His explanation for how his piece was "anti-Semitize[d]" is as follows:

My initial thought was that this perversion of my work was attributable to patriotic Ukrainians who were incensed at the injustices of the *60 Minutes* broadcast, and who had been carried away by their righteous indignation to express themselves in ways that were intemperate, ill-considered, and ultimately self-defeating. Since that first interpretation of what had gone wrong, however, I am inclined to a different view.

My reinterpretation now is that I am yet another Ukrainian who has been conscripted—into unwittingly—into replaying the role of Trofim Kichko. This reinterpretation is based in the first place on a CUI BONO analysis—I ask who gains and who loses by the *Za Vilnu Ukrainu* creation? I lose in that my article which in reality was devoid of anti-Semitism is now rendered crudely anti-Semitic. Ukraine loses in the eyes of anyone who sees the *Za Vilnu Ukrainu* article. And who gains? Moscow, in making Ukrainians appear virulently anti-Semitic discredits and destabilizes Ukraine. And Israel gains, in that Jewish Ukrainians are given one more reason to feel

Yet the complainants' own dictionary translates a related word under the heading "zhyd" as "ugly (dirty) Jew."¹⁷² In addition, sources other than CBS have also publicly translated "zhid" as "kike."¹⁷³ Indeed, one such source reports an announcement by the Ukrainian ministry of information in 1996 that the government planned to propose legislation banning the use of the word "zhyd" in the mass media.¹⁷⁴ If the word were not perceived at least by Ukrainian Jews as objectionable, it would hardly have been necessary for the government to propose such legislation or, perhaps more importantly, for Jewish organizations to publicize it. It should also be noted that use of the word "zhyd" was prohibited during the Bolshevik occupation.¹⁷⁵ An article in the Ukrainian Archive website—host to critiques of *The Ugly Face of Freedom*—admits that the majority of Ukrainians and Jews today consider "zhyd" offensive.¹⁷⁶

In any event, the meaning of words is rooted in their particular linguistic

unwelcome in Ukraine and one more reason to emigrate to Israel.

....

Thus, I ask myself, who is behind *Za Vilnu Ukrainu*? Who supports this newspaper? Who gives it donations? Who protects it from prosecution? Who suggests mistranslations and cartoons? A CUI BONO analysis does not assign blame, but it does tell us where to start looking—Moscow and Jerusalem. These are the two forces that gained by this travesty; Ukraine and I lost.

Id. Mr. Prytulak has posted an expanded version of his critique of the *60 Minutes* program on the web. See Lubomyr Prytulak, *The Ugly Face of 60 Minutes*, available at <http://www.ukar.org/60minart.shtml>, (visited Sept. 24, 2000). His general characterization of the program is that it is a "calumny" against the Ukrainian people by Jews: "From the beginning of the affair, it could not escape notice that this broadcast was not only an attack upon Ukrainians and upon the nation of Ukraine, but that it was a *Jewish* attack, this because every last person bearing responsibility for the broadcast, from the very top of the chain of command to the very bottom, was Jewish . . ." *Id.*

172. See Reply to Opposition of CBS, Inc. to Petition to Deny Ex. 11, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

173. See, e.g., Union of Councils for Soviet Jews, UCSJ Position Paper, Ukraine, Jan. 1, 1998, available at <http://www.fsmonitor.com/stories.asemluk2.shtml> (last visited Sept. 24, 2000) ("The Ukrainian ministry of information announced in December 1996 a plan to launch legislation to ban the use of the word zhid [kikes] to refer to Jews in the mass media.").

174. *Id.* (citing to the Antisemitism World Report 1996, Institute for Jewish Policy Research and American Jewish Committee).

175. THE EINSATZGRUPPEN REPORTS: SELECTIONS FROM THE DISPATCHES OF THE NAZI DEATH SQUADS' CAMPAIGN AGAINST THE JEWS JULY 1941-JANUARY 1943, at 188 (Yitzhak Arad et al. eds., 1989) ("[W]hoever called the Jews Zhid (Yid) (which was at that time a curse word) and not Evrei (Hebrew), was sent to prison [by the Bolsheviks].") [hereinafter EINSATZGRUPPEN REPORTS].

176. Introduction to Excerpts from Roman Serbyn, "*Zhyd*" vs. "*Yevrei*" in the *Sion-Osnova Controversy*, available at <http://www.ukar.org/sebyn1.shtml> (last visited July 18, 2000). The author contends that the term "zhyd" was formerly the only term for Jew in Ukrainian and "carried no pejorative connotation." *Id.* However, "possibly through widespread Russification," the "majority . . . now find the term repugnant." *Id.* That introduction precedes short excerpts from a paper by Roman Serbyn recounting a dispute regarding "zhyd" and apparently taking the position that the word should not be deemed offensive in Ukrainian as it was in Russian.

contexts, their current uses, and their cultural history. Thus, changed context can affect meaning. The attempt to communicate meaning across languages requires translation. A translator has the task of finding equivalence in meaning—selecting in one language a word best representing the meaning of a word in another language.¹⁷⁷ Such attempts to find equivalence require familiarity with both the languages and the cultures of the source and target words. Moreover, translation also involves choices of equivalent words from dissimilar cultural contexts and always requires choices in meaning and perspective.¹⁷⁸ It requires interpretation. Different translators will translate the same text differently. Often, linguistic and cultural differences lead to gaps in interpretive contexts, where languages will not map. In sufficiently dissimilar languages and cultures, some words will simply be untranslatable. Only when the social and cultural histories of the two contexts have close correspondences will translators' interpretive activities be constrained. It therefore is a truism that the process of translation is inevitably complex and contestible.

The *Serafyn* court purports to understand that “translation is a tricky business, and it is axiomatic that one can never translate perfectly.”¹⁷⁹ Yet, it completely ignores the cultural complexities of translation. The difficulty posed by translation, for the court, is simply that “[t]ranslating can be compared to editing a long interview down to a few questions and answers.”¹⁸⁰ The standard for mistranslation is whether it affects “the basic accuracy” of the report.¹⁸¹ Translation is much more complex than that, however, particularly when dealing with “highly charged word[s]” and “inflammatory term[s].”¹⁸²

The word “zhyd” may be a perfect example of the translator's dilemma. The noun “Jew” in American English would probably not be perceived by the majority of Americans as having pejorative overtones. By contrast, even the complainants admitted that the word “zhyd” in Ukrainian is a complex term that can be used both pejoratively and neutrally.¹⁸³ This puts the translator in an impossible dilemma. If she translates the word into American English as “Jew,” then she chooses only one of the conflicting meanings it

177. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189-1211 (1993) (describing the process of translation in the context of developing an approach to constitutional interpretation grounded on the translation metaphor and citing relevant sources).

178. *Id.* at 1196-1206.

179. *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998).

180. *Id.*

181. *Id.*

182. *Id.*

183. Petition to Deny Ex. 9, at 5-6, *WGPR, Inc.*, 10 F.C.C.R. 8140 (1995) (No. 94-1027).

may have in Ukrainian. That choice will not capture the interpretive complexity admitted by the complainants. The same is true if the word is translated as “kike.”¹⁸⁴ Under these circumstances, the translator is left with an interpretive decision. Allowing that interpretive decision to be influenced by a sense of how the word might have been understood in societies with a history of anti-Semitism is not an irrational choice. We could say that the decision may be made by an analysis of context, but the identification and interpretation of context itself is necessarily contextual and socially grounded. It should not be in the province of judges and administrative agencies to reject a contextually grounded interpretive translation.¹⁸⁵

Although there may be some disagreement among translators as to whether the meaning of the word “zhyd” could ever vary with context, or might be used by Jewish Ukrainians or non-Jewish Ukrainians who were not anti-Semitic, many translators appear to recognize the fundamentally derogatory and negative meaning of the word in the general course of use in Ukraine.¹⁸⁶ Some suggest that the term has an extremely negative connotation and point, among other things, to the adjectival use of the word to describe negative characteristics such as greed or craftiness about people of any ethnicity. At worst, even if every person in Western Ukraine who uses the word “zhyd” would not invariably do so in an anti-Semitic way, the complainants’ own expert admits to the negative meaning of the word in at least some parts of Ukraine. Thus, contrary to the court’s acceptance of the charge of mistranslation, CBS had a very strong position that its translation of “zhyd” as a derogatory term was entirely supportable.¹⁸⁷

184. It might be argued that the translator could choose a less intensely derogatory word in the language of the translation. Thus, for example, CBS might have translated the word as “Jewboy” or “Hebe” or “shylock”—assuming that such references might be seen as slightly less derogatory than “kike” in English. How one could establish relative degrees of offensiveness and derogation is a difficult question, however. People might disagree—making this issue also a matter of cultural interpretation. Moreover, it is unclear whether words with slightly less derogatory meanings would address the complainants’ concerns.

185. *Cf. Nat’l Assoc. for Better Broad. v. FCC*, 591 F.2d 812, 819-20 (D.C. Cir. 1978) (affirming FCC’s decision to grant renewal despite petition to deny for refusal to remove racial and ethnic slurs and quoting FCC opinion for proposition that the agency would not “arbitrate the definition of vague terms” which “fairly lend themselves to varying interpretations”). While we may take exception with the Commission’s general statement that characterization of language as a racial slur was “merely a matter of subjective interpretation,” the FCC’s recognition of the difficulty posed by having to arbitrate the definition of vague terms is a useful analogy to the *Serafyn* situation. *Id.* at 819.

186. Translations on file with author. *See also* Union of Councils for Soviet Jews, UCSJ Position Paper: Ukraine, Jan. 1, 1998, available at <http://www.fsmonitor.com/stories/asem1uk2.shtml> (Sept. 24, 2000) (describing complaint by Ukrainian Jew about use of the word “zhid” to refer to Jews, suggesting that at least some Jewish Ukrainians find the word offensive).

187. In any case, based on the Prytulak letter submitted with the complaint, there would appear, at a minimum, to be sufficient complexity surrounding usage of the word as to preclude a *prima facie*

Obviously, the meaning of words will also depend on the linguistic context in which they are used. Words often have multiple meanings—sometimes even contradictory meanings—but the context of use is supposed to signal the intended meaning to the hearer or reader. An assessment of the word “zhyd” in its local context—in the *60 Minutes* program—also reveals the court’s error. In every instance in which “zhyd” was used in the broadcast, it was derogatory or decidedly unflattering. Assuming that the word “zhyd” should have been translated as “Jew,” one speaker, a Ukrainian man-on-the-street, said that Ukrainians “do not have to rely on America[] and Jews”—a statement which unmistakably reveals both a homogenizing characterization and a dislike of Jews. The second speaker, the editor of the daily newspaper *For a Free Ukraine*, which has published articles blaming Jews for Ukraine’s current economic condition,¹⁸⁸ related a joke in which the abbreviation for the Soviet Union was said to stand for “three Kikes and a Russian,”¹⁸⁹ suggesting that the Soviet regime, long despised by many Ukrainians, was dominated by Jews. The following dialogue with the same editor also appeared in the broadcast, once again assuming that “zhyd” should have been translated as “Jew”:

MAN #2: [*Through Translator*] Jews have better chances here than even the original population.

SAFER: Than the Ukrainians.

MAN #2: [*Through Translator*] Yes. This newspaper considers the government’s chief task should be in the well-being of the Ukrainian population, first and foremost.¹⁹⁰

In this exchange, the speaker accuses the government of favoring Jews over “the original population.”¹⁹¹ By excluding Jews from the population whose well-being should be “the government’s chief task,” his statement betrays segregationist and anti-Semitic sentiment. In short, even if “kike” is not in the abstract the best translation for the word “zhyd,” it would not have changed the anti-Semitic nature of the remarks in question.

finding of intentional news distortion based on the broadcast’s translation.

188. U.S. Department of State, *Ukraine Human Rights Practices, 1995*, DEPARTMENT OF STATE DISPATCH, LEXIS, Nexis Library, Department of State Dispatch File; Union of Councils for Soviet Jews, UCSJ Position Paper, Ukraine, Jan. 1, 1998, available at <http://www.fsmonitor.com/stories/asemluk2.shtml> (last visited Sept. 24, 2000).

189. *60 Minutes: The Ugly Face of Freedom* (CBS news broadcast, Oct 23, 1994). See *supra* Part II.B.2.

190. *60 Minutes: The Ugly Face of Freedom* (CBS news broadcast, Oct 23, 1994).

191. *Id.*

There is very little evidence that should lead to the conclusion, virtually assumed by the *Serafyn* court, that the word “zhyd” was mistranslated. The court’s standard—whether the translation “affects the basic accuracy” of the statement¹⁹²—assumes either that there is a fixed meaning to the word and the translation is wrong, or that the translation is clearly wrong in the context of a particular statement. No one in the case disagreed that the word “zhyd” could carry the derogatory implication of “kike.” Thus, the first alternative—that the word has a fixed meaning which is simply mistranslated—does not apply in this situation. Therefore, the court must focus on the second alternative reading of its test—whether the translation is wrong in the context of a particular statement. On this reading, if we assume the accuracy of the complainants’ statement that the word can have a neutral meaning, then it would in context appear questionable to translate “zhyd” as “kike” if two western Ukrainian peasants said: “There used to be many zhyds in this area” absent any other indication in tone or facial signals that the speakers were anti-Semitic. But that was not the nature of the statements in the program, as discussed above.

Furthermore, the court, in attempting to narrow the sweep of its suggestion, concludes that if historical research were necessary or credibility of interviewees needed to be weighed, “then any alleged inaccuracy is almost certainly neither egregious nor obvious.”¹⁹³ It is difficult to understand why this caveat should not apply directly to the issue of the word “zhyd” in the *60 Minutes* story. After all, translation of “inflammatory” words in particular requires reference to historical and cultural usages and meanings. What makes a word “inflammatory”? To what degree is the word “inflammatory”? Did the meaning change over time? Does the word have different uses depending on social class? Are there geographic differences in the meaning? Are there different sorts of contexts in which the interpretation of the word would change?

It is even possible to argue that the court’s desired attempt to distinguish between derogatory and neutral meanings of an ethnic descriptor is misguided by definition. Linguistic references to subordinated groups often reflect the groups’ subordination. It is difficult to define as “neutral” a descriptive term used by the majority culture to refer to members of a subordinated ethnic group. The term would inevitably be understood against a background or culture of hierarchy which would inform its meaning.

Even were the Commission to contemplate adoption of the *Serafyn*

192. *Serafyn v. FCC*, 14 F.3d 1213, 1224 (D.C. Cir. 1998).

193. *Id.*

court's standard, the court does not address the difference between "obvious" and "egregious" as standards for the nonextrinsic standard it proposes.¹⁹⁴ What if a statement of fact is obviously wrong, but not very important to the thrust of the program? Or what if the error is in fact egregious, but not obvious? How are the obviousness and egregiousness of the factual errors to be gauged? By reference to what standard will we decide that the error was so obvious that not spotting it should be a presumptive admission of subjective intent to distort? How shall the FCC justify its decision in one case that the error was sufficiently egregious to justify the inference of distortive intent, but in another case that it was slightly less egregious and therefore passable?

This is, in fact, an even less satisfactory standard than that of the much-maligned "reckless disregard" standard in the public figure defamation context, and perhaps even more of a threat to the important value of a free press.¹⁹⁵ The Commission should not adopt a policy of inferring an intent to distort from "egregious or obvious" errors because, among other things, such a policy would ensnare the Commission in a quagmire of "actual malice" type motion practice and evidentiary hearings, without even the requirement of an individual plaintiff who has been personally libeled to limit the number of such cases. Nothing in the Court's decision requires the Commission to adopt such a policy.¹⁹⁶

The *Serafyn* court does suggest in a footnote that if the Commission were to exclude evidence of fact inaccuracies from its analysis of broadcaster intent "for prudential reasons," this would be "an exercise of judgment within its discretion if not unreasonable."¹⁹⁷ Given that the news distortion doctrine is not specifically mandated by the Communications Act, prudential considerations would counsel very strongly against extension of the doctrine in the fashion envisioned by the court. This conclusion is compelled not only by the obvious dangers of the policy itself, but also by the ease with which a court like that in *Serafyn* could argue for intrusive review with hardly any recognition of the dangers posed. Ironically, the analysis of *The Ugly Face of*

194. Indeed, the court uses the terms in the disjunctive in some parts of the opinion and in the conjunctive in others.

195. See discussion of the defamation standards *infra* Part III.B.

196. The basis for this argument is the Court's statement in a footnote that "counsel for the Commission was unable to say at oral argument whether the agency simply did not believe that such evidence [i.e., of egregious and obvious factual inaccuracy] could ever be probative—which would be a mistake—or understood the point we are making but chose to exclude such evidence for prudential reasons—which would be an exercise of judgment within its discretion if not unreasonable." *Serafyn*, 149 F.3d at 1224 n.*.

197. *Id.*

Freedom itself should indict the *Serafyn* court's proposals for extending the news distortion policy.

3. *Second-Guessing Editorial and Production Choices*

The second prong of the D.C. Circuit's proposed news distortion policy revision would permit the FCC to draw negative inferences from the broadcaster's editorial choices in the production of its story. Specifically, in *Serafyn*, the court focused on decisions regarding the selection of expert consultants and asserted failures to assure the accuracy of "inflammatory" statements.¹⁹⁸

a. *Decisions on the Selection of Experts*

The *Serafyn* court criticized the FCC for finding that the network's refusal to accept help volunteered by the complainants' expert should not be interpreted as evidence of subjective intent to distort.¹⁹⁹ The D.C. Circuit found that because the broadcaster has complete discretion to choose its consultants, its decision "may be probative on the issue of intent."²⁰⁰ The court concluded that "[b]efore the Commission may reject this evidence . . . it must explain why CBS's decision to employ one expert over another—or not to employ one at all—is not probative on the issue of its intent to distort."²⁰¹

Complainants contended that CBS's failure to consult their proffered expert constitutes extrinsic evidence of intentional news distortion because it indicates that CBS "[was not] interested in the truth."²⁰² The Commission rejected this argument, finding that while CBS's decision was "extrinsic" to the broadcast, it "falls far short of demonstrating intent to distort the . . . program" because the "[d]etermination[] as to which experts to utilize is a

198. *Id.* at 1218-24.

199. Some months prior to the broadcast, Lubomyr Luciuk, a Professor of Politics and Economics at the Royal Military College of Canada, apparently wrote to CBS, offering to assist with the report. Reply to Opposition of CBS, Inc. to Petition to Deny Ex. 1, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027) (Declaration of Lubomyr Luciuk dated Feb. 6, 1995). In his letter, Professor Luciuk indicated that he had written a doctoral dissertation on western Ukraine during the Second World War, including Ukrainian/Jewish relations and "related themes." Luciuk also stated that he had interviewed dozens of veterans of the Galicia Division and "written extensively on that unit's wartime record and post-war experiences."

200. Indeed, by contrast to the Commission's position—which was to stay away from evaluating broadcasters' editorial decisions about which experts to utilize—the court took the position that "it is only because the broadcaster has such discretion that its ultimate decision may be probative on the issue of intent." *Serafyn*, 149 F.3d at 1223.

201. *Id.*

202. *Id.*

decision solely within the province of the broadcaster.”²⁰³ The Commission’s approach had precedent in previous cases under the news distortion policy.²⁰⁴ The court found this reasoning “too loose.”²⁰⁵

At bottom, the court’s demand equates a broadcaster’s deliberate intent to mislead its audience with a government agency’s determination as to whether the broadcaster was fair in its selection of experts and its presentation of viewpoints. This is problematic both as a matter of inference and of constitutional law.

First, it is inappropriate to presume too much from the simple editorial

203. *Id.* (citing WGPR, Inc., 10 F.C.C.R. 8140, 8148 (1995)).

204. *See, e.g.*, *Am. Broad. Cos. (Synanon)*, 90 F.C.C.2d 395 (1982) (rejecting Synanon’s claim that the FCC erred in concluding that the record did not show that station ignored Synanon’s views or comments in connection with pending news stories); *Accuracy in Media, Inc.*, 39 F.C.C.2d 416, 421 (1973) (rejecting claims of news distortion about PBS programs “the three r’s . . . and sex education” and “Justice?” on ground that even if viewpoint of particular experts were not presented, “the selection of spokesmen is entirely within the discretion of the licensee and there is no evidence to indicate that PBS acted unreasonably”), *recon. denied*, 43 F.C.C.2d 851 (1973), and *recon. denied*, 47 F.C.C.2d 37 (1973), *aff’d sub nom. Accuracy in Media Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975); *Universal Communications Corp.*, 27 F.C.C.2d 1022, 1025-26 (1971) (rejecting complainant’s claims that station had suppressed and distorted news regarding Mobile’s African American community). In *Universal Communications*, the Commission explained:

Complainants have merely established that they disagree with Universal’s news judgments. . . . It is well established, of course, that the Commission does not sit to review the broadcaster’s news judgments. Clearly, the Commission cannot decide that a broadcaster erred in its choice to present film of one speaker instead of another, or that one story should have been covered instead of another on a particular day.

Id. Admittedly, the *Synanon* case is not on all fours with *Serafyn* because in *Synanon* ABC was a defendant in a suit Synanon brought. 90 F.C.C.2d at 396 n.3. Nevertheless, the Commission rejected Synanon’s invitation to inquire into the station’s decisions not to consult with Synanon or use their denials. *Id.*

In *Central Intelligence Agency*, the CIA claimed that ABC deliberately distorted facts in a series of reports about allegations of CIA involvement with a then-bankrupt Honolulu investment firm that allegedly defrauded investors. 57 Rad. Reg. 2d (P & F) 1543 (staff ruling), *aff’d*, 58 Rad. Reg. 2d (P & F) 1544 (1985). The Commission dismissed the complaint because the CIA did not provide “direct extrinsic evidence that [ABC] possessed a deliberate intent to distort the news.” *Am. Legal Found. v. FCC*, 808 F.2d 84, 87 (D.C. Cir. 1987) (quoting CIA Complaint at 7, *CIA v. FCC*, FCC No. 85-374 (Commission order dated Sept. 11, 1985), Joint Appendix at 7). When the CIA declined to seek judicial review, the American Legal Foundation, a conservative media watchdog organization, pursued the matter to the D.C. Circuit. The court found that the ALF did not have standing to obtain a review of the Commission’s decision. 808 F.2d at 92. Interestingly, the CIA had argued that ABC deliberately reported false information about the CIA’s ties with the firm because (1) ABC did not attempt to verify claims of interviewees, (2) ABC improperly refused to accept CIA’s denials as true, (3) ABC ignored information from public documents that suggested that the CIA was not significantly involved with the firm, and (4) ABC broadcast statements by a source “when . . . [ABC] knew that he was a completely untrustworthy source.” *Id.* at 86. These claims are very similar to those made by the UCCA parties in *Serafyn*. The *American Legal Foundation* court did not address those claims, even in dictum—leaving in place the Commission’s rejection of the requested hearing—in contrast to the *Serafyn* court’s approach.

205. *Serafyn*, 149 F.3d at 1223.

decision to use one expert rather than another or to reject a complainant's expert. There may be many reasons for preferring one expert over another. Some of those reasons will be substantive—the producer agrees with the expert's views—and some will have to do with other considerations. Often relevant, among others, are factors such as reputation, stature, credentials, credibility, style, availability, degree of diversity, convenience, familiarity with broadcasting generally (or the program specifically), experience, and apparent degree of knowledge in the field. The journalistic desire to consult neither side's expert when covering a controversy is also often relevant. Inevitably, however, complainants will argue that the broadcaster's rejection of their volunteer expert was due to bias and that all the other listed factors are nothing more than pretexts used to disguise the ideological selection. What are the FCC and courts to make of those claims? Is this a prudent degree of involvement with the editorial processes of the press? As a practical matter, how should (or can) the network prove that its decision to employ one expert over another is not probative on the issue of its intent to distort? Moreover, the court's approach creates an incentive for individuals with particular agendas to volunteer their services as experts, be refused, and then claim that the broadcaster distorted the news by not using their services or adopting their views. In *Serafyn*, there was no indication that *CBS News* did not use experts in preparing its program. Indeed, the network could have chosen not to use experts at all. Even though this would doubtless be an example of bad news reporting, it should not necessarily be considered evidence of news distortion.

The First Amendment forbids any branch of government from demanding "fairness" in a newspaper article or a particular broadcast.²⁰⁶ It protects the one-sided expression of particular viewpoints, including those which are "vehement, caustic and . . . unpleasantly sharp."²⁰⁷ How, then, can a government agency be asked to consider sanctioning a broadcaster based on whether it is satisfied with the broadcaster's explanation of why it selected one expert rather than another to be interviewed for a particular report? How can a court bootstrap an obligation to justify editorial decisionmaking onto the very editorial discretion guaranteed by the Constitution and the FCC's policies?

206. Even under the Commission's repealed "fairness doctrine," a broadcaster was only obligated to present contrasting viewpoints on controversial issues of public importance in its overall programming—not in any individual broadcast. See *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Fairness Report)*, 48 F.C.C.2d 1, 10-11 (1974).

207. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The D.C. Circuit's approach comes uncomfortably close to government choosing the press's authoritative sources. At the least, the court seems to be smuggling back the fairness doctrine by an extreme interpretation of the news distortion policy—although the D.C. Circuit previously decided that the Commission possessed the authority to eliminate the fairness doctrine.²⁰⁸ The *Serafyn* court's inferential approach to the broadcaster's decision not to consult a particular expert is tantamount to imposing an obligation to present contrasting viewpoints.²⁰⁹

Interpreting the news distortion policy to require the broadcaster to justify its selection of experts simply because some individuals who disagreed with the approach of the program were not consulted is dangerous, inconsistent with First Amendment norms, and unlikely to lead to the kind of full-fledged discourse that the FCC intended to promote with the news distortion policy.

b. Investigative Obligations for “Inflammatory” Statements

The *Serafyn* court's second interference with editorial choices related to an extraordinary burden on licensees to assume affirmative investigative obligations “when the word chosen by the translator is an inflammatory term such as kike[.]”²¹⁰ Specifically, according to the court, “the licensee could be expected to *assure* itself of the accuracy of the translation.”²¹¹ Thus, the Commission could reasonably assume a broadcaster's intent to distort the news if news personnel did not assure themselves of the accuracy of translation of inflammatory words.²¹² But how is the Commission to determine whether a particular word is “inflammatory” enough to trigger the obligation? What if, as will likely be the case, translators disagree about the nuances of the meaning? How is the broadcaster to “assure” itself of the accuracy of the translation? Will consulting another translator be sufficient? Must the broadcaster justify to the Commission and the D.C. Circuit its selection of translators and its reasons for finding them credible? How can a broadcaster ever satisfy this burden in a situation, such as the one in *Serafyn*, where linguistic dissimilarities make exact translations difficult, if not impossible? Isn't such a burden fundamentally inconsistent with constitutionally grounded commitments to editorial independence? Isn't there

208. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). *See also supra* note 3.

209. For an argument that the *Serafyn* court's interpretation of the news distortion doctrine imposes a more intrusive obligation on broadcasters than the general fairness doctrine obligation, see *infra* Part V.B.2.

210. *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998).

211. *Id.* (emphasis added). *See also supra* text accompanying note 193.

212. *Id.*

a high degree of likely chill if broadcasters are compelled to participate in hearings on these sorts of definitionally vague editorial issues?

4. *Judicial Revision of the Extrinsic Evidence Standard as Applied*

The third aspect of the new substantive approach proposed by *Serafyn* for evidence of news distortion is the court's revised application of the Commission's extrinsic evidence standard.²¹³ The new standard appears to give significant evidentiary weight to reaction evidence—a kind of evidence to which the Commission did not traditionally give much credence.²¹⁴ This

213. One difficulty with the *Serafyn* court's criticism of the Commission's procedure in news distortion cases is the court's analytic approach to weighing proffered evidence. The D.C. Circuit's opinion suggests that the Commission improperly analyzed the proffered evidence of distortion by isolating each piece of evidence rather than viewing the evidence as a whole. *Serafyn*, 149 F.3d at 1220. What would a wholistic approach entail? The court implies that even if each piece of evidence might not be sufficiently probative of distortive intent, such intent might be suggested by the whole evidentiary mosaic. While a good argument can be made that the court misread the Commission's method, the more interesting issue is the implicit analytic method suggested by the court's language. Must the administrative agency adopt a news distortion policy that assesses all proffered evidence as a whole, implicitly adopting a presumption of distortion, or may it choose to interpret the evidence in a manner protective of speech values? The court's probabilistic approach does not fit easily if each piece of proffered evidence is itself ambiguous and the question is the defendant's intent. In other contexts, it is a standard mode of analysis to conclude that individually inconclusive pieces of evidence, when addressed in their multiplicity, make particular factual interpretations more probable. *See, e.g., ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE LAW AND PRACTICE*, 468-73, 483-85 (3d ed. 1994) (describing totality of the circumstances approach in hostile environment workplace sexual harassment cases). However, in news distortion cases, the issue is not whether a reasonable third party would interpret a series of ambiguous comments as offensive in their totality, but whether a multiplicity of ambiguous evidence should lead to the conclusion that the licensee intended the false or misleading meaning.

It does not logically follow that if a piece of evidence is subject to multiple interpretations—some culpable and some not—it would be more justifiable to choose the culpable interpretation simply because there are other pieces of evidence subject to the same kind of interpretive choice. Otherwise, the approach would constitute a particularly troubling bootstrap in the First Amendment context. Even if there were a multiplicity of errors in a broadcast, there is no reason to conclude that simply the totality of such errors demonstrates knowing and deliberate distortion. For example, it is perfectly predictable that some broadcasters, particularly under economic pressure, will engage in sloppy journalism. This will inevitably lead to a series of mistakes and false statements. This is not the kind of specific evidence of subjective, deliberate intent to distort that the Commission has required in the application of its news distortion policy.

Moreover, there is a real question whether the Commission should use the "totality of evidence" approach suggested by the court in news distortion cases. A similar issue arises in the copyright infringement context when a court must decide whether to assess infringement with regard to a work as a whole—including its otherwise uncopyrightable parts—or after an excision of the uncopyrightable material. There are contending views, even in the copyright context, about how to proceed because courts realize that the evidentiary issue is often outcome-determinative. The copyright analogy should make clear that the choice between the "filtration" and the "gestalt" models is based on contending policy considerations.

214. For a discussion of the Commission's traditional approach to extrinsic evidence, see *supra* Part II.A.

approach is based on faulty logic and is also inconsistent with First Amendment norms.

a. *Privileging Certain Types of Reaction Evidence: After-the-Fact Complaint Letters*

While the court accepted the Commission's finding that the outtakes of *60 Minutes*' interview with Rabbi Bleich did not evidence CBS's intent to distort, it did question the Commission's treatment of the proffered evidence of viewer complaint letters.²¹⁵ Thus, through its criticisms of the FCC, the

215. The broadcast excerpt of the Bleich interview did not include the positive statements he made about Ukraine. However, the Commission did not find this misleading because other language in the program preceding the broadcast of Bleich's remarks made clear that his comments concerned extremist groups in Ukraine. *WGPR, Inc.*, 10 F.C.C.R. 8140, 8147-48 (1995). On appeal, the D.C. Circuit found that the FCC was "not unreasonable in finding that Safer's phrase 'some Ukrainians' and his other references to extremist groups effectively limited the scope of Bleich's comments to 'a segment of the Ukrainian population.'" *Serafyn*, 149 F.3d. at 1222 (quoting *WGPR*, 10 F.C.C.R. at 8147-48) (citations omitted).

One of the *Serafyn* complainants' chief allegations was that Rabbi Bleich's interview statements were taken out of context to make it appear that he believed all Ukrainians were anti-Semitic; in fact, Bleich was referring only to right-wing ultranationalists. See *WGPR*, 10 F.C.C.R. at 8147. The initial complaint attached, as an exhibit, a fax from Rabbi Bleich to the Ukrainian Heritage Defense Committee in which he claimed that his words were quoted out of context. Petition to Deny Ex. 3, *WGPR, Inc.*, 10 F.C.C.R. 8140 (1995) (No. 94-1027). The publicly available outtakes of Rabbi Bleich's interview show that his comments quoted in the broadcast were made in response to questions about radical nationalists. His positive statements about, for example, the Ukrainian government's efforts on behalf of human rights, were not used in the broadcast. Portions of Rabbi Bleich's outtakes were included in the material the complainants submitted to the FCC and the court. There is no indication that they obtained the outtakes from CBS. See *id.*

The complainants made much out of the Rabbi's claim of being quoted out of context. It may be said that CBS sacrificed the complexity of Rabbi Bleich's position in order to provide elements of it elsewhere in the program, uttered by others. However, his characterization is properly irrelevant to whether the broadcast overall distorted the story.

Moreover, neither the Commission nor the court addressed Rabbi Bleich's fiduciary role or the institutional concerns of Ukraine's Jewish community. Rabbi Bleich is the American-born Orthodox rabbi of Ukraine. He must deal with the Ukrainian government every day in order to enable his people to practice their religion. If the rabbi lambasted that government, effectively dismissing the state's efforts to combat anti-Semitism and allow a resurgence of Jewish worship in Ukraine, it could harm his constituents. Thus, Rabbi Bleich had a structural interest in providing a nuanced and balanced view of the events in modern Ukraine. This is not to say that Rabbi Bleich lied or temporized in his *60 Minutes* interview or his letter charging the network with quoting him out of context. It is, rather, to say that Rabbi Bleich doubtless had a specific political motive for wanting all of his statements—in all their complexity and balance—to be reported in the program. That is what CBS did not do.

Nor did the initial Petition to Deny quote the full text of Rabbi Bleich's comments. In addition to his statement that "my words were quoted out of the context that they were said" and that "the CBS program was unbalanced since it focused on a very small minority, ignoring the majority and the positive achievements of Ukraine in its three years of independence," the Bleich letter also noted "the danger of the extreme nationalist parties such as UNA-UNSO who proclaim 'Ukraine for Ukrainians.'" Petition to Deny Ex. 3, *WGPR, Inc.*, 10 F.C.C.R. 8140 (1995) (No. 94-1027). Further, while Bleich complimented the administration of the previous Ukrainian President for publicly

court effectively adopted a reading of extrinsic evidence that would ground news distortion on post-broadcast audience complaint letters. The D.C. Circuit emphasized the potential probative value of complaint letters, contending that even people without direct personal knowledge of intent to distort may possess “relevant information that constitutes circumstantial evidence about such intent.”²¹⁶ The complaint letters CBS received, while considered evidence extrinsic to the program, were dismissed by the Commission because the letter writers were neither CBS insiders nor people

apologizing for the crimes of Ukrainian Nazi collaborators during World War II, he suggested that “it would be appropriate for the present government of Ukraine to publicly denounce anti-Semitism and any other form of bigotry.” *Id.*

What is of particular interest in connection with the prudential exercise of FCC power, however, is the interpretation and use of Rabbi Bleich’s statements in an analysis supporting the *Serafyn* complaint. The following language from an exhibit appended to the initial complaint and purporting to analyze the program speaks for itself:

A SENSE OF RESPONSIBILITY. Jews have lived with no other peoples as intimately and for as long as they have with Ukrainians. In this shared history, there have been bright periods and dark episodes. It is possible to imagine a shared future in which the bright periods predominate and the dark episodes are banished. This is the future that Ukrainians and Jews should strive toward, this is the image that should guide them in their dialogues and that should have guided Mr. Safer in his broadcast. Perhaps it is already the attitude that inspires the majority of both Ukrainians and Jews.

The Jewish claim to a share of the newly-created nation of Ukraine is as tenable as that of the ethnic Ukrainians and of the ethnic Russians and others who reside there. At present, all three of these groups are beginning to mine that claim in relative peace. Differences are being overlooked, cooperation is the norm, a bright future is possible.

Into this scene burst immature and undiplomatic people like Morley Safer needing a sensational story, Simon Wiesenthal desperate to retain his relevance in the modern world by having it believed that 1941 is repeating itself, and Jacob Blike disoriented by having been plucked from the United States to fill this exotic role of Rabbi of Ukraine—and these three show no grasp of the political situation, no comprehension of the complex world that they are simplifying into their stereotypes, no sympathy for impulses toward reconciliation that are manifest on all sides, certainly no sense of responsibility for nurturing these impulses. This gang of three has no stake in Ukraine—Mr. Safer leaves for home immediately after reading his lines into the camera, Mr. Wiesenthal lives in Vienna (where needing to get along with Germans but not Ukrainians, he expediently concludes that Germans weren’t as bad as Ukrainians), and Jacob Blike—unhappy in his discovery that in slinging mud he has become muddied, every day more deeply convinced that he has been miscast in this role of Rabbi of Ukraine—we may expect will shortly be catching a plane for home. What do any of them care if they are stirring up a hornet’s nest in Ukraine?

The Jews who are left behind in Ukraine, who have a stake in Ukraine, who need to get along—to these 60 Minutes does not give air time. It’s the irresponsible ones with nothing to lose who are able to offer the more sensational testimonials.

And not only does 60 Minutes’ trio of provocateurs have nothing to lose from chaos erupting in Ukraine, they have this to gain—that if chaos does erupt, they will be able to play the role of prophets who foretold its coming, and they will do this quite overlooking that they helped it come.

Petition to Deny Ex. 9, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027) (letter from Lubomyr Prytulak to Laurence A. Tisch, President, CBS, dated November 15, 1994). For further views expressed by the author of that exhibit, visit <http://www.ukar.org>.

216. *Serafyn*, 149 F.3d at 1222.

with “direct personal knowledge of intent to falsify.”²¹⁷ The *Serafyn* court criticized that approach.²¹⁸

The court is obviously right in its initial statement that letters, even from people without direct knowledge of the broadcaster’s intent, may provide factual information from which, when viewed with other pieces of evidence, intent may be inferred.²¹⁹ However, the court’s choice of an example for the proposition that such letters can convey direct information about the producers’ state of mind shows the failure in the court’s application of its inferential principle. Indeed, there is a hidden danger in the court’s approach that the subjective intent to distort a broadcast will be inferred from some generalized notion, after the fact, that the broadcaster’s newsgathering process was not as candid as a court might wish. This is a rather profound extension of the news distortion principle as traditionally applied by the Commission. It entails seriously press-restrictive consequences.

This result is most clearly illustrated by looking at the specific evidence of complaint letters in *Serafyn* itself. There, the court recommended the following upon remand:

[The Commission] may wish to consider separately two types of letters. First, there may be letters that convey direct information about the producers’ state of mind while the show was in production. For example, Cardinal Lubachivsky charged that the producers misled him as to the nature of the show. Second, there are letters that point out factual inaccuracies in the show. For example, Rabbi Lincoln, a viewer, wrote in about the mistranslation of “zhyd.” Although letters of this type may not have independent significance, they may yet be probative in determining whether any error was obvious or egregious, and if so whether it bespeaks an intent to distort the facts.²²⁰

A close look at the court’s example of Cardinal Lubachivsky’s complaint will concretely illustrate the danger of the court’s overbroad statement. The cardinal’s complaint that the *60 Minutes* producers had misled him as to the

217. *Id.* (quoting *WGPR*, 10 F.C.C.R. at 8148) (citation omitted). In addition, the FCC argued that letters sent by viewers subsequent to the broadcast were evidence “clearly incapable of going to intent, because intent is a state of mind accompanying an act, not following it.” *Id.* The *Serafyn* court skewered this argument, contending that “evidence that sheds light upon one’s intent is relevant whether it was prepared before or after the incident under investigation; consider, for example, a letter written after but recounting words or actions before an event.” *Id.* More charitable readings of the Commission’s position are possible.

218. *See id.*

219. *Id.*

220. *Id.*

nature of the show must be read in proper journalistic context.²²¹ Traditional principles of journalistic autonomy counsel against giving too much information or editorial input to the subjects of news reports and documentaries.²²² Because any news event could conceivably be reported in a number of different ways, a broadcast story will often be different from any particular interviewee's expectations. Moreover, there is a considerable body of opinion in the journalistic community that it is acceptable—if not admirable—for a reporter in the newsgathering process to do or say whatever is necessary to “get the story,” especially if it is important.²²³ The misleading character of the newsgathering process, however, says nothing about the accuracy of the program as broadcast.

In the Cardinal Lubachivsky example, the most that can be said was that the Cardinal misunderstood the thrust of the program and might not have participated had he realized that its actual intended focus would be on anti-Semitism in Ukraine. It does not follow, however, that the use of the Cardinal's statements was in any way misleading to the public or intended to be so. And *that* is the nub of the news distortion policy. Moreover, the question whether the broadcast segments of Cardinal Lubachivsky's interview were accurate or misleading is more directly and accurately answered by comparing outtakes of the interview with the broadcast version, as was done in the Rabbi Bleich context. Not much weight should rest for purposes of a news distortion inquiry on Cardinal Lubachivsky's subjective impression that he was misled as to the nature of the show. Finally, Commission precedent demonstrates that the news distortion policy is not to be used to revise erroneous impressions left either with interviewees or, unintentionally, by broadcasts.²²⁴

221. *Id.*

222. Giving the subjects of news reports any significant control over the broadcast undermines both journalistic autonomy and judgment and also journalistic credibility with the public.

223. Admittedly, this approach to newsgathering has its detractors. As the initial *Food Lion* case demonstrated, courts increasingly look askance at misleading newsgathering techniques. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997), *rev'd*, 194 F.3d 505 (4th Cir. 1999).

224. *See, e.g.*, Polly Sowell, 48 F.C.C.2d 494, 494 (1974) (rejecting a news distortion claim by interviewee who claimed she consented to an interview only because the reporter promised that the interview would be broadcast in its entirety and further claimed that airing half the interview left an “erroneous impression” about the Republican Party's position on the Nixon impeachment matter); *Citizens for Abraham D. Beame*, 41 F.C.C.2d 155, 155-56 (1973) (rejecting a news distortion claim in which a political candidate alleged that the station's editing of his answers to questions left the public with the misleading impression that he would not engage in debates). *See also* CBS Program “Hunger in America,” 20 F.C.C.2d 143, 151 (1969) (noting that the FCC will not investigate “the type of situation frequently encountered, where a person quoted on a news program complains that he very clearly said something else” and that “[t]he Commission cannot appropriately enter the quagmire of investigating the credibility of the newsmen and the interviewed party in such a type of case”).

A parallel argument can be made about the court's second suggestion in the passage quoted above, that the Commission consider viewer letters pointing to factual inaccuracies as probative of broadcaster intent to distort.²²⁵ There is no particular reason to give letters from viewers, whoever they may be, a privileged position simply because they assert factual inaccuracies. Surely that determination (leaving aside the question whether it is appropriate in the first instance) is far more reliable if it relies on experts in the field rather than on the fortuity of viewer mail.

The court may mean that such letters should be considered probative because their existence, particularly if they are numerous, proves that the inaccuracy was obvious. But this is a dangerous approach to inference. That someone did or did not complain is not necessarily related to the obviousness of an error; it only reflects the efficacy of an organized letter-writing campaign on a controversial topic. Under the D.C. Circuit's approach, even if there is some controversy about the accuracy of a factual assertion, courts might find the broadcaster's chosen interpretation to be incorrect simply because the majority of people writing in took that position and called the error obvious.²²⁶ The court's principle is both underinclusive and overinclusive. There may well be factual inaccuracies that slip by because people did not write to protest. There also may be factually correct statements that will unleash a storm of protest because a significant number of people strongly disagree.²²⁷

b. Improperly Inferring General Patterns of Distortion: Public Statements on Newsgathering and the Presence of Written Policies on Distortion

Finally, with respect to the Commission's alternative ground of decision that the plaintiff had not alleged a "general pattern of distortion extending

225. *Serafyn*, 149 F.3d at 1222. For a further elaboration of the difficulties with the court's "obvious or egregious" test, see discussion *supra* Part III.A.2.

226. Ironically, the court's discussion of the "mistranslation" of the word "zhyd" is a perfect example of this type of dangerous inference. See discussion *supra* Part III.A.2.a.

227. If the court implicitly means that viewer letters about inaccuracies become probative of the broadcaster's subjective intent to distort when and because the broadcaster does not respond to such claims, this is an even more radically intrusive stance. There is no reason to read undue meaning into a broadcaster's decision to ignore viewer letters, particularly when there is little indication that the letters are from neutral, knowledgeable, and expert people. Requiring broadcasters to accept or investigate all claims of inaccuracy, including claims made strategically by viewers with a particular viewpoint or hidden agenda, would grind news operations to a halt. The journalistic community views the editing process as sacrosanct, and courts are deferential to the press's editorial choices. The reading of the *Serafyn* court's language explored here would unduly undermine that principle without a countervailing good reason.

beyond that one episode [The Ugly Face of Freedom],”²²⁸ the *Serafyn* court greatly expanded the type of circumstantial evidence from which the FCC could infer a broadcaster’s general pattern of intentionally distorting news programming.²²⁹ In the fourth aspect of its new model, the *Serafyn* court suggested that negative inferences might plausibly be justified by station employees’ public comments about the licensee’s approach to newsgathering and by a station’s failure to have an explicit policy prohibiting news distortion.²³⁰ Indeed, the court went so far as to suggest that a general practice of inaccuracy and distortion—far beyond the accuracy of a single report—might be inferred from such evidence.

Complainants in *Serafyn* argued that *60 Minutes* had no policy against news distortion and indeed considered some distortion acceptable.²³¹ To support this, they submitted a *Washington Post* article in which Mike Wallace was quoted as saying “[y]ou don’t like to baldly lie, but I have” and Don Hewitt observed “[i]t’s the small crime versus the greater good.”²³² Further, complainants cited some comments by Don Hewitt to the effect that he “wouldn’t make Hitler look bad on the air if I could get a good story.”²³³

On appeal, the D.C. Circuit found the Commission’s failure to consider the above evidence “troubling”²³⁴ and thought the comments to be “to say the least, suggestive”²³⁵ regarding CBS’s general policy about distortion in its overall programming. Indeed, the court found, “because of the importance the Commission placed upon the supposed lack of such evidence, its presence in the record casts the Commission’s alternative ground into doubt.”²³⁶ Having characterized Hewitt and Wallace as “likely members of the ‘news management’ whose decisions can fairly be attributed to the licensee” under the Commission’s standard for materiality in news distortion findings, the court suggested that their statements would undermine not only *The Ugly Face of Freedom* itself, but more generally the FCC’s rejection of a general pattern of distortion by CBS.²³⁷ The court also gave inferential weight to CBS’s asserted failure to adopt internal policies prohibiting news

228. *Serafyn*, 149 F.3d at 1220.

229. *Id.* at 1219-22.

230. *Id.* at 1220-21.

231. *Serafyn*, 149 F.3d at 1218.

232. *Id.* at 1218. See also Colman McCarthy, *The TV Whisper*, WASH. POST, Jan. 7, 1995, at A21.

233. *Serafyn*, 149 F.3d at 1218. See also Richard Jerome, *Don Hewitt (Executive Producer of the News Program 60 Minutes)*, PEOPLE WEEKLY, Apr. 25, 1995, at 85.

234. *Serafyn*, 149 F.3d at 1221.

235. *Id.*

236. *Id.*

237. *Id.* at 1221.

distortion.²³⁸

However, the comments about acceptable deceptions attributed to Mike Wallace and Don Hewitt in the *Washington Post* article were clearly made in discussing *newsgathering*, not the *presentation* of the news.²³⁹ In further explaining this point, Wallace apparently said: "It really depends on your motive [for lying]. . . . Are you doing it for drama, or are you doing it for illumination? Each one has to be weighed separately as to the cost-benefit."²⁴⁰ Hewitt, admitting to being "trouble[d]" by undercover investigations using hidden cameras, justified the practice on comparative moral grounds: "It's the small crime versus the greater good. . . . If you can catch someone violating 'thou shalt not steal' by your violating 'thou shalt not lie,' that's a pretty good trade-off."²⁴¹

While there is dispute within the journalistic community about the appropriateness of certain types of surreptitious newsgathering techniques, it is clear that even the reporters who engage in such newsgathering activities do so primarily in order to present what they see as the "true" story to the public. They may omit the truth or lie to the targets of their stories and even to their sources, but all in the name of revealing the truth to the viewing audience.²⁴² This is very different from any kind of admission of lying to the public with rigged, slanted, or distorted news. As for Don Hewitt's remarks about Hitler, they constituted a hyperbolic denial of the rumor that he had deliberately tried to undermine another journalist on the air. In denying rumors of his unprofessional conduct, Hewitt responded, "I made a pass at her—I *never* denied that . . . But I wouldn't make *Hitler* look bad on the air if I could get a good story."²⁴³ Moreover, elsewhere in the story cited by the Serafyn complainants, Hewitt staunchly defended *60 Minutes* broadcasts against charges of bias by referring to the program's fairness-testing editor.²⁴⁴

238. *Id.* at 1218, 1221.

239. Richard Harwood, . . . *And Lying for a Story*, WASH. POST, July 27, 1996, at A23.

240. Howard Kurtz, *Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings*, WASH. POST, Nov. 30, 1992, at A1 (quoting *60 Minutes* correspondent Mike Wallace).

241. *Id.*

242. See, e.g., Russ W. Baker, *Truth, Lies and Videotape: "Prime Time Live" and the Hidden Camera*, COLUM. JOURN. REV., July-Aug. 1993, at 25; Kurtz, *supra* note 240. See also Tom Luljak, *The Routine Nature of Journalistic Deception*, in HOLDING THE MEDIA ACCOUNTABLE: CITIZENS, ETHICS, AND THE LAW 11-12 (David Pritchard ed., 2000) (suggesting that various sorts of deception are common and that journalists employ deception to maintain a competitive edge in addition to serving the public).

243. Jerome, *supra* note 233, at 85, 90.

244. *Id.* ("We have an editor . . . whose sole job is to compare the cut segment to the uncut transcript and answer the question 'Have we been fair?'" (quoting *60 Minutes* Executive Producer Don Hewitt). Hewitt's reference to a 'fairness edit' undermines complainants' attempt to use this

Thus, the difference in the contexts of the *Serafyn* claim and the Hewitt and Wallace statements makes that “evidence” definitionally inapposite.

The court’s implicit approval of press interview statements as indicative of general patterns of licensee programming distortion is problematic for other reasons as well. Unlike affidavits in a particular litigation, news interviews given by reporters to other news organizations in other contexts are not sworn statements germane to the issue. In addition to the inevitable questions about whether the meanings of the statements were properly understood in context, reliance on such indirect statements of policy does not account for misquotations and misunderstandings by the authors of the underlying articles. If one news report in one medium is subject to charges of slanting and bias, so may be the other report on which the news distortion charge is based. In addition, if we believe that a reporter may lie and slant the news he produces in one context, why should we assume that he would not exaggerate or slant his answers to interview questions in other contexts for his own purposes? There is no reason to privilege such “extrinsic” evidence to the degree that the court in *Serafyn* assumes is appropriate.²⁴⁵ Moreover, a review of prior cases in the area demonstrates that the court’s inferential approach is unprecedented in the news distortion corpus.²⁴⁶

As for policies on news distortion, the Commission itself admittedly

article to prove Hewitt’s deliberate or reckless acceptance of falsity.

245. One could claim that if there are antidistortion journalistic norms and a reporter’s statement appears to contradict them, we should think of the statement as a “statement against interest” and therefore more credible. This does not address the issue of using the statement out of context. More importantly, however, it fails to distinguish sufficiently between the journalistic norms applicable to newsgathering and to reporting. These are different journalistic enterprises. Although strategic deception in gathering news is controversial, there are those in the journalistic community who approve of intrusive newsgathering techniques and even misleading a source to get a story. But even particularly aggressive newsgathering techniques do not necessarily entail aggressive reporting techniques. Having gotten the story “by hook or by crook,” a reporter can certainly thereafter take exquisite care in the way in which it is actually reported on the air.

246. See, e.g., *Pacifica Foundation*, 95 F.C.C.2d 750, 755 (1983) (rejecting the complainant’s attempt to rely on comments in the station’s monthly newsletter and an announcer’s on-the-air statement that the station was providing an alternative view, unavailable in mainstream newspapers, about Central America, as extrinsic evidence of intent to distort).

In *Yellow Freight Sys., Inc.*, the complainant submitted evidence that a reporter in a documentary critical of truck safety had previously written articles in a dissident Teamster group’s newsletter. 73 F.C.C.2d 741, 757 (1979), *aff’d*, 656 F.2d 600 (10th Cir. 1981). The FCC, affirmed by the Court of Appeals for the Tenth Circuit, did not order a hearing on the news distortion claim because the reporter submitted an affidavit denying the charge and because the reporter’s articles criticizing the administration of pension funds was not evidence that NBC distorted reports critical of the trucking industry’s safety practices. *Id.* at 757. The Tenth Circuit agreed that the articles were not related to the broadcast and called the complainant’s inferential argument a “non-sequitur.” 656 F.2d at 603. The connection between Wallace’s and Hewitt’s generalized interview puffery delivered in an entirely different context and the deliberate distortion claimed in *Serafyn* is even more attenuated than the “non-sequitur” in *Yellow Freight*.

opined in an earlier case that such policies were desirable.²⁴⁷ In *Hunger in America*, the Commission wrote: “[w]e stress that the licensee must have a policy of requiring honesty of its news staff and must take reasonable precautions to see that news is fairly handled.”²⁴⁸ *Serafyn* did not establish that the network did not have such a policy, however; indeed, the CBS News Division did have a policy against news distortion.²⁴⁹

The court’s discussion of the question of distortion policies is problematic. First, of course, it raises questions directed to the specific case.²⁵⁰ Second, however, it raises questions regarding the inferential weight apparently given to evidence of news distortion policies. Even if CBS did not have a formal, written news distortion policy, should that necessarily lead to a substantive conclusion regarding the nature of CBS’s news coverage? The underlying issue is the degree of evidentiary weight to be given to the apparent failure of a broadcaster to have a formal policy prohibiting news distortion. The FCC’s policy prohibiting news distortion is on the books, and

247. CBS Program “Hunger in America,” 20 F.C.C.2d 143, 150-51 (1969).

248. *Id.* at 151 n.6.

249. Indeed, the Commission asked CBS to set forth its staging policies as part of its sanction in the *Pot Party* case. Inquiry into WBBM-TV’s Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (Pot Party), 18 F.C.C.2d 124, 139 (1969). CBS did so. At the time *The Ugly Face of Freedom* was broadcast, the CBS News Standards provided: “Staging is prohibited. CND broadcasts must be just what they purport to be. We report facts *exactly* as they occur. We do *not* create or change them. It is of the utmost importance, therefore, that these basic principles be adhered to scrupulously by all CND personnel . . .” CBS News Standards, at 38 (on file with author). The News Standards also stated that “[s]ignificant errors in material facts must be corrected, clearly and promptly, in appropriate broadcasts.” *Id.* at 5. CBS’s News Standards advised its staff:

It is not sufficient merely to report that the statement included in the original broadcast has been denied. The accuracy of the denial must be specifically confirmed.

—It is not sufficient merely to include the accurate information in the correcting broadcast. The fact that it is a correction must be specifically noted.

—It is not sufficient merely to broadcast a letter from a viewer or listener which asserts we were in error. The accuracy of the assertion must be specifically admitted.

Id. The CBS News Standards were subsequently revised, but continue to prohibit news distortion.

Nevertheless, CBS can be faulted for failing to provide evidence of its published news standards. *Serafyn v. FCC*, 149 F.3d 1213, 1218 (D.C. Cir. 1998). CBS’s provision of such material would not have constituted an official investigation into its news broadcasting.

250. The court’s unquestioning acceptance of the complainants’ contention that there were no such guidelines is surprising in this context. *Serafyn*, 149 F.3d at 1218. Here, CBS took the position that it would not address the charges substantively for policy reasons grounded on the First Amendment. *Id.* It did not selectively provide and withhold documents and information as it pleased. While the network’s resistance may not have been prudent, such resistance is different from a situation in which a party with relevant information simply refuses to supply it. Admittedly, in many circumstances, if a party with relevant information refuses to supply it, courts find it reasonable to infer that the information is adverse to that party. This argument is much more problematic in the speech context, however. CBS’s tactical position was presumably directed by First Amendment considerations.

neutrality in news reporting is a widely articulated journalistic norm.²⁵¹ In any event, distortion could very well take place against a background of detailed antidistortion policies—the existence of the policy manual cannot be determinative.

This is not intended to be an arrogant defense of the media on the ground that broadcasters should simply be trusted not to violate legal or professional norms. Rather, it is a criticism of the D.C. Circuit for having overstated what we can reasonably conclude from a news organization's failure to have a specific nondistortion policy. If there is evidence of willingness to distort, then that evidence should suffice on its own to prove the point. That there is also no articulated policy does not necessarily enhance the evidence of deliberate intent.

Ultimately, what is most troubling about the *Serafyn* court's treatment of the petitioner's claims about CBS's policy on distortion is that it takes Hewitt and Wallace's interview comments as evidence of a "general pattern of distortion extending beyond that one episode."²⁵² The totality of CBS's approach to news presentation is thus assertedly rendered suspect on the basis of comments whose completely different context is not even recognized or addressed by the court. This is a significant extension of the traditional news distortion policy.

B. Lessons from Defamation Law

When addressed in its broader doctrinal context, it is clear that an invigorated news distortion policy allows administrative power to circumvent tort law constraints. A comparison of the news distortion standard and defamation law clarifies the degree to which expansive standards designed to improve news reporting and public discourse are both inconsistent with First Amendment values and unnecessarily create a conflict between administrative and tort law.

The litigation in *New York Times v. Sullivan*,²⁵³ in which the Court first articulated the constitutional limitations on state defamation law, was brought to mute or suppress advertisements about Southern bigotry during the civil rights struggle.²⁵⁴ The Court in *Sullivan* found a constitutional privilege to

251. On journalistic norms of objectivity and neutrality, see, for example, MICHAEL SCHUDSON, *DISCOVERING THE NEWS* (1978); Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221 (1992) (citing to other relevant sources therein).

252. *Serafyn*, 149 F.3d at 1220.

253. 376 U.S. 254 (1964).

254. *Id.* at 256-59.

criticize public officials in order to promote robust public debate—even though a number of the details in the advertisement at issue were literally inaccurate.²⁵⁵

News distortion claims such as the ones in *Serafyn* are similar to the defamation claims in *Sullivan*. Moreover, they often arise in procedural contexts in which complainants possess the same deterrence objectives in invoking the administrative policy as plaintiffs do in politically motivated defamation actions.²⁵⁶

1. *The Meaning of Meaning and Truth*

Under traditional defamation doctrine, meaning and truth are not defined literally.²⁵⁷ Courts decide whether the “gist” of a statement is defamatory falsehood or “substantially” true.²⁵⁸ The meaning of the statement at issue is defined by context and in relation to the community whose norms are put at issue by the plaintiff.²⁵⁹ Whether at common law where truth was a defense, or since the progeny of *New York Times v. Sullivan* placed the burden of proving falsity in public issue cases on the plaintiff, the statement is assessed by reference to a standard of substantial truth and not literal accuracy.²⁶⁰ The policy benefits from this approach are self-evident. Both reputation and the press are protected by legal rules that focus on what was actually understood in context. The *Serafyn* court’s adoption of an “obvious or egregious” factual error standard as a litmus test for a finding of deliberate news distortion is inconsistent with the approach to meaning in defamation law.²⁶¹

255. *Id.* at 270-71.

256. Commission responsiveness to the public is in many ways laudable. However, an orchestrated use of Commission policies by a group with a particular substantive point of view about the truth is disturbing in light of its likely chilling effect and raises questions about the limits on administrative responses to complaints from the public. *See also infra* Part V.B.3.

257. *See, e.g.*, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS § 3.7, at 3-14 to 3-19 (2000); RESTATEMENT (SECOND) OF TORTS § 581A cmt. f, at 237 (1977).

258. *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991); SACK, *supra* note 257.

259. *See, e.g.*, Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996); Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 345-51 (1999) (providing a provocative discussion of the importance of context in ascertaining defamatory meaning).

260. *See, e.g.*, *Masson*, 501 U.S. at 517-18.

261. An inquiry into meaning in defamation law focuses on what was understood by the hearers of the statement. *Masson*, 501 U.S. at 513. A finding of news distortion depends on the speaker’s subjective intent. *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985). The point here, however, is simply that the adoption of an “obvious or egregious” error standard for the imputation of intent is inconsistent with the highly contextualist approach to defining meaning in defamation cases.

2. *Comparison with Reckless Disregard*

It might be argued in support of the *Serafyn* doctrinal extension that the D.C. Circuit's proposal is no more intrusive than the actual malice standard in defamation law. In view of its focus on a subjective standard of intentional news distortion, the FCC's news distortion policy arguably has been applied in a fashion analogous to the actual malice standard of the post-*New York Times v. Sullivan*²⁶² defamation cases. The only question is whether imposing liability for what might be called "reckless disregard" as well as for actual, subjective knowledge of falsity, is appropriate in the context of news distortion in electronic media. Why, one might ask, should we eliminate the news distortion policy as constitutionally suspect if we tolerate an analogous analytic construct in the defamation area?²⁶³ The short answer is that defamation doctrine, policy, and remedies cannot in fact serve as an appropriate analogy to the news distortion context.

First, the FCC self-consciously differentiates between news distortion and defamation standards. As the agency put it in *Bruce A. Hassel* (in which the complainant argued news staging based on affidavits and depositions taken from parties in a defamation suit against a licensee), "the standards used by the courts in defamation cases . . . differ from those applied by the Commission in reviewing allegations of news staging and/or rigging."²⁶⁴ The decision concluded that "[t]he allegations contained in the pending civil complaint and submitted by [the complainant] in the petition to deny did not meet the very high burden of pleading established by the Commission."²⁶⁵ Similarly, in rejecting a malice-based alternative to the fairness doctrine, the Commission concluded that even though a malice standard might reduce the chilling effect of the fairness doctrine, it would not eliminate the effect.²⁶⁶

262. 376 U.S. 254, 283 (1964) (adopting a First Amendment constitutional privilege for libel cases involving criticism of public officials). The *Sullivan* progeny extended the "actual malice" standard to cases involving defamation of "public figures." See *Gertz v. Robert Welch*, 418 U.S. 323, 334-36 (1974).

263. Indeed, in an attempt to impose a more stringent review standard in the fairness doctrine context, commentators have argued implicitly that the extrinsic evidence standard of news distortion cases should apply to all "improper news reporting" complaints in an analogy to the actual malice standard in the defamation context. See, e.g., Jones, *supra* note 40, at 1248-50 & n.176. However, this proposal was made when the fairness doctrine was still on the FCC's books and when commentators sought to limit the doctrine's potentially broad and vague scope. Intent upon that project, commentators like Jones did not adequately address the problems of the extrinsic evidence standard, lest they win the battle to lose the war.

264. *Bruce A. Hassel*, 3 F.C.C.R. 6489, 6489 (1988).

265. *Id.*

266. *Syracuse Peace Council*, 3 F.C.C.R. 2035, 2037 (1988), *review denied*, 867 F.2d 654 (D.C. Cir. 1989).

There are also significant distinctions between defamation and news distortion. Doctrinally, for example, plaintiffs in public figure defamation cases involving matters of public concern bear the burden of proving the falsity and defamatory character of the defendant's statement before getting to the question of actual malice.²⁶⁷ Opinion statements and rhetorical hyperbole are not actionable.²⁶⁸

Moreover, in defamation doctrine, the standard for defamatory statements about public figures is whether they were made with actual knowledge of falsity or reckless disregard for the truth.²⁶⁹ Actual malice is only found if the plaintiff can show with clear and convincing evidence that the defendant had at least serious doubts about the truth of its statements about the plaintiff.²⁷⁰ That standard, in turn, does not impose liability for what might be termed professional negligence as judged by journalistic norms.²⁷¹ A mere failure to investigate does not itself prove reckless disregard.²⁷² That is the case even if the better journalistic practice in the situation would be to investigate the allegation before publishing. Even if the plaintiff can show that journalistic training makes reporters sensitive to the value of accuracy, courts do not make inferences of actual malice from evidence that the reporters nevertheless made errors for which they have no excuse.²⁷³ Only if the plaintiff can shoulder the heavy burden of showing that the defendant had sufficient warning as to the probable falsity of the statement so that not investigating would be tantamount to "reckless disregard of the truth" can the defendant be deemed to have acted with actual malice.²⁷⁴ The Supreme Court has made clear that the reckless disregard prong of the actual malice standard should not be liberally interpreted in favor of plaintiffs in public figure defamation cases.

Even if the full actual malice standard were to be used in the news

267. See *Pa. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

268. See *Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 20 (1990) (noting that opinion statements which do not implicitly rely on unarticulated statements of fact are not actionable as defamation).

269. *Sullivan*, 376 U.S. at 279-80.

270. *Pa. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (establishing plaintiff's burden in public figure defamation cases); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring defamation plaintiffs to provide "clear and convincing proof" of actual malice).

271. See *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) (establishing that failure to investigate alone is not proof of actual malice under *Sullivan*). See also *Zupnik v. Associated Press, Inc.*, 31 F. Supp. 2d 70, 73-74 (D. Conn. 1998) (granting summary judgment for newspaper wire service in defamation action grounded on false statement in news rewrite). For a critique of the subjective wrongdoing requirement, see, for example, John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 CORNELL J.L. & PUB. POL'Y 289 (1996).

272. See *St. Amant*, 390 U.S. at 733.

273. See, e.g., *Zupnik*, 31 F. Supp. 2d at 73-74.

274. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

distortion context, its limitations would have to be respected as well. Any interpretation of the news distortion standard that goes beyond the notion of deliberate subjective intent to distort would be effectively an end-run around the constitutional protections in the defamation context. Given that a governmental agency would be engaged in specific oversight of program content and accuracy, the *Serafyn* court's approach presents an even greater probability of censorship—self-censorship and governmental suppression—than is the case in even the worst defamation scenario. The *Serafyn* court's "obvious or egregious" factual inaccuracy standard does not appear to satisfy the more stringent definition of actual malice used in defamation cases.²⁷⁵

Different social policies also underlie the different rules. The traditional reason for the defamation cause of action is the protection of reputation. Although the interest in reputation is just as much of a social interest as the interest in protecting the press and the free flow of information,²⁷⁶ the underlying policy of defamation is the social norm that individual reputations should receive protection against false and defamatory charges. By contrast, the news distortion policy is not directed to the protection of individual reputations. Rather, it appears to be designed to protect democratic decisionmaking in the citizenry as a whole.²⁷⁷ It is a way of enlisting government in making sure that the information needed for citizens in a democracy is presented in an undistorted, truthful fashion.

The differences in remedies between the private civil action for defamation and the license-denying power of the FCC in news distortion cases implicate different degrees of exercise of governmental power in the service of the relevant social policies. Ultimately, in a defamation action against the press, a loss for the defendant means the imposition of damages and the potential chilling effect resulting from fear of future damage awards.²⁷⁸ By contrast, a successful news distortion claim could lead not only to a letter of reprimand to the station²⁷⁹ but even to license revocation or

275. The Court's approach in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), demonstrates that even a knowing falsification is not problematic in some circumstances. There, the Court found that a reporter could knowingly edit the language of an interviewee's statements while still using quotation marks so long as the meaning of the statements was not substantially different. *Id.* at 516.

276. Robert Post's classic *The Social Foundation of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986), points out that the traditional dichotomy—between the individual interest in the protection of reputation and the social interest in the free dissemination of information—is really a mischaracterization. *Id.* at 740-41. The real tension in cases like *Sullivan* is the attempt to balance the contending social interests in reputation and a free press. *Id.* at 691-92.

277. See discussion *infra* Part V.A.1.

278. SACK, *supra* note 257, ch. 10, at 10-1 to 10-32. See also *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) (addressing dangers of self-censorship resulting from damage awards).

279. See HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 1262-65 (1999).

nonrenewal.²⁸⁰

Perhaps most importantly, application of a reckless disregard standard in the news distortion context would likely lead to extensive evidentiary inquiries, intrusive discovery, and lengthy deliberate distortion hearings. The law reviews contain numerous articles criticizing the Court for allowing extensive discovery of editorial processes in connection with actual malice inquiries.²⁸¹ Yet the threat posed by such hearings and fishing expeditions is much greater in the news distortion context for the simple reason that while a defamation case has one or a small number of identified plaintiffs, the number of potential complainants about broadcast news programs has no such limitation. Indeed, they needn't be "defamed" at all. A peace group might claim that a news program presents a distorted, falsely positive picture of Pentagon weaponry. Or a conservative Jewish group might claim that a program on Middle East peace efforts put Yassir Arafat in a falsely positive light. Certainly the potential chill is much greater in that context.

3. *The Administrative End-Run Around Tort Limitations: The Conflict Between News Distortion and Group Libel Doctrines*

Far from being consistent with the constitutional privilege in defamation law, *Serafyn* demonstrates how in certain circumstances, the application of the news distortion doctrine illuminates a conflict between tort and administrative law. Thus, the difficulties detailed above in connection with the application of the "new" news distortion policy are matched by an interdoctrinal tension. Specifically, the news distortion claim in *Serafyn* by the Ukrainian community groups was in effect a claim for group libel in the administrative context, interpreting the program as inaccurately accusing all Ukrainians of being anti-Semitic.²⁸²

It is clear that such a group libel claim would not be successful under current defamation law because of the limitations on the group libel cause of

Monetary forfeitures are available only for violations of Commission rules, 47 U.S.C. § 503 (1999), while the news distortion prohibition is only a policy.

280. 47 U.S.C. §§ 309(k), 312 (1999). See also ZUCKMAN, *supra* note 279, at 1261-62, 1265-66.

281. See, e.g., Jane Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL OF RTS. J. 1069, 1082-85 (1996) (criticizing cases such as *Herbert v. Lando*, 441 U.S. 153 (1979), and its progeny because these cases invite juries and appellate courts to decide whether journalists acted in a "professional" manner).

282. *Serafyn* first argued that the program was a violation of the FCC's personal attack rules, but the Commission disagreed, holding that the personal attack rules could not apply to a claimed insult to all Ukrainians. After losing the personal attack argument, the complainants then moved to the news distortion claim. See *supra* note 96; WGPR, Inc., 10 F.C.C.R. 8140, 8140 n.2 (1995); In re Complaint of Ukrainian Congress of America v. CBS, Inc., 10 F.C.C.R. 11,948 (1995).

action.²⁸³ The question is whether the regulatory apparatus of the administrative state should be used to achieve the same result.

Although in *Beauharnais v. Illinois*²⁸⁴ the Court found that a criminal group libel statute was not within the area of constitutionally protected speech,²⁸⁵ courts addressing the issue after the Court's decision in *New York Times v. Sullivan* have assumed that *Beauharnais* was tacitly overruled.²⁸⁶ In light of the unavailability of criminal libel claims, plaintiffs in such cases must proceed under the traditional civil defamation cause of action under state law.

Courts have required group libel plaintiffs to satisfy the ordinary elements of defamation at common law. Therefore, most such claims have foundered on the courts' finding that the claim was not sufficiently "of and concerning" the plaintiff.²⁸⁷ This identification requirement has meant that the determinative factor for a group libel claim is the size of the group. While courts do not purport to ground their size cut-offs on any scientific principles, it is clear that defamation of an entire people—what has been called "blood

283. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.32, at 1089-90 (5th ed. 1995) (noting that "modern cases" reject the idea of group libel).

284. 343 U.S. 250 (1952).

285. In *Beauharnais*, the petitioner distributed a segregationist leaflet defaming African Americans. 343 U.S. at 252-53. He was convicted under a statute prohibiting publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion which [exposes that class of persons] to contempt . . . or which is productive of breach of the peace." *Id.* at 251. The trial court refused to charge the jury that constitutional principles required them to acquit unless the leaflet was "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Id.* at 253. The Supreme Court held, in a 5-4 decision, that it was unnecessary to consider the issues behind the phrase "clear and present danger" because libelous utterances were not within the area of constitutionally protected speech. *Id.* at 253-57.

286. See, e.g., *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (reiterating the Seventh Circuit's previous conclusion that "cases such as *New York Times v. Sullivan* have so washed away the foundations of *Beauharnais* that it could no longer be considered authoritative"), *aff'd mem.* 475 U.S. 1001 (1985); *Collin v. Smith*, 578 F.2d 1197, 1204-05 (7th Cir. 1978), (declining to apply *Beauharnais* to a Nazi march in Skokie); *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973) ("[I]n view of more recent decisions, it is extremely doubtful that the Illinois statute [in *Beauharnais*] would be upheld today."); *Anti-Defamation League of B'nai Brith v. FCC*, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring) ("[F]ar from spawning progeny, *Beauharnais* has been left more and more barren . . ."). See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992) (striking down a hate speech ordinance on First Amendment grounds). For an argument that the court should explicitly overrule *Beauharnais*, see Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech, Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 950-52 (1996).

287. See, e.g., Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343 (2000) (reviewing group libel case law and proposing numerical cutoff).

libel”—would not fit under these quantity-focused approaches.²⁸⁸

288. In *Neiman Marcus v. Lait*, 14 F.R.D. 159 (S.D.N.Y. 1953), a classic group libel case, the court suggested the number twenty-five as an appropriate benchmark. See also *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) (dismissing libel claim on behalf of 500 Nigerian businessmen); *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (dismissing libel claim on behalf of over one million hunters); *Talal v. Fanning*, 506 F. Supp. 186, 187 (N.D. Cal. 1980) (dismissing libel claim on behalf of large group of Muslims); *Webb v. Sessions*, 531 S.W.2d 211, 213 (Tex. App. 1975) (holding that individuals may not recover damages for defamation of a group consisting of more than 740 persons). Recently, in a highly publicized “veggie libel” defamation action brought by a Texas organization of cattle ranchers against talk show host Oprah Winfrey, the court held that the plaintiffs could not assert a common law defamation claim against Winfrey for airing statements about “mad cow disease.” *Tex. Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 864 (N.D. Tex. 1998). Because there are “about a million” cattlemen in the United States, and none of the plaintiffs were mentioned by name on the *Oprah* show, the court found that the identification requirement of the cause of action had not been satisfied. *Id.* (quoting *Webb v. Sessions*, 531 S.W.2d 211, 213 (Tex. App. 1975)). The court found that the cattle ranchers’ organization could not assert a defamation claim for a group or class consisting of “cattlemen” in the United States, and plaintiff therefore could not meet the “of and concerning” requirement. *Id.*

Four individual commercial fisherman could not maintain a defamation action against four television stations that continued to air commercials opposing commercial net fishing after the stations received notice that the advertisements were false and misleading. *Brown v. New World Communications of Tampa, Inc.*, 712 So. 2d 395, 395 (Fla. Dist. Ct. App. 1997). The court reasoned that the commercials referred generally to “commercial net fishermen,” a class too large for plaintiffs to meet the “of and concerning test.” *Id.* See also *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800 (Fla. Dist. Ct. App. 1997) (same, but plaintiffs filed as class action); *Adams v. WFTV, Inc.*, 691 So. 2d 557 (Fla. Dist. Ct. App. 1997) (class action). *Cf. Burns v. Gardner*, 493 S.E.2d 356, 358-60 (S.C. Ct. App. 1997) (using law of standing instead of defamation law to dismiss claim that a newsletter defamed “the Black Blind population of South Carolina”).

The by-now-traditional argument in support of that result is that if a defamatory statement is made about a very large group, it will be interpreted by the listener as simply rhetorical hyperbole and disbelieved. After all, goes the claim, surely no reasonable person can believe that all Jews are stingy or crafty. While this conclusion is logically compelling, it simply does not account for the prevalence and effect of ethnic stereotypes. Cabining group libel simply on the basis of this kind of audience perception argument is not entirely satisfactory in the real world. Surely even the most virulent anti-Semite does not believe that every single Jew is stingy. But there is enough of an underlying assumption about the money-grubbing character of Jewish culture that the stereotypical comment makes a mark—perhaps a presumption—in the dealings of many non-Jews with Jews. So it is an overstatement to contend that defamatory statements about large groups do not reflect on the individual members of the groups because the comments are dismissed as hyperbole. Even if the defamatory statement is not believed to be literally true about every member of the group, it may nevertheless reinforce underlying cultural assumptions from which the individual group member must differentiate herself as an individual. Thus, defamatory statements about groups are likely to have harmful effects on particular members of the groups to the extent that those individuals are associated with or defined by their group characteristics. At the least, the listener may harbor two inconsistent views in this type of situation: dismissal of the defamatory statement as rhetorical hyperbole with regard to a specific person in a specific interaction, and, simultaneously, reinforcement of a presumption of group difference that must be overcome by the particular individual in the process of differentiating herself from her presumed group characteristics.

A different argument in support of the numerosity requirement in libel law today is that once a statement is made about a very large group—ethnic, cultural, or otherwise linked by some affinity—it should be dealt with as a political statement rather than a particularized false statement of fact about each member of that group. This suggests that group libel is disfavored because statements of that kind

It is beyond the scope of this paper to address the desirability in general of recognizing currently unrecognized tort-like causes of action for group libel. However, a claim can be made that even if it is appropriate for state courts not to recognize class actions for libel, administrative recognition is completely different. After all, general harms that do not have adequate remedy in the civil litigation context are often subject to general regulation in the regulatory state. State substantive law and federal administrative law properly have different footprints. Civil litigation is purportedly designed to compensate individuals for particular harms. But administrative regulation may well appropriately extend beyond individual harm—to deter and punish more general ills. So it might be said that there is nothing wrong with the FCC choosing to redress the general harm of group libel even if state courts do not.

To the contrary, however, I argue—for a number of reasons particular to the administrative context—against allowing an administrative agency like the FCC to use a news distortion doctrine to punish reputation-harming statements like the ones identified by the plaintiffs in *Serafyn*. To extend the news distortion doctrine in this way is far less justifiable than to recognize group libel claims in tort law.

The viability of such claims in administrative proceedings is likely to place far more pressure on First Amendment principles than their recognition in the context of civil tort actions. First, defamation law is not designed primarily for speech suppression; rather, its purpose is the compensation of individuals for harm to their reputations.²⁸⁹ The speech-suppressive effect of libel actions is only (although predictably) a byproduct of the compensatory scheme. By contrast, suppression of speech—and not compensation—is the entire goal of the news distortion doctrine in group defamation claims such as the ones in *Serafyn*.

Second, the chilling effect on the press is likely greater in the administrative context. Because the administrative arena may not afford the equivalent processes to drop claims at a very early stage,²⁹⁰ or at least

are actually political statements. Thus, regardless of their harmful effect on individuals, such political statements should be protected on this view because of our commitment to the robust and unfettered discussion of political ideas. In *Michigan United Conservation Clubs v. CBS*, the court suggested that there cannot be defamation liability for large groups because the imposition of such liability would “seriously interfere with public discussion of issues, or groups that are in the public eye.” 485 F. Supp. at 900. See also Freedman, *supra* note 286, at 951-52 (discussing three lines of attack—including an argument similar to that above—for arguing that group libel statutes are unconstitutional and that *Beauharnais* should be overruled).

289. See Post, *supra* note 276, at 692-93.

290. The Commission’s use of staff review may be seen as equivalent to motions to dismiss or for summary judgment in the defamation litigation context. But FCC staff review is subject to

because of the drastic character of the potential sanction of license revocation, the chilling effect of such “news distortion as group libel” claims in the FCC context is potentially quite significant.²⁹¹

Thus, the news distortion policy, especially as reinterpreted by the D.C. Circuit, is in tension with defamation law and raises the kinds of First Amendment concerns that led to the adoption of a constitutional privilege in the libel context. Ultimately, an invigorated application of the news distortion doctrine would create an unnecessary tension between the strictures of tort

administrative appeal with more stringent review than judicial review of dismissals in defamation cases.

Admittedly, the Commission's traditional rhetoric in the news distortion area emphasizes licensee discretion and the Commission staff gatekeepers who address news distortion claims begin with that presumption. On the other hand, the Commission's staff responds to complaints. In the first instance, they have little incentive to stop the inquiry from going forward, other than the Commission's nonintervention rhetoric. Even that brake might be released if the Commission adopts the D.C. Circuit's recommended approach in *Serafyn*. In any event, a staff inquiry on a news distortion claim is effectively a governmental agent interrogating the station on behalf of the complainant. Although too much should not be made of this, it stands in contrast to the procedural neutrality of the court in a defamation action. Finally, and perhaps most importantly, the FCC has jurisdiction over the station in virtually every regard. Therefore, the licensee is in a continuing oversight relationship with the Commission staff. The station's interpretation of a Commission inquiry must always be assessed in light of that continuing regulatory relationship. This regulatory aspect is conspicuously missing in a classic tort action.

291. Admittedly, the Commission traditionally has relied on the First Amendment to reject claims—under its personal attack rule, fairness doctrine, licensing precedents, or general public interest obligations—by large groups complaining of reputational harms. *See, e.g.*, Complaint of Anti-Defamation League of B'nai B'rith, 4 F.C.C.2d 190 (1966), *aff'd sub nom.* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 170 (D.C. Cir. 1967). In *B'nai B'rith*, for example, the Commission majority found that the First Amendment required the agency to recuse itself from substantive review of offensive and false statements about Jews broadcast on public issue programming. *B'nai B'rith*, 403 F.2d at 171-72. Relying on the fairness doctrine and the reply right offered by the Anti-Defamation League the Commission majority took an absolutist, speech-protective approach. The majority's refusal to review content complaints in the *B'nai B'rith* case is consistent with its subsequent decisions concerning other ethnic slurs and group libel-like claims. *See, e.g.*, Julian Bond, 69 F.C.C.2d 943 (1978) (relying on First Amendment principles to reject complaint that station broadcast racial epithets). *See also* Zapis Communications Corp., 7 F.C.C.R. 3888 (1992) (rejecting petition to deny renewal on ground, inter alia, that program insulted and stereotyped minorities); Turner Broad. Corp., 87 F.C.C.2d 476 (1981) (rejecting petition that alleged, inter alia, that the station aired “inflammatory, racist and demeaning” statements); Avco Broad. Corp., 53 F.C.C.2d 48 (1975) (rejecting complaint that station broadcast ethnic slur that degraded Mexican-Americans); The Outlet Co., 53 F.C.C.2d 611 (1975) (same); Thaddeus L. Kowalski, 46 F.C.C.2d 124 (1974), *aff'd sub nom.* Polish-American Congress v. FCC, 520 F.2d 1248 (7th Cir. 1975) (rejecting complaint of Polish-Americans that ABC aired “demeaning” jokes). This approach is consistent with the current jurisprudence of group libel. However, if the Commission were to adopt an invigorated interpretation of its news distortion policy, as recommended by the D.C. Circuit, it would either reverse that precedent in the personal attack/public interest context or it would end up with an inconsistent set of precedents in the news distortion area. Indeed, *B'nai Brith's* reliance on the then-applicable fairness doctrine suggests that in the absence of such precedent, there might be more pressure on the Commission to find some remaining regulatory rubric under which to rid the air of such offensive discourse.

law and the application of administrative rules designed for different ends.²⁹² Whatever the ultimate merits of excluding group libel claims from traditional defamation law, there is no good reason to allow the regulatory state to be used in the direct suppression of speech.

Even after *New York Times v. Sullivan*, there have been numerous instances of defamation suits apparently brought to establish historical truth or to vindicate an ideological position (or even an entire people). Whether in General William Westmoreland's suit against CBS over its report regarding troop strength during the Vietnam War,²⁹³ or in Ariel Sharon's suit against *Time* magazine for its coverage of the massacres in the Safra and Shatila refugee camps during Israel's Lebanese occupation,²⁹⁴ or in David Irving's recent suit against Deborah Lipstadt for having called him a Holocaust denier,²⁹⁵ one of the underlying concerns of observers is that the actions would put the judiciary in the impossible position of choosing historical truth and naming it legal truth.

IV. TWO UNSATISFACTORY FALLBACK POSITIONS

A. Weaknesses of the "Traditional" News Distortion, Slanting, and Staging Policy

Perhaps the most dangerous aspect of the FCC's traditional news distortion policy is the manner in which its porousness opens it to the kind of expansion and elaboration suggested by the D.C. Circuit's decision in *Serafyn*.²⁹⁶ However, and less dramatically, the traditional news distortion

292. This is not to say that the current application of group libel law is particularly commendable. A description of the quantitative approach employed by the majority of courts reveals its weaknesses. More generally, the question arises whether there should be group libel claims at all. Many have argued that there is a need for a powerful cause of action for group libel in contexts including pornography, sexual harassment, and hate speech (on the Internet and elsewhere). While the particular proposals differ, all begin with the proposition that harmful statements about groups generally have harmful effects on individuals identified as members of the groups. For a recent student argument that a narrowly structured "group vilification" tort would pass constitutional muster, see Mark S. Campisano, Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1997). The broad question of the desirability of group libel claims is beyond the scope of this paper, however. What is significant for this Article is that attempts to prohibit news distortion in situations like that in *Serafyn* conflict with the current law of group libel. Thus, allowing administrative control over news is likely to circumvent the limits of traditional libel law for reasons unexplained by either the FCC or the *Serafyn* court.

293. See *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984). See also RODNEY A. SMOLLA, *Westmoreland v. CBS: Litigating the Symbols and Lessons of Vietnam*, in *SUING THE PRESS* 198-237 (1986).

294. See *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

295. See *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B. Apr. 11, 2000).

296. For a discussion and critique of the *Serafyn* court's approach to news distortion, see *supra* Parts II.B.4, III.A.

doctrine is also subject to critique for its own requirements of extrinsic evidence, significance, materiality, and direction by management.²⁹⁷ Even without the analytic occasion provided by *Serafyn*, the traditional news distortion doctrine would suffer from sufficient infirmities to support its elimination. In light of *Serafyn*, those infirmities should loom large indeed in terms of future policy at the FCC.

The first issue with regard to the application of the policy is the quantum of proof required. Whether at the complaint or the hearing stage, the Commission has made clear that a very significant showing must be made of deliberate distortion.²⁹⁸ This requirement makes it difficult for complainants to prevail in news distortion cases. At the same time, the policy gives the Commission tremendous discretion in its interpretation of the significance of the evidence adduced. By what yardstick is the Commission to assess the “significance” of the evidence?

As previously described, the bottom line of the Commission's traditional approach—regardless of its statements about the importance of fair and accurate coverage—seems to be that even if a broadcast is false, the agency will not look into the making of that broadcast unless extrinsic evidence triggers the inference that the untruth was deliberate and intended by the broadcaster. The broadcast itself—an assessment of its veracity—will not be sufficient to trigger a hearing, apparently because the falsity of the broadcast could just as easily be due to mistake or because the broadcast could not easily be susceptible to a determination of falsity. The required extrinsic evidence, then, is not extrinsic evidence that demonstrates the inaccuracy of the broadcast. Rather, it is extrinsic evidence that demonstrates the falsifying state of mind of the broadcaster. As noted above, the Commission has never defined such extrinsic evidence with specificity. Instead, the agency has provided examples of what might constitute such evidence.

Some of the categories of extrinsic evidence the Commission has mentioned in its news distortion cases—such as an affidavit from an employee discussing instructions to distort or suppress the news²⁹⁹—are perfectly predictable and fit well into the Commission's model. The prototypical case would be one in which a station manager advises a reporter to slant a particular story or, more commonly, where he advises the reporter not to report on some element of the news. An affidavit from the reporter

297. For a discussion of the FCC's requirements and specifications for proper news distortion claims, see *supra* Part II.A.

298. *See id.*

299. *See, e.g.,* In re *Pacifica Foundation*, 95 F.C.C.2d 750, 755-56 (1983). *See also supra* Part II.A.

swearing to the instruction is probative of the broadcaster's intent to distort or suppress. It is deemed to be direct evidence that independent and objective news judgments have been displaced. Whatever it demonstrates about the underlying falsity of the broadcast, it certainly evidences the licensee's own intention to distort or suppress.³⁰⁰

Even this apparently clear category of extrinsic evidence, however, presents problems. First, the history of Commission decisions even in the perfect "employee affidavit" cases is instructive: Simply put, the Commission has not always rushed to credit the proffered accounts.³⁰¹ This

300. In fact, this inquiry is a bit more complicated in the context of news suppression. In the news staging or news distortion case, one can reasonably infer the licensee's intent from employee evidence of station instructions to stage or distort. One could also infer the licensee's belief that its broadcast could be viewed as false, distorted, or staged. These inferences are a bit more troubling in the news suppression cases. News suppression claims allege that the news was "distorted" in the sense that the broadcaster refused to air newsworthy information principally because of economic or ideological imperatives unrelated to the news value of the information. In those situations, the affidavit of an employee recounting instructions not to cover a story, for example, does not necessarily constitute evidence of anything more than a policy of not covering the event. It does not evidence the proposition that the news policy was motivated by economic or ideological interests rather than the broadcaster's perception of the public interest or a difference of opinion as to newsworthiness.

301. In *Michael D. Bramble*, 58 F.C.C.2d 565 (1976), Bramble, the former news director of KBUN, alleged that the station dismissed him from his position because his news story about a public interest research group's grocery price survey was considered incompatible with the interests of local merchants who advertised on the station. *Id.* at 565-66. Bramble said that the station's general manager specifically directed him to "kill" these stories because they displeased sponsors. *Id.* at 566. Rather than holding a hearing because an "insider" had submitted extrinsic evidence of deliberate suppression by top management, the Commission conducted a field investigation into Bramble's allegations and concluded that "it cannot be determined that the licensee did subordinate public to private interest." *Id.* at 572.

In *KMAP, Inc.*, the Commission rejected a news suppression claim and granted the station's application for renewal despite extrinsic evidence of suppression by former employees. 72 F.C.C.2d 241, 245, 254 (1979). The Community Service Organization (CSO) and the United Farm Workers' Organizing Committee (UFWOC) claimed that the license should not have been renewed because the station suppressed news stories about the UFWOC. *Id.* at 241-42. The extrinsic evidence consisted of affidavits from two former employees. *Id.* at 242. The employees claimed that they had displeased station management when they broadcast information about the UFWOC and that station management had issued strict orders that the station would not release any publicity pertaining to Cesar Chavez or UFWOC. *Id.* KWAC responded that at the time that the complaining reporters worked at KWAC, the United Farm Workers' organizing movement had just begun and would "exaggerate the importance of certain so-called newsworthy items." *Id.* at 242. The station claimed that KWAC did not want to be the propaganda mouthpiece for any movement and that management policy forbade carrying press statements from controversial organizations as "news" without first checking them for accuracy. *Id.* The station further claimed that the reporter was unduly sympathetic to the viewpoint of the farm workers. *Id.*

The Commission admonished KWAC that it might "consider a programming policy of absolute exclusion of information concerning a particular group or subject regardless of its newsworthiness to be contrary to the public interest." *Id.* at 243. The Commission also conditioned KWAC's license renewal upon its submission of a written statement "to make clear that the present and future policy of the licensee is to present all news, announcements and other programming required by the public interest, and that there is no exclusionary policy against the broadcast of such subjects." *Id.*

has been good for broadcasters in the past,³⁰² but shows the porousness of the test and the dangerous interpretive license it gives the Commission to make credibility determinations in such a sensitive area.

Moreover, outside the core category of direct employee evidence of falsity, the evidence inevitably becomes more ambiguous. For example, what about quotations from statements in other contexts by agents of the licensee purporting to admit to deceptive news practices? In *Serafyn* itself, the plaintiffs produced some statements by *60 Minutes* personnel in prior news interviews as extrinsic evidence of intent to distort.³⁰³ Of course,

Apparently, KWAC fulfilled this condition in a statement that it filed prior to this decision. In their petition for reconsideration, the UFWOC claimed that KWAC did not adequately respond to the extrinsic evidence the UFWOC provided and that "because of KWAC's unique concentration of control over the distribution of news and information to its Spanish-speaking audience, KWAC had a special obligation to be fair in its treatment of UFWOC." *Id.* The Commission explained:

[A] pattern of disagreement between a licensee and an individual or group over the coverage of news events or stories does not necessarily constitute news distortion or suppression. . . . Despite petitioners' submission of the affidavits . . . we acted properly in rejecting their news suppression allegations. Although, as petitioners argue, many of their allegations admittedly were not stale when made to the Commission, initially we note the affidavits contain no information as to how the general "orders" or "directions" not to broadcast information about UFWOC were conveyed. Further, petitioners have not attempted to rebut KWAC's explanation of how its news policy of seeking verification of statements and press releases by "controversial" organizations may have been misinterpreted by affiants. Most importantly, however, the allegations of specific occurrences of news suppression contained in the affidavits are, at best, vague and ambiguous. For instance, in regard to the portion of Mr. Zapiain's affidavit . . . any Commission inquiry into news suppression must be predicated on information more specific and substantial than allegations that an individual was "asked . . . indirectly, but in certain terms" to suppress news. . . . It appears highly implausible a licensee would establish a policy of suppressing news about a particular organization and then provide that organization with free time for psa's and/or live broadcast of one of the organization's functions. . . . [I]t [also] appears implausible a licensee would offer an organization the opportunity to have such formal input into its station's operation while at the same time maintaining a policy of "suppression" of news about that organization. In view of the above, we again conclude petitioners have raise no substantial and material question of fact in this regard.

Id. at 244-45 (internal citations omitted). This passage is a good example of the way in which the FCC deals with the extrinsic evidence submitted. Although the FCC did admonish the station that it would scrutinize the station's next renewal application carefully, the Commission's scrutiny was due to the station's "lax operating and bookkeeping practices" more than the news suppression allegations. *Id.* at 254.

302. For example, the Commission denied a complaint that CBS had distorted its coverage of the Arab-Israeli conflict. J. Allen Carr, 30 F.C.C.2d 894 (1971). The complainant referenced a *60 Minutes* program in which Mike Wallace had claimed that CBS was unable to obtain an interview with even one high Egyptian government official and provided the Commission with an affidavit from a government official describing CBS's failure to honor their interview appointment. *Id.* at 898. The Commission said that this was "not the type of extrinsic evidence" to which the Commission referred when it discussed news distortion. *Id.* This decision is, of course, extremely probroadcaster. The Commission rationally could have said that if CBS was responsible for the failure to meet with an Egyptian government official, then its knowing statement to the contrary was knowingly false.

303. *Serafyn v. FCC*, 149 F.3d 1213, 1220-21 (D.C. Cir. 1998).

characterizations of prior statements in different contexts are always subject to differences in interpretation of meaning and context.³⁰⁴ What did the statement mean in its original context? Is it in fact applicable to the current context? Thus, even the most basic and arguably incontestable category of extrinsic evidence from which to infer subjective distortive intent necessarily requires interpretation and translation and is itself subject to ambiguity.

Third, the development of news distortion policy jurisprudence depends entirely on the fortuity of having employees or others somehow personally familiar with the situation willing to leak management memos or swear to the licensee's news distorting policies. Although some good cases will surely come up for hearing under this kind of standard, the approach is not the most efficient way to assure that the stations engaging in the worst sorts of distortion or staging will be brought to the Commission's attention. Because the FCC's policy relies on the fortuity and haphazard character of admissions about distortion, it does not in application necessarily achieve its purpose of enhancing the availability of truthful information for public deliberation. What we may get is simply a haphazard set of news distortion complaints determined largely by the availability of former employees willing to testify about station news distortion policies. So the dangers of governmental content review are not outweighed by an efficiently administrable standard.

On the other hand, the standard may also be overbroad. Although whistleblowing in fact often brings to light many abuses that would otherwise be concealed, not all whistleblowers necessarily tell the truth. In some cases, whistleblowers' claims may result from misinterpretations or even personal disgruntlement or ideological agendas of the employees. Yet, because hearings are predicated on such evidence, a Commission inclined to investigate such claims more assiduously than the Commissions of the past may well impose costly hearings on broadcasters who ultimately are exonerated from the claims of distortion.³⁰⁵

Fourth, some other categories of what might be classed as "extrinsic" evidence—evidence from outside the broadcast itself—may be problematic from the outset. For example, in *Serafyn*, the plaintiff made the argument that evidence from a dictionary which did not support the broadcast's translation of a significant word should be considered extrinsic evidence adequate to

304. See discussion *supra* Part III.A.4.b.

305. Of course, any legal system imposes costs on defendants who ultimately win, and similar arguments can be made in numerous different legal contexts by prodefendant interest groups. What, then, makes these limits inherent in any legal process *especially* problematic here? This Article claims that these costs are unjustifiable when incurred simply in an attempt to find a proxy for direct examination of broadcaster content decisions.

trigger a hearing.³⁰⁶ Such evidence may suggest inaccuracy in the translation. Given differences in dictionaries, however, it might just as easily suggest simply an alternative translation.³⁰⁷ It would only be considered evidence of a subjective intent to distort if the Commission employed some kind of reckless disregard standard. Such a standard would require that in “objectively verifiable” errors, the Commission should infer the requisite distortive intent from the obvious difference between the translation used and the one in the dictionary. Why should we charge broadcasters with the knowledge of contradictory information outside the broadcast so long as there is nothing about their translator’s credentials that is inherently suspect? Wouldn’t this guarantee that, apart from problems of translation discussed above, a broadcaster could never translate a word if it was described with different meanings in various dictionaries?

More problematic yet is the FCC’s recognition of outtakes as the kind of extrinsic evidence from which one could infer intentional distortion. The idea behind including outtakes in the category of permissible extrinsic evidence is that a comparison of what was broadcast and what was edited out can provide mute testimony to what the broadcaster must have intended. The nature of the editorial process, however, renders such a comparison fruitless in the vast majority of circumstances.

What is the classic instance of this effect? One can imagine the FCC constructing a hypothetical in which the outtakes include a clearly and dispositively exculpatory piece of evidence, while the broadcast as aired contains only a stream of circumstantial and implicitly inculpatory evidence. Most outtakes will not present the clear case, however.³⁰⁸ Editing raw videotape and crafting a story from the mass of visuals and interviews available is the essence of the editorial function.³⁰⁹ It entails selecting and organizing—and compressing—hours of often disconnected material into a coherent story. It is not a mechanical process. Within the broad framework provided by current journalistic norms,³¹⁰ different producers, reporters, and

306. *Serafyn*, 149 F.3d at 1218.

307. For a recent criticism of judicial reliance on dictionary definitions, see, for example, Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999).

308. Arguably, even this “classic” use of outtakes may not fit into the extrinsic evidence model the Commission adopted.

309. See, e.g., Note, *The First Amendment and Regulation of Television News*, 72 COLUM. L. REV. 746, 768-69 (1972) [hereinafter *First Amendment and Regulation*].

310. There is quite a bit of diversity even in the pool of common journalistic norms. From now-traditional “objective” reporting to “public journalism,” there are a variety of models of good reporting. Regarding public or community journalism, see, for example, DAVID MERRITT, PUBLIC JOURNALISM AND PUBLIC LIFE: WHY TELLING THE NEWS IS NOT ENOUGH 113-22 (1995); Theodore

editors will come up with different accounts, using and emphasizing different aspects of the news material gathered.

In any event, very few cases will involve the clear choice between totally exculpatory and totally inculpatory matter. In the context of virtually unavoidable ambiguity, then, the notion that outtakes can reliably serve as clear “extrinsic” evidence of news distortion is unpersuasive. After all, unless there is direct corroborative testimony of intent to distort the news, the mere fact that a producer selected some particular material rather than some alternative footage from the mass of available film is no more probative of intent than a claim that entirely extrinsic references to dictionaries or other accounts of historical reality show the inaccuracy of the broadcast program. Ultimately, the approach that looks at outtakes as extrinsic evidence of intent to distort is actually circular. It is only by assuming the truth of the material left out of the broadcast that the FCC could conclude in any given case that a station’s knowing refusal to include the material in what aired must be evidence of knowing distortion.

Finally, it may be that certain kinds of claims about news practices are more capable of being subject to extrinsic evidence than others. If the claim is one of rigging or staging, it may be possible to find evidence that someone in the news department arranged for a truck to be blown up in exactly the same kind of explosion that the program claimed occurred in the ordinary course of use.³¹¹ Or if the claim is one of failing to disclose a conflict of interest, it may be relatively easy to establish the relationships among the participants and even the knowing decision not to disclose the relationships.³¹² However, even if extrinsic evidence might be relatively easy to imagine in these sorts of contexts, other types of more complex distortion or suppression claims would be unlikely to be evidenced by clear extrinsic documentation.

In addition to the problems of the extrinsic evidence standard, the other limiting elements of the news distortion policy also make the policy so difficult to apply that it may be ineffective in practice. The malleability of the “significance” standard is self-evident. The very difference between the FCC and the *Serafyn* court suggests that what counts as significant evidence of

L. Glasser & Stephanie Craft, *Public Journalism and the Prospects for Press Accountability*, 11 J. MASS MEDIA ETHICS 152-53 (1996); Alicia C. Shepard, *The Gospel of Public Journalism*, AM. JOURNALISM REV., Sept. 1994, at 28.

311. See Tom Mashburg, *GM Sues NBC, Says Crash Test Rigged*, BOSTON GLOBE, Feb. 9, 1993, at 1.

312. Even here, however, there are fine lines. There may be situations in which matters of degree and judgment would lead one person to say that a conflict requiring disclosure existed while another person might not be so sure.

distortion (as opposed to immaterial, *de minimis* inaccuracy) can vary from evaluator to evaluator.

It is also difficult to demonstrate that slanting or distortion has in fact been undertaken in response to high-level managerial instruction. Rather than adopting a more agency-based notion, in which the broadcaster would be deemed liable for the foreseeable unauthorized actions taken on its behalf, the Commission has adopted a requirement of direct licensee policy.³¹³ As noted above, FCC-watchers have argued that the doctrine is so seldom applied that it is effectively toothless despite its lofty goals.³¹⁴ If so, that raises the question of what benefits, if any, are gained from its continued existence.

Finally, the news distortion policy creates a significant sanction problem. Because it is often claimed in the renewal or license application context, the Commission has the choice either of denying the application for license or renewal, or approving the application with an admonitory letter. The middle ground of forfeitures and fines has not been traditionally available.³¹⁵

Despite these various critiques—or perhaps *because* of the FCC's recognition of the difficulties with governmental review of news content in a First Amendment culture—the Commission has not sought to apply its news distortion doctrine aggressively. The continuing existence of the policy, however, enabled judicial second-guessing of the Commission's stance of administrative prudence. Whatever its flaws as traditionally articulated and applied, the policy as judicially revised in *Serafyn* is far more problematic—both doctrinally and as a matter of policy. If the policy remains on the books, it is sure to be an attractive nuisance to courts and policymakers seeking to improve public discourse.

B. The Narrowing "News Staging" Alternative

Although this Article has criticized the administrability of both the traditional and the "new," post-*Serafyn* news distortion policy, it must still address the question whether there is any aspect of the rule that can or should be salvaged. Should the whole policy be scuttled or is a narrower interpretation plausible? Is there some way of allowing the FCC to impose sanctions on a limited category of "fabricated" or "staged" news, for example? If so, is such a middle ground a good and workable idea as a matter

313. See *supra* notes 69-70 and accompanying text.

314. See RAY, *supra* note 28, at 4-7.

315. Indeed, this was the Commission's articulated reason for adopting its rule prohibiting hoaxes. Amendment of Part 73 Regarding Broad. Hoaxes, 7 F.C.C.R. 4106 (1992) (Report and Order).

of mass communications policy?

This is not an entirely hypothetical question. Whether as a result of the need for sensational news, particularly in investigative programs, or because of cost and time pressures that push reporters and producers to cut journalistic corners, or just as a result of bad judgment, there have been a number of recent instances in which the press fabricated the news. A familiar example in the broadcast context is the 1992 *Dateline NBC* debacle, in which NBC News, without disclosure, rigged crash tests with remote controlled flaming rockets in order to illustrate the possibility of fire during a program questioning the safety of GM trucks' gas tanks.³¹⁶

The first issue, then, is whether there is a sufficiently principled—or at least pragmatically serviceable—distinction between news staging and rigging and news slanting and distortion to justify an FCC policy prohibiting the former and avoiding review of the latter. This is not a new concern. Commissioner Nicholas Johnson—in an argument for more precise FCC standards regarding impermissible staging—demonstrated the difficulties with the current FCC approach in 1969.³¹⁷ Focusing on the vagueness and overbreadth of the Commission's definition of news staging when applied to situations like the instigation of news events by the press, Commissioner Johnson argued that the Commission should instead adopt more certain and clearer newsgathering standards.³¹⁸

The first pass at this question might focus on the distinction between the media reporting on the news as opposed to making the news. However, while viewers and listeners intuitively understand this distinction, we can also think of any number of situations on the periphery which make it difficult to maintain as a bright line.³¹⁹ This is, *inter alia*, because it is very difficult to

316. See, e.g., Mashberg, *supra* note 311. Similarly, there have been claims of fabricated news in print as well. See *supra* note 73.

317. Inquiry into WBBM-TV's Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (Pot Party), 18 F.C.C.2d 124, 143-61 (1969) (Comm'r Johnson, dissenting).

318. *Id.* at 152-55. Commissioner Johnson provided the following suggestions:

[A]nalysis [sh]ould include . . . (1) the extent to which television caused, or in some way influenced the occurrence in question; (2) the legality of the event in question—and whether society in general views the crime as forgivable (e.g., the dissemination of birth control information) or unforgivable (e.g., the smoking of marihuana, prostitution, etc); and (3) the duty of the broadcaster to inform the police in advance of an impending event's occurrence instead of filming it.

Id. at 156.

319. See also *supra* note 79 (discussing difficulty of distinguishing news staging from broadcaster agreement to cover a future event); *infra* Part V.C. There are a number of editorial practices that people might characterize as distortion or staging. Some examples include: retaping an interview to catch both subjects' reactions when only one camera is used, using old background film for a new story without attributions, suggesting that other source's film is the station's own, using a voiceover or

imagine any pure types either of slanting or of staging. News staging and rigging and news distortion are often quite intertwined. Thus, one of the particularly troubling things about the NBC “dramatization” of the truck explosion is that the event had to be staged by the broadcaster because it did not easily happen on its own.³²⁰ Therefore, in order to convince the audience that these types of trucks are actually dangerous, it is at least arguable that the broadcaster made the crash look easier and more common than it would be in the ordinary course of events. That circumstance could well be characterized as an example of news staging as inextricably intertwined with news slanting or distortion.

Yet another rationale for why news staging is to be deemed “heinous” is that it is akin to entrapment in the criminal law or to misrepresentation and fraud in torts; it undermines the role of the press and imports an element of corruption into the process. How is this different, one might ask, from mistakes the news media make in sensationalizing and hyping the news for their own economic interests and in order to titillate an increasingly jaded audience? There may be a difference between making a mistake or exaggerating an existing story that does not owe its origin in any specific way to the media itself and the classic news-staging situation in which the event was actually orchestrated by the media. In the latter instance, the media is centrally part of the story being told. Putting the media at the center of the story leads to two types of difficulties. One is the possibility of corruption and self-serving decisions made by an institution that has abandoned the role of neutral observer. The other is the effect of appearance—leading to the deligitimation of the role, credibility, and accountability of the press.

Ultimately, I do not believe the distinction between news staging and news slanting or distortion is sufficiently workable, especially at the margins. The multiplicity of possible news staging scenarios emphasizes the difficulty of distinguishing between fabricated news acted out at the behest of the press and news events instigated or enhanced by press coverage. Nevertheless, if the Commission feels it politically necessary to craft something akin to FTC-like consumer protection rules against deception,³²¹ then it should draft a

accompanying story to imply more than is actually on the tape, simulating actual events without disclosure, and fabricating stories.

320. See Mashberg, *supra* note 311 (noting that NBC designed the test to “guarantee” a fire).

321. The Federal Trade Commission (FTC) regulates deceptive practices in addition to taking other consumer and commerce-protective measures. See 15 U.S.C.A. §§ 45, 57(a) (1999) (making deceptive practices and unfair methods of competition unlawful and authorizing the FTC to adopt rules pursuant to statutory authority). The Federal Trade Commission’s web site reveals a sampling of the kinds of consumer protection initiatives undertaken by the Commission. See Federal Trade Commission, Consumer Protection, available at <http://www.ftc.gov/ftc/consumer.htm> (last visited Jan.

policy very narrowly applicable to core examples of news fabrication.

V. NEWS DISTORTION AND THE PUBLIC INTEREST: OF CONFLICTING DEMOCRATIC VALUES

An analysis of the difficulties posed by the specifics of the FCC's traditional approach to claims of news distortion and by the D.C. Circuit's new slant on the issue raises the more general question: Can any news distortion policy deliver on the promise of improving press accuracy and political discourse without unduly trampling expressive freedoms? The underlying problem is that fundamental democratic values are implicated on both sides of the debate.

The interventionist argument, particularly in the current news climate, can invoke sufficient examples of undesirable press behavior to serve as a viable source of pressure on the Commission. At least until the appointment of Michael Powell as the new Chairman of the FCC, one could have predicted that the likelihood of such pressure would be enhanced by the 1990s Commission's increasing reliance on expansive regulatory rationales far beyond the scope of spectrum scarcity. Thus, during regulatory times in which market failure and *quid pro quo* arguments are increasingly used to justify FCC regulation of broadcast speech and behavior, arguments for intervention to improve democratic discourse are viewed as increasingly powerful.³²² This Article argues that the interventionist choice with respect to content itself is predictably worse than a market constrained by structural rules, press self-criticism, and public pressure. The Article does not take the position that any solution is perfect. Indeed, much can be said about the degree of, and causes for, the failure of the electronic media to enhance the public sphere. But in assessing the 'second best,' this Part argues that regulating news distortion is likely both to fail in its ends and to impose other public costs inimical to democratic norms.

A. Policy Arguments in Support of Regulating News Distortion

The desire to regulate news distortion comes from a perception that slanted or rigged news is harmful to the public interest.³²³ As a policy matter, then, we must first identify the harms of news distortion and the rationales

8, 2001).

322. See, e.g., *supra* note 15.

323. See CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 (1969) ("Rigging or slanting the news is a most heinous act against the public interest—indeed there is no act more harmful to the public's ability to handle its affairs.").

for regulation. We must then determine what, if anything, government intervention can do to ameliorate those harms. Is the FCC's intervention justified by the rationales for regulating news distortion? Can the FCC profitably address such concerns regulatorily using its traditional interpretation of the news distortion doctrine? Do the recent developments in the Clinton-era FCC's regulatory rationales support such intervention?

1. *The FCC's Regulatory Values—Truth and Press Integrity*

Although the Commission's language in the exhortative portions of its news distortion cases is rhetorically rich, it is not precise about either the harms of distortion or the benefits of distortion policy in addressing those harms. Rather, the Commission focuses on the benefits of news and the importance of television. The cases reveal two interrelated arguments: one focusing on the centrality of neutral news reports to the public and the other focusing on the integrity of the press. Public confidence in the integrity of the press is seen as essential to democratic functioning.

There is much dicta in the cases about the importance of news and the centrality of television:

We have allocated so much spectrum space to broadcasting precisely because of the contribution it can make to an informed public. Thus it follows inevitably that broadcasting must discharge that function responsibly, without deliberate distortion or slanting. The nation depends on broadcasting, and increasingly on television, fairly to illuminate the news.³²⁴

In midst of the Vietnam war—where television news reports transformed the conflict into a highly controversial “living room war”—the FCC's language about the role of news emphasizes the importance of truthful, neutrally presented news. This is seen as necessary to the public interest because of its contribution to an informed public. Under this view, with adequate information, the public will engage in rational self-governance and make good decisions.³²⁵ The implicit contrast is an uninformed and manipulated public. In *Network Coverage of the Democratic National Convention*, one of the seminal slanting and staging cases, the Commission characterized directed slanting as “amount[ing] to a fraud upon the public . . .

324. Complaint Concerning the CBS Program “The Selling of the Pentagon,” 30 F.C.C.2d 150, 153 (1971).

325. See Mrs. J.R. Paul, 26 F.C.C.2d 591, 592 (1969) (noting that fair reporting promotes “robust wide-open debate” on important public controversies).

patently inconsistent with the licensee's obligation to operate his facilities in the public interest."³²⁶ The FCC values news delivered without staging, slanting, or distortion for its importance to self-governance and the democratic role of citizens: to "the public's ability to handle its affairs."³²⁷

This approach also suggests that the public, which increasingly relies on the electronic press, must be able to assume responsibility and neutrality on the part of broadcasters.³²⁸ Thus, the Commission's rationale is also based on the need to have integrity in the press process.³²⁹ In one case, for example, the Commission says, "[t]he integrity of news broadcasting is crucial to an informed, responsible electorate and the Commission has stressed the continuing duty of licensees to take adequate measures to insure such integrity."³³⁰

In its significant opinion in *The Selling of the Pentagon*, the agency exhorted broadcasters to examine their editorial judgments because "what ultimately is at stake in this entire matter is broadcasting's own reputation for probity and reliability, and thus its claim to public confidence."³³¹ The connection between the public's need to be informed accurately and its faith in the institutions providing the information was well articulated by Commissioner Nicholas Johnson in the infamous *Pot Party* case:

Charges [of news staging] are serious for a number of reasons. Although for thousands of years many believed that when man looks at the world he perceives not reality but some image of a greater truth concealed from view, television and other modern forms of communication have stood this ancient notion on its head. For many

326. Network Coverage of the Democratic Nat'l Convention, 16 F.C.C.2d 650, 657 (1969).

327. CBS Program "Hunger in America," 20 F.C.C.2d 143, 151 (1969).

The Commission, responding to a request for a declaratory ruling that the *Dick Cavett Show* made changes in response to pressure from the White House, stated:

In sum, our policies are designed (i) to promote robust, wide-open debate involving both sides to a controversy, to the end that the American public will be informed; (ii) to take action against rigging or slanting of the news, wherever we may appropriately do so; and (iii) to avoid the censor's role, "including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself."

Nat'l Citizens Comm. for Broad., 29 F.C.C.2d 386, 387 (1971), *recon. denied*, 32 F.C.C.2d 824 (1971) (quoting Mrs. J.R. Paul, 26 F.C.C.2d 591, 592 (1969)).

328. This is not to say that the FCC requires only believable news, but rather that the news media must be seen as believable and reliable. Otherwise, for example, there would be no reason for the public to believe true but incredible news. Countering our false stereotypes may be especially important and especially vulnerable to news distortion claims.

329. Inquiry Into WBBM-TV's Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (*Pot Party*), 18 F.C.C.2d 124, 155-65 (1969) (Comm'r Johnson, dissenting).

330. Howard L. Gifford, 50 F.C.C.2d 125, 126 (1974) (rejecting news distortion claim arising from television stations announcing election winners before votes were counted).

331. CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150, 154 (1971)

today, truth is the image of reality seen on television. . . .

For this reason, the integrity of the mass media is essential to its role of communicating honest opinion and accurate information. When people lose their faith in even isolated incidents of news as they are depicted to them, they will begin to distrust all news presentations. It is therefore essential that no element of falsity or deception creep into the news. Once it does, like the proverbial "rotten apple," the rest of the barrel will decay.

Especially important, democracies function, or fail to function, on the accuracy of the information and opinion supplied to their citizens. When voters cast their ballots for law and order and against violence, for example, they do so on the basis of what they understand to be the true state of the world. . . . If these events did not in fact occur at all, the ballots cast become unjustifiable and irrational. Democracy ceases to function, and arbitrariness and injustice enter.

It is essential, therefore, that public confidence in the integrity of the broadcaster's product be maintained.³³²

The harm of falsity under this view is not primarily that it will lead to bad decisions in the specific instance, but that it will lead the public to opt out of mainstream institutions for self-governance and thus undermine the overall functioning of democracy.³³³

2. *The Modern Reality of the Press: Public Ambivalence and Structural Pressures on Press Objectivity*

Most people today rely on television news for their knowledge of current events.³³⁴ Yet that dependency is matched by a frequently articulated distrust of the media.³³⁵ While media critics describe the importance to modern

332. *WBBM-TV*, 18 F.C.C.2d at 145-46 (Comm'r Johnson, dissenting). Commissioner Johnson therefore called for the FCC to "evolve rules and standards for proper licensee behavior in the area of investigative reporting" in order to "formulate a consistent approach to the broad range of staging problems." *Id.* at 146.

333. For a view that questions the interest protected by the regulation of news content and the concrete harm of falsehood, see *First Amendment and Regulation*, *supra* note 309, at 758.

334. Public Interest Obligations, *supra* note 1, ¶ 1 & n.1.

335. For an argument that the press's current coverage strategies undermine its social role and lead to public cynicism about the press as an institution, see, for example, Clay Calvert, *The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later*, 22 VT. L. REV. 493, 500-05 (1998) (citing other relevant sources therein); *Media Gets Vote of No Confidence*, ROLL CALL, Jan. 11, 2001, available at 2001 WL 7038417 (describing results of polls showing lack of public confidence in news media).

journalism of the value of a neutral and objective electronic press, they point to systematic constraints on the private media's ability to achieve the goals of neutrality and objectivity.³³⁶

The media is blamed for shaping and distorting events and not merely reporting them, as conduits might.³³⁷ On one account, this is because of specific substantive biases and agendas.³³⁸ On another account, it results from structural and economic constraints that narrow the scope of what the

336. Media analysts describe numerous sorts of constraints on the media, including: commercial pressure by advertisers, pressure by conglomerate corporate owners, competitive pressures to obtain "scoops", organizational cultures, capture by small groups of elite sources, and medium-specific sorts of constraints (particularly in connection with telegenicity norms and particular types of recurring narrative structures in the electronic media). Critics also challenge the news values of objectivity and neutrality. See TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 249-82 (1980); DORIS A. GRABER, *MASS MEDIA AND AMERICAN POLITICS* 69-102 (2d ed. 1984) (describing newsmaking and news reporting models); MICHAEL PARENTI, *INVENTING REALITY: THE POLITICS OF NEWS MEDIA* (2d ed. 1993); MICHAEL SCHUDSON, *DISCOVERING THE NEWS* (1978); Robert Rutherford Smith, *Mythic Elements in Television News*, in *SOCIAL MEANINGS OF NEWS: A TEXT-READER* 325-50 (Dan Berkowitz ed., 1997); Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 *RUTGERS L. REV.* 609, 680-83 (1991) (citing other relevant source therein); *infra* notes 340-41; *supra* note 251.

337. Media theorists argue that such a shaping and agenda-setting function by the media is unavoidable. See generally *SOCIAL MEANINGS OF NEWS: A TEXT-READER* (Dan Berkowitz ed., 1997). It results from the fact that media workers at every bureaucratic level—reporters, editors, producers, and publishers—have to select which of the day's events should be covered, how, and in what order. That process of selection is one of construction. See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 179-82 (6th ed. 2000) (addressing subjectivity of "objective" news); Stuart Hall, *The Determinations of News Photographs*, in *THE MANUFACTURE OF NEWS* 234 (Cohen & Young eds., 1981). Indeed, the very definition of news as a selection from the day's events assumes a narrow compass for what could otherwise constitute news. Moreover, we cannot ignore the degree to which the prototypical press conference, photo opportunity, rally, and hijacking are staged by their participants with a view to news coverage. See generally DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* (1987).

Nevertheless, there is popular sentiment that the press is biased and manipulates events in a fashion beyond the unavoidable. See, e.g., Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 *TEX. L. REV.* 1627, 1659-60 (1999) (citing JOHN ZOLLER, *A THEORY OF MEDIA POLITICS* (forthcoming) (on file with Richard Hasen, author of Campaign Finance Laws and the Rupert Murdoch Problem, 77 *TEX. L. REV.* 1627 (1999) (regarding public perception of liberal media bias)); Felicity Barringer, *No President-Elect? Blame the News Media*, *NY TIMES*, Dec. 11, 2000, at C8. See also S. ROBERT LICHTER ET AL., *THE MEDIA ELITE: AMERICA'S NEW POWERBROKERS* (1986) (providing social science study making the case for liberal media bias because elite journalists self-identified as liberal).

338. See HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK AND TIME* 304-08 (1980); GRABER, *supra* note 336, at 71, 342. As one reporter put it: "The accusation that the news media are biased in favor of liberals, Democrats and especially liberal Democrats has become the conventional wisdom of the age." Eric Black, *Slant on the News; U of M Study Disputes Notion of 'Liberal Media.'* *STAR TRIB.*, May 5, 1998, at 16A. The same theme has pervaded letters to the editor and op-ed pieces regarding media coverage of the 2000 presidential campaign. See, e.g., Elizabeth Jensen, "Nightline" *E-mail Goof Renews Cries of Media Bias*, *L.A. TIMES*, Dec. 15, 2000, at F2.

private press can report.³³⁹ Media critics charge that structural constraints on media independence have a deeply distortive effect on news coverage.³⁴⁰ Every significant electronic purveyor of news is now part of a large conglomerate organization.³⁴¹ The economic imperatives of increasingly clustered information outlets may well lead corporate parents of news organizations to discount and undermine journalistic norms of thoroughness, neutrality, accuracy and investigative courage.³⁴² Conglomerate control of news reporting leads to obvious risks ranging from cross-promotions to the avoidance of controversy that could affect the entity's non-news businesses. Regardless of whether even commonly owned mass communications outlets will sometimes have economic incentives to provide diverse programming generally, the increasing number of mega-mergers in the communications market raises sharply the question of what will happen to news and public discourse as a result. Will there be an adequate commitment to news programming? Even if so, will the consolidations suppress adequate diversity of news programming? Will the consolidations put increasing pressure on the journalistic independence of news divisions? There are claims that it will be very difficult for news organizations within large conglomerates with other economic interests not to pander to those economic interests—whether upon specific request and direction or because of self-censorship caused by knowing where one's bread is buttered. Even without corporate parents with nonmedia interests, it stands to reason that advertising support alone can affect television coverage for reasons other than journalistic newsworthiness norms.

Both the right and the left criticize the electronic media for slanted coverage of news.³⁴³ Critics charge bias both in what is covered and in how it is covered. Some observe systematic failures to cover either particular groups

339. See generally BAGDIKIAN, *supra* note 337; EDWARD HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* (1988); GANS, *supra* note 338; GRABER, *supra* note 336, at 71-87.

340. See generally BAGDIKIAN, *supra* note 337; ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* (1989); ROBERT W. MCCHESENEY, *RICH MEDIA POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999).

341. For sources describing the consolidation, see, for example, BAGDIKIAN, *supra* note 337; EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA* (1999); David Waterman, *CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 FED. COMM. L.J. 531, 541 (2000); Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551 (2000); *Where Things Stand*, BROADCASTING & CABLE, Jan. 1, 2001, at 22-31.

342. For an argument calling for a governmental review of such effects, see, for example, National Broadcasting Co., 14 F.C.C.2d 713, 719-21 (1968) (Comm'r Nicholas Johnson, dissenting).

343. For example, both Fairness and Accuracy in Reporting (FAIR), a liberal group, and Accuracy in Media (AIM), a conservative counterpart, claim that the media is biased against their respective viewpoints.

of people³⁴⁴ or particular types of stories.³⁴⁵ While claims of bias are directed to the print press as well, the electronic media are often the primary focus of arguments about media bias and harm.

With regard to the news that is actually covered, critics claim that broadcasters are factually inaccurate, tell incomplete stories, are sometimes biased, and are likely to exaggerate and sensationalize stories in the race for ratings.³⁴⁶ Recent history of dramatizations without disclosure has also led to charges that the need to sensationalize leads to actual staging of events to achieve newsworthy effects.³⁴⁷

Critics claim that the effect of such direct and indirect distortions is to undermine democratic values. Whether the press is seen as a primary shaper of social values or simply as a significant social mechanism reinforcing existing beliefs, media critics argue that the press has an undeniable impact on public perceptions.³⁴⁸ When that impact is the result of biased and one-sided accounts of important events, it is thought to be harmful both substantively, because of its inaccuracy, and procedurally, because of its effect on the ultimate credibility of the press.

Reliance on a diversity of outlets and counter-speech to counteract the influence of false and bad speech or information may be, in the critics' view, increasingly unrealistic. With the many mergers both in the new and old media,³⁴⁹ there is an undeniable consolidation of what were otherwise independent news sources or potential sources. While magazines and

344. See generally BAGDIKIAN, *supra* note 337, at 45-46; CHRISTOPHER P. CAMPBELL, RACE, MYTH AND THE NEWS (1995); ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA (2000); PAMELA T. NEWKIRK, WITHIN THE VEIL: BLACK JOURNALISTS, WHITE MEDIA (2000).

345. See, e.g., BAGDIKIAN, *supra* note 337, at xxvii-xxix; GRABER, *supra* note 336, at 89-96; SHANTO IYENGAR, IS ANYONE RESPONSIBLE? (1991) (suggesting that the episodic character of television news coverage of politics reduces ability to see systemic problems); Stephen D. Reese, *The News Paradigm and the Ideology of Objectivity: A Socialist at the Wall Street Journal*, in SOCIAL MEANINGS OF NEWS 420, 422-27 (Dan Berkowitz ed., 1997) (describing news media's use of the objectivity paradigm to reinforce liberal capitalist hegemony); E.J. Dionne, Jr., *Back to Bias*, WASH. POST, July 14, 1998, at A15 (describing FAIR report about media's conservative coverage on economic issues).

346. See, e.g., John H. Fuson, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629, 644-45 (1999) (tracing the evolution of sensationalistic news from William Randolph Hearst to Rupert Murdoch); David A. Logan, "Stunt Journalism," *Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 166-67 (1998) (tracing the increasing "tabloidization" of television news). Authors who focus on the coverage of African Americans in the media discuss the ways in which such coverage reflects racial stereotypes. See generally CAMPBELL, *supra* note 344; ENTMAN & ROJECKI, *supra* note 344.

347. See Mashberg, *supra* note 311 (discussing accusations that NBS "rigged" a truck to explode).

348. See, e.g., Lili Levi, *supra* note 336, at 672-73 & n.211 (1991) (citing other relevant sources).

349. See, e.g., Stephen Labaton, *FCC Approves AOL-Time Warner Deal, With Conditions*, N.Y. TIMES, Jan. 12, 2001, available at 2001 WL-NYT 0101200061.

newspapers do provide alternatives to news sources in the electronic media, most Americans still get their news and information primarily from the electronic media. Studies of work and leisure life in the United States show that people have little time for participation in public life.³⁵⁰ What makes us think that the average American, who has selected one or another of the traditional news shows as his primary information source, will spend more of his scarce time and resources in flipping to other channels or reading a variety of different print sources in order to increase his exposure to various different versions of the same news?

As for the Internet as a potential savior of the commons and public life, current developments in that medium may be as worrisome as they are hopeful. Having been characterized at the beginning by cyberlibertarians as the new frontier of liberty and self-regulating social order, the current generation of the Internet has actually become a two-track place. On one track—a commercial, entrepreneurial model—information is viewed as a commodity and purveyed for profit, thus raising many of the same issues of economic influence discussed above in connection with television news. On the other, “political,” track, there is admittedly an abundance of news and information including otherwise previously untapped sources. However, the “political” Internet has no quality filters and is also host to a proliferation of easily accessible hate propaganda.³⁵¹

3. Possible Interventionist Rationales

Stories of press bias, insensitivity, sensationalism, intrusiveness, arrogance, superficiality, and timidity toward economic and political authority naturally prompt reformist responses. The balancing effect of effective counter-speech—the traditional constraint—is arguably limited for many people. If history is a guide, this is likely over time to lead to increasing pressure on the FCC to regulate. After all, the heyday of the traditional news distortion policy was the early 1970s, when the FCC and broadcasters suffered congressional and other inquiries into news staging and distortion. The court's approach in *Serafyn* reflects the cyclical character of calls to regulate controversial speech.

Importantly, the new pressure to regulate comes in the context of a new

350. See generally JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1993).

351. For views on the increasing amount of Holocaust denial, especially on the web, see Credence Fogo-Schensul, *More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241 (1997-98); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35 (1997).

and more complex regulatory framework. The traditional rationale for the reduced First Amendment status of the broadcast medium was the scarcity of broadcast frequencies.³⁵² For much of the history of radio as a mass medium, the FCC used the notion of spectrum scarcity to subject broadcasting to a degree of oversight foreign to the print world. Claims of scarcity were used to justify not only regulations of industry structure, but also content regulations.³⁵³ Communications regulation has changed significantly in the

352. See *supra* note 13 and accompanying text.

353. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (relying on scarcity in rejecting constitutional challenge to fairness doctrine); *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (upholding Commission's chain broadcasting regulations on scarcity grounds). See also sources cited in *supra* note 13. Historically, the FCC has imposed three principal types of content regulations on the electronic mass media. One type is designed to improve the political process directly. Communications Act of 1934, 47 U.S.C. § 312(a)(7) (1999) (federal candidate right of access); *id.* § 315 (equal opportunities for candidate advertising).

A second type of FCC content regulation is designed to benefit children. See *Action for Children's Television v. FCC*, 59 F.3d 1249, 1262 (D.C. Cir. 1995) (prohibiting regulation requiring that indecency be channeled to late night hours); *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10,660 (1996) (affirmative obligation requiring broadcasters to provide three hours of children's educational programming per week).

The third type of FCC content regulation was designed to improve the quality of news and nonentertainment programming broadcast to the public. Over the years, the Commission adopted both direct and indirect content-improving policies. For example, the agency first articulated in 1949 the balanced programming obligations that came to be known as the fairness doctrine. See *Report on Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1247-48 (1949). See also *supra* note 2. In addition, the Commission in 1960 imposed an affirmative obligation on broadcasters to ascertain and provide responsive programming for the needs and interests of their communities. See *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960). Although it emphasized broadcaster discretion in the selection of nonentertainment programming, the Commission's *En Banc Programming Inquiry* nevertheless listed 14 program types "usually necessary to meet the public interest, needs and desires of the community." *Id.* at 2314. In 1973, despite its previous statements, the Commission added a ten percent informational programming "guideline" for Commission staff in acting on license applications. Amendment of Part O of the Commission's Rules, 43 F.C.C.2d 638 (1973). In 1975, the Commission decided that all applications proposing less than five percent "local" and less than five percent "informational" programming should be referred to the Commission for action rather than being addressed at the staff level. Amendment to Section 0.281 of the Commission's Rules, 59 F.C.C.2d 491 (1976).

Subsequently, the Commission eliminated its specific and highly detailed formal ascertainment procedures in its radio and television deregulation proceedings, although it still retained broadcasters' obligations to program in the public interest in response to ascertained community needs. See *Report and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logs for Commercial Television Stations*, 98 F.C.C. 2d 1076 (1984), *recon. denied*, 104 F.C.C.2d 358 (1986), *rev'd in part sub nom. Action for Children's Television v. F.C.C.*, 821 F.2d 741 (D.C. Cir. 1987). The Commission also retreated from the program categories in the *En Banc Programming Inquiry* report. *Id.* Finally, as pointed out *supra* note 2, the Commission decided to cease enforcement of the fairness doctrine after concluding in the 1980s that the doctrine no longer served the public interest. *Syracuse Peace Council v. WTVH(TV)*, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

The Commission had also toyed with regulation of entertainment programming. For example, in the early 1970s, it issued an order reminding licensees to consider the desirability of broadcasting "drug-oriented" lyrics on the radio. Public Notice, 28 F.C.C.2d 409 (1971), *modified by* Memorandum

past decade.³⁵⁴ Despite its appearance here and there in judicial opinions,³⁵⁵ the regulatory rationale of scarcity has decidedly taken the back seat. In the 1980s, the Commission began a deregulatory trend sparked by the recognition that the spectrum scarcity argument could not bear the weight of the content regulations it was supposed to justify. The elimination of the fairness doctrine may well have been the apogee of this deregulatory trend, at least symbolically. Adopting the rhetorics of deregulation, of parity between the broadcast and print press, and of increasing media convergence, the Commission dismantled many of its controls over both content and industry structure.

Yet the deregulatory trend in broadcast content regulation did not end the matter. Arguments for regulatory parity between print and broadcast were overshadowed in time by a different type of regulatory discourse. Mass media policy developed a schism. On the one hand, the Commission embraced the rhetoric of deregulation in all but a few areas.³⁵⁶ On the other hand, new regulatory rationales developed to replace scarcity. While the most common of these new regulatory justifications is the protection of children,³⁵⁷ both the Commission and media theorists have advanced additional regulatory theories not as limited as the child-protection rationale.³⁵⁸ Some characterize free spectrum allocation as an example of government largesse deserving of a public interest quid pro quo on the part of

Opinion and Order, 31 F.C.C.2d 377 (1971), *aff'd sub nom.* Yale Broad. Co. v. FCC, 478 F.2d 594 (D.C. Cir. 1973). During that decade, FCC Chairman Richard Wiley also pressured and threatened broadcasters into adopting what came to be known as the "family viewing" policy, prohibiting the early prime-time broadcast of entertainment programming inappropriate for viewing by general family audiences. *See* Writers Guild of Am. W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976) (finding First Amendment and Administrative Procedure Act violations in Chairman's jawboning), *vacated and remanded sub nom.* Writers Guild of Am. W., Inc. v. Am. Broad. Co., 609 F.2d 355 (9th Cir. 1979) (vacating judgment and remanding to FCC on jurisdictional grounds for exhaustion of administrative remedies).

354. *See supra* Part I.

355. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994).

356. Since the Chairmanship of Mark Fowler during the Reagan years, the FCC has undertaken deregulatory efforts too numerous to name here. *See* Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 586-92 (2000) (addressing the Commission's deregulation of its structural rules); *supra* notes 2-3 and accompanying text (addressing the Commission's elimination of the fairness doctrine).

357. For example, both the regulation of broadcast indecency, *see* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), and the imposition of children's educational programming requirements, *see* Children's Television Programming, 11 F.C.C.R. 10660 (1996), are grounded on the need to protect children and enhance their development.

358. For a description (and critical review) of such regulatory rationales, *see* generally RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997).

the regulated entities.³⁵⁹ Others ground regulation on the notion that the broadcast airways are a public forum of sorts.³⁶⁰ Yet others more generally focus on the impact of media.³⁶¹ Still others would ground FCC intervention on perceived market failure.³⁶² All these arguments could potentially justify content as well as structural regulations of the electronic media. Thus, what we have today is in fact a mixed regime of deregulation and some pockets of regulation—with potentially expansive theoretical justifications for regulation.³⁶³

The news distortion policy is a useful litmus test for the potentially expansive new regulatory framework. Regulatory rationales such as the impact of television, the quid pro quo for free use of a public resource, or the broad notions of market failure in theory could be seen as justifying the kind of intrusive content review that the *Serafyn* court's interpretation of the news distortion doctrine might entail.

While no progressive media theorists have addressed the issue, it might be argued that the current regulatory rationales would support regulation of news distortion. After all, rationales that focus on the impact of the electronic medium could justify arguments for regulation that would purport to

359. See, e.g., FCC Chairman William E. Kennard, "What Does \$70 Billion Buy You Anyway?" Rethinking Public Interest Requirements at the Dawn of the Digital Age at Museum of Radio and Television, New York, New York (Oct. 10, 2000), available at http://www.fcc.gov/daily_releases/daily_businesses/2000/db1010/spwek023.html; Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1725-48 (1997). See also RATIONALES & RATIONALIZATIONS, *supra* note 358, at 43-68 (criticizing quid pro quo or "social compact" theories justifying regulation).

360. See Robert M. O'Neil, *Broadcasting as a Public Forum*, in RATIONALES & RATIONALIZATIONS, *supra* note 358, at 125-50 (discussing public forum argument); Logan, *supra* note 359.

361. For reference to media critics who focus on harmful impact of certain types of television programming on children and the social fabric, see, for example, Tim Kiska, *Are Reality TV Shows Going Too Far? New Programs May Be All the Rage, But Critics Say They Cheapen TV and American Morals*, DETROIT NEWS, Jan. 9, 2001, at 1; Christopher Stern, *FCC to Examine TV Sex, Violence; Hearings to Focus on Harm to Children*, WASH. POST, Sept. 13, 2000, at E3.

362. Much of former FCC Chairman Reed Hundt's regulatory rhetoric, for example, used market failure as a justification for regulatory interventions. See, e.g., Reed E. Hundt, *The Public's Airways: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089 (1996); Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11 (1996). See also SUNSTEIN, *supra* note 15, at 62-75; C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997). For a critique of market-failure arguments, see Thomas W. Hazlett, *Market Failure as a Justification to Regulate Broadcast Communications*, in RATIONALES & RATIONALIZATIONS, *supra* note 358, at 151-82.

363. See Lili Levi, *On the Mixed Cultures of Regulation and Deregulation*, 38 JURIMETRICS J. 515 (1998) (reviewing RATIONALES & RATIONALIZATIONS, *supra* note 358). Both Congress and the FCC have justified these areas of content regulation on the ground that they are narrow, limited, and quantifiable. See, e.g., Reed Hundt, *supra* note 362, at 1091; Hundt & Kornbluh, *supra* note 362, at 20-22.

minimize the harms of distorted news. Rationales grounded on a broad interpretation of market failure might lead to the conclusion that the private market for the production of news today is dysfunctional for systemic reasons and must therefore be disciplined by FCC intervention. Rationales that are grounded on a quid pro quo notion are quite boundless—so long as there is some sense of parity between the *quid* and the *quo*, theorists espousing these norms could support content regulation designed to balance skews in public discourse. Minimal democracy-enhancing programming rules do not *per se* violate such a balance. Indeed, media theorists who do not simply argue that broadcasters should be treated like the print press but, rather, who claim that the norms of the First Amendment itself require the adjustment of expressive inequalities in the press as a whole,³⁶⁴ could claim that the FCC should play a role in improving news coverage. For these media theorists, the First Amendment would not preclude—and indeed would support—affirmative governmental attempts to improve the public sphere.

B. Policy Arguments in Favor of FCC Retreat

Media critics' concerns about the various possibilities of bias in the news are doubtless real. But is the solution an invigorated application of an FCC news slanting, staging, or distortion policy? Just as excesses of private broadcasters doubtless have negative effects on public discourse, attempts to regulate news distortion harm classic democratic values as well. Thus, democracy-based arguments for the news distortion doctrine, while clearly appealing, are challenged by contending democratic norms and founder on the realities of news reporting.

1. The Democratic Harms of "Official Truth"

The fundamental problem, as Part III has demonstrated in detail, is that news distortion claims will all-too-often require an administrative agency or court to establish an official "truth" against which the broadcaster's claims must be assessed. The news distortion policy is ultimately incapable of application in a way that does not overly intrude into editorial judgments. This itself undermines speech norms that shore up democracy.

There are a number of problems with the imposition of the government's version of historical truth, with adverse legal consequences, on a private party. One obvious problem is the prohibitions of the First Amendment. Our

364. See, e.g., FISS, LIBERALISM DIVIDED, *supra* note 15; FISS, THE IRONY, *supra* note 15; Owen M. Fiss, *The Censorship of Television*, 93 Nw. U. L. Rev. 1215 (1999).

constitutional structure is designed to avoid the authoritative selection of truth by the state. Whether because of a belief in the marketplace of ideas, or because of a commitment, prompted by counter-majoritarianism, to governmental speech neutrality, our constitutional history suggests that a press independent from government will more likely enhance democratic discourse. It is a minimum requirement of our notion of democracy that the state not dictate its vision of events to the press. This is not to say that “censorship” practiced by the private press cannot undermine communitarian norms of equal participation in public discourse. Several modern free speech theorists argue that today, our concerns should focus more on the corrosive effects on democracy of private, corporate censorship than on governmental control of speech.³⁶⁵ However, a vigorous policy banning news distortion implicates questions not about access to communications media, but about courts and administrative agencies deciding the truth of controversial social issues and historical facts.

The second difficulty in allowing governmental accounts of truth lies in the fact that the government could simply get the story wrong, or select only one aspect of a far more complex story and privilege that aspect to the exclusion of others. Administrative agencies and courts will have to choose one among various possible readings of a given press account and, on that basis, to select between versions of facts in difficult and controversial contexts, where sometimes history will ultimately be the best judge, where facts are unclear, or where truth is somewhere in the middle ground. The specific nature of the administrative and judicial process will also predictably create certain sorts of skews potentially inimical to the public interest. As further detailed above and in the Appendix, we can ironically level that charge—that the government could get the story wrong—against the *Serafyn* court’s interpretation of historical facts.

Ultimately, allowing the government such a role in enforcing a particular official view of historical truth may have a negative impact not only on what is available for public discourse, but also on the degree of public confidence we may have in the judiciary and administrative state.

Potentially invasive regulation of broadcast content is not the appropriate solution to structural problems posed by consolidation. To the extent that the likelihood of bias can be traced back to the likely results of consolidation, regulation of speech (rather than structure) should not be the proper price to pay for the Commission’s retreat from economic regulation.

365. Owen Fiss, for example, is a leading exponent of this view. See *supra* note 364. Influential media theorists such as Ben Bagdikian, see *supra* note 337, and Noam Chomsky, see generally NOAM CHOMSKY & EDWARD HERMAN, *MANUFACTURING CONSENT* (1988), express similar concerns.

2. *News Distortion Regulation as More Harmful to Speech Norms than the Fairness Doctrine*

Like the news distortion policy, the FCC's fairness doctrine was designed to promote the public interest. On many accounts, however, the history of the FCC's attempts to enhance the quality of news and informational discourse through the fairness doctrine was hardly positive.³⁶⁶ In eliminating the fairness doctrine, the Commission expressed concern that the policy constituted a constitutionally troubling invasion into the editorial discretion of broadcast journalists.³⁶⁷ The agency worried that the fairness doctrine in operation—contrary to its intention in principle—had a chilling effect on broadcaster coverage of controversial issues of public importance.³⁶⁸

The news distortion policy—particularly as reinterpreted by the D.C. Circuit—presents significantly greater dangers of improper governmental control over news content than the fairness doctrine. Thus, whatever one's view on the desirability of the fairness doctrine,³⁶⁹ a serious undertaking to prevent news distortion presents a far greater threat to democratic values and the public interest.³⁷⁰

When it was in force, the fairness doctrine consisted of a two-pronged obligation. Broadcasters had an obligation to devote a reasonable percentage of time to the coverage of controversial issues of public importance, and, when they did so, to provide an opportunity for the presentation of contrasting points of view.³⁷¹ Yet, the FCC evaluated compliance with the

366. See, e.g., KRATTENMAKER & POWE, *supra* note 13.

367. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees (Fairness Doctrine Obligations), 102 F.C.C.2d 143, 147 (1985).

368. *Id.* at 184-86.

369. Some decry the elimination of the doctrine, suggesting that it could have had a salutary effect on public discourse on the air. See, e.g., Jerome A. Barron, *What Does the Fairness Doctrine Really Mean?*, 12 HASTINGS COMM. & ENT. L.J. 205, 231-32 (1989) (arguing that fairness-like obligations inhere in the public interest standard); R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993). See also SUNSTEIN, *supra* note 15, at 54-55 (criticizing FCC's rationale for eliminating the doctrine); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 101-02 (2000) (addressing potentially positive effect on group polarization of something like the fairness doctrine).

370. The inevitable blurriness between claims of news slanting and distortion and those of unfair or unbalanced news reporting under the fairness doctrine has been well catalogued. See Jones, *supra* note 40, at 1241-44. While the proposal that the same standards should apply to both fairness doctrine and news distortion claims is beside the point today, its rationale—the difficulty of distinguishing one type of claim from the other in terms of complaints about news reporting—is not.

371. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Fairness Report), 48 F.C.C.2d 1, 9-21 (1974), *recon. denied*, 58 F.C.C.2d 691 (1976), *aff'd sub nom.* Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977).

fairness doctrine in light of the overall programming of the station; applied the doctrine only to controversial public issues (as defined by a pro-broadcaster Commission with much deference to reasonable and good faith broadcaster judgments); allowed for a significant amount of broadcaster discretion with regard to both prongs of the doctrine; did not require the broadcaster either to provide access to or to air the views of particular entities with contrasting viewpoints; and did not permit inquiry into the subjective intent of broadcasters.³⁷² In addition, the FCC virtually never enforced the doctrine.

The news distortion policy, particularly if applied pursuant to the *Serafyn* court's proposal, does not benefit from the limits of the fairness doctrine. For example, complainants can file claims of news distortion regarding any kind of news coverage, and not simply controversial issues of public importance. News distortion claims can be grounded on a single news story, rather than being assessed through a review of the entirety of the broadcaster's coverage. Additionally, charges of news distortion do not fit neatly into the bipolar, proponent/opponent model of issue coverage promoted by the fairness doctrine. The very presentation of an issue as one involving two contending sides may itself be the basis of a news distortion complaint if the issue is complex and not satisfactorily represented in a polar fashion. More significantly, the fairness doctrine did not require the FCC to select the meaning of broadcast content or to establish truth in a controversy—at least to the same broad degree as required by the news distortion doctrine.

The FCC's reasons for eliminating the general fairness doctrine obligation clearly, and even more aptly, apply to the news distortion policy. Despite the infrequent imposition of fairness doctrine sanctions the Commission's decision to eliminate the requirement³⁷³ hinged on the doctrine's likely creation of a chilling effect on the coverage of controversial issues.³⁷⁴ A similar argument—with more bite—can be made with regard to the news distortion policy.³⁷⁵

372. See *Fairness Report*, 48 F.C.C.2d at 10-17.

373. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees (*Fairness Doctrine Obligations*), 102 F.C.C.2d 143 (1985). See also *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989); *Fairness Report*, 48 F.C.C.2d at 7.

374. *Fairness Doctrine Obligations*, 102 F.C.C.2d at 185-86.

375. Of course, there is less empirical evidence to support the chilling effect argument in the news distortion context than that adduced by the Commission when it repudiated the fairness doctrine. There, at least, the Commission had anecdotal evidence of broadcasters avoiding controversial issues for fear of running afoul of the fairness doctrine. The FCC has never held a notice of inquiry proceeding, in which such evidence might have been gathered, in the news distortion context. Logic

Journalism, particularly investigative news reports, typically operates through the device of telling a story.³⁷⁶ The news distortion doctrine—even more than the fairness doctrine—requires the FCC to select a particular meaning of the story in order to address whether or not the challenged account is accurate. And in the D.C. Circuit's recent extension, the policy requires the FCC to draw negative inferences from the broadcaster's decision not to present another possible account.

Moreover, having selected such a meaning, the news distortion doctrine—particularly in its post-*Serafyn* interpretation—requires the Commission to establish the truth or, at least, to take administrative notice of the falsity, of the news report as articulated by the broadcaster. Even under noninvasive news review standards, the Commission will likely be unable to avoid addressing the substantive underlying claims of truth.³⁷⁷ As *Serafyn* itself demonstrates, a news distortion decision turns the Commission and the courts into partisan vehicles used by complainants to establish the official version of historical truth.

suggests, however, that a doctrine designed to enhance 'truth'—and that involves inquiry into the broadcaster's subjective intent to distort—would lead to a chilling effect at least equal to that discussed by the FCC in connection with the fairness doctrine.

Some suggest that the news distortion policy was a relatively toothless regulation because the Commission simply did not apply it in a draconian way. See, e.g., RAY, *supra* note 28, at 4-7. That suggestion begs the question of what effect the very existence of the rule and its high-sounding rhetoric might have had on broadcaster behavior, regardless of actual FCC enforcement. Despite the FCC's rather laconic news distortion enforcement record, the Commission's rhetoric was quite uncompromising and might well have had a hortatory effect. It is impossible to discern the answer to the question of whether the broadcasters paid attention to the rhetoric or to the actuality of the enforcement record, or both in some combination. At the very least, this suggests that the court should not require the Commission to engage in stringent enforcement of the news distortion policy.

376. See, e.g., RICHARD CAMPBELL, *60 MINUTES AND THE NEWS: A MYTHOLOGY FOR MIDDLE AMERICA* (1991) (describing the narrative structure of *60 Minutes* and its debt to traditions of literary journalism and muckraking).

377. For years, there have been stories about the degree to which fictional works purporting to be autobiographical to some degree can actually be subjected to traditional tests of truth. Jerzy Kosinski, the prize winning author of *The Painted Bird*, has been criticized for making up some of the Holocaust experiences he recounts. See David Treadwell, *Novelist Jerzy Kosinski, 57, Kills Himself in N.Y. Home*, L.A. TIMES, May 4, 1991, at A1 (recounting charge). Recently, Rigoberta Menchu's account of her struggle for the rights of indigenous peoples in South America has been challenged as inaccurate in a number of details. See Larry Rother, *Tarnished Laureate: A Special Report; Nobel Laureate Finds her Story Challenged*, N.Y. TIMES, Dec. 15, 1998, at A1. As in the complex discussions of what constitutes "substantial truth" in some defamation cases, there are always issues about how to define "truth" in a particular situation. People argue that whether or not Ms. Menchu learned Spanish in a convent school or was entirely self-taught later in life is immaterial to the larger "truth" of her book—the truth of the collective pain and oppression of her people. To a certain extent, substantial truth depends on the characterization and the statement's level of generality.

3. *Factors Skewing Governmental Accounts of Truth: Chilling Interest Group Strategies*

Controversial issues by their very nature invite complaints of bias, inaccuracy, or distortion.³⁷⁸ Yet, current controversial issues are precisely the kinds of topics that broadcasters should not fear to address. Very few things are exempt from debate. Because someone in the audience will always be able to complain about slant or bias in the news, it is difficult to imagine the FCC being able to apply a rational and sensible news slanting and distortion policy without creating an undesirable chilling effect on the very type of programming that the policy is designed to foster.³⁷⁹

In addition to arguments based on constitutional principle and the inability to define truth, several factors have potentially skewing effects on governmental accounts of truth. Most generally, but perhaps most importantly, the fact that private groups rather than the FCC in the role of a roving Commission instigate the adjudication of news distortion claims will doubtless affect the issues as to which the government will authoritatively opine.

While judicial and administrative processes may be ill-suited to the determination of “truth” regarding news accounts, they may be quite susceptible to capture by censorious private interest groups. The judicial process often requires courts to make decisions on a cold or incomplete record. The comparative acuity of the various sets of lawyers no doubt influences resolutions both by the FCC and the courts. Extensive administrative and judicial processes themselves likely impose speech-suppressive costs. The administrative process sometimes provides an end-run around less hospitable judicial processes.

Indeed, a policy that prohibits news distortion may function as a particularly problematic invitation to a strategic use of the administrative process. The chilling effect of the news distortion doctrine should be addressed in light of the possibility that an invigorated policy might become a potent tool in the hands of interest groups with clear agendas to dissuade speech. In *Serafyn* itself, Ukrainian-American community groups staged an apparently organized campaign to discredit the news program,³⁸⁰ to punish

378. See Jane Kirtley, *Second-guessing News Judgment*, 20 AM. JOURNALISM REV. 86 (1998).

379. This was a very powerful consideration in the Commission's decision to eliminate the general fairness doctrine obligation for broadcasters. *Fairness Doctrine Obligations*, 102 F.C.C.2d at 225. The argument is most persuasive in cases like *Serafyn*, and not cases of “faked” or “rigged” news. The difficulty of rules regarding the latter is addressed *supra* Part IV.B.

380. Ukrainian-Americans offended by the broadcast apparently sparked a letter-writing campaign to CBS, legislators, and CBS advertisers. See Reply to Opposition of CBS, Inc. to Petition to Deny, at

CBS more broadly than a single program might reasonably warrant, and to engage the Commission in the authoritative evaluation of the truth of the program's content.³⁸¹ Grounding their argument on the basis that a broadcaster who could air such inaccuracy once is likely to do so again and ignore segments of its license community, the *Serafyn* complainants argued that CBS should not be permitted to enter into license transactions and should even lose its licenses for the unfitness suggested by the *Ugly Face of Freedom* program. *Serafyn* itself provides a good example of the way in which groups that would not have any other recourse under the libel laws can use the news distortion doctrine as part of a chilling strategy.³⁸²

Why is the organized strategy of interest groups to influence broadcast coverage such a bad thing? Particularly with a relatively laissez-faire FCC, shouldn't interest groups with particular viewpoints be able to use grass roots methods to keep networks accountable? Isn't this particularly necessary as broadcasters seek to satiate our increasingly jaded appetites with increasingly sensationalized programming?

This Article does not argue that interest groups convinced they have been wronged by broadcast coverage should not freely use private means—boycotts, newspaper editorials, protest meetings with broadcasters and the community—to express their concerns. Indeed, the existence of these alternative safety valves strengthens the case for eliminating the news distortion policy. Rather, the Article highlights concerns with the potential undue effects on broadcast coverage of attempts to use a multiflanked strategy at the FCC. If the news distortion doctrine remains on the Commission's books and receives the kind of interpretation promoted by the D.C. Circuit in *Serafyn*, it may be invoked in subsequent programs addressing controversial issues because of the contested nature of truth in

608, Ex. 4, 5, 6, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

Interest groups have targeted other *60 Minutes* programs as well. See AXEL MADSEN, *60 MINUTES: THE POWER & THE POLITICS OF AMERICA'S MOST POPULAR TV NEWS SHOW* 113 (1984) (providing specific examples of the “[p]ressure groups and special interests [that] inevitably react to stories investigating their turf”).

381. For example, the complainants' attorney stated at oral argument that “we want the record clear” even if CBS did not lose its licenses. Transcript of Oral Argument at 11, *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998) (No. 95-1385). This statement suggests the complainants' content-oriented purpose.

382. The *Serafyn* complainants attempted to engage Congress in oversight of the CBS program, including having Congressman Bonior read negative commentary on the program into the congressional record. They also engaged in a letter campaign to CBS advertisers to convince them to boycott. A sympathizer posted a web page purporting to address each of the program's asserted inaccuracies in detail. The *Serafyn* settlement is also telling. The complainants settled for their legal fees and persuaded CBS to make the admissions noted above. It is clear that the UCCA parties' intention was an ideological one.

those situations.

Consistent application of the news distortion doctrine to controversial issues becomes worrisome particularly because, despite their protestations, broadcasters will often retreat from controversy in favor of more mainstream fare if their economic interests so dictate. *Serafyn* again provides a case in point. Rather than further litigate the matter, CBS—in the midst of corporate changes and needing both FCC and community support—simply settled the case even though it may well have prevailed on remand at the FCC. Granted, CBS could have come to its settlement decision as a result of its own news judgment that the story told in *The Ugly Face of Freedom* was not the story it wished it had told in the particular fashion chosen. Or perhaps the network did not see the need to expend additional resources simply for a narrow principle—which the Commission would probably clarify at some point in response to some declaratory request by the National Association of Broadcasters in any event. The network might have thought it would be important to indicate to the Ukrainian-American audience that it did not intend to alienate that part of its viewership. As in all things, CBS's decision to settle was probably influenced by a variety of factors. It is nevertheless useful—when addressing the policy wisdom of the news distortion doctrine—to focus on the extent to which it can become a lever to influence the programming of private broadcasters with significant economic interests at stake.³⁸³

4. *The Illusion of Neutrality and Accuracy*

The news distortion doctrine disserves its goal to the extent that it is designed to promote democracy pursuant to an unrealistic and conflict-ridden ideal. While interrelated, the two democracy-based rationales articulated by the FCC in support of the news distortion policy in fact point to different sorts of remedial rules. The focus on the importance of truthful news to an informed public engaged in self-governance naturally leads to a strict liability notion: the government should step in substantively to correct error whenever the news is inaccurate, false, or slanted. As noted above, there are significant problems with the notion of the governmental correction of news error regardless of intent to distort. Despite the importance of the need for truth,

383. Admittedly, *60 Minutes* is no doubt a very profitable program; therefore, broadcasters can conclude that controversy, too, is a valuable asset. See Logan, *supra* note 346, at 167. However, the chilling effect argument does not deny that news programming about controversial topics makes money. Rather, the point is that when faced with choosing among controversies, networks might be swayed by the existence of a news review policy that may be used as a sword by organized interest groups with resources to spare.

the Commission appears implicitly to recognize the inevitability of error and the importance of not adopting rules that will lead to a predictable chilling effect.³⁸⁴ Licensees will no doubt make mistakes or take controvertible positions about news events. Despite the belief that accurate and objective news is imperative for the public, everyone understands that there will be errors and there will be some circumstances in which a news story will have multiple reportable meanings. Because the policy as interpreted requires deliberate distortion—and not just mere inaccuracy—it cannot provide an assurance of truth in fact.³⁸⁵ Requiring editorial decisions to hew to the news interpretation of the FCC—particularly as that interpretation has been pushed by particular interest groups—would constitute a perfect example of censorship. Indeed, the agency has specifically noted that its news distortion policy is designed to maintain the fine balance between the Communications Act's prohibition of censorship under section 326 and the Commission's task of assuring broadcasting in the public interest.³⁸⁶

As for the second rationale—public belief in the integrity of the press—such a notion does not require that stringent a rule. Even if mistakes are made, if the public believes that the press is responsible and attempting to report neutrally and objectively without slanting or distortion, then democracy as a whole will not be severely undermined. The news distortion policy, however, cannot assure public belief in the press's integrity either. At most, the news distortion doctrine provides an illusion of neutrality which may ultimately be more corrosive than the news decisions of private broadcasters.

Some would challenge even the notion of a news distortion policy as definitionally unworkable. For them, the traditional norms of truth and objectivity are at the least unattainable and more likely unintelligible.³⁸⁷ Thus

384. See, e.g., *Minnesota Farmer's Union*, 88 F.C.C.2d 1455, 1467 (1982) (“The Commission recognizes that inaccuracies inevitably occur in the ordinary course of news reporting. . . [and] that the burden of proof is high and difficult to overcome, but we believe that anything less will ultimately interfere with and endanger the important First Amendment rights involved—and, relegate this Commission into the role of the ‘national arbiter of truth.’”).

385. This is merely a description of the FCC's reliance both on “truth” and on “press integrity” as rationales for its news distortion policy. It is not an argument that the policy is inconsistent with a common legal goal of reducing or eliminating harm. The question, of course, is whether the news distortion doctrine—although it does not eliminate falsehood—is likely to reduce significantly the amount of false news broadcast.

386. The Commission's stated rationales are reminiscent of the Supreme Court's approach to the adoption of a constitutional privilege for defamation in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

387. Such press critics could take two positions. On one hand, they could argue that even though journalistic objectivity and neutrality are theoretically possible, too many biasing factors make such objectivity unlikely in practice. Those media analysts who are concerned about the distorting effects of

any governmental intervention attempting to establishing a neutral truth allegedly distorted by the broadcaster proves unavailing. Even under a less severe interpretation, a strong argument remains that an FCC attempt to prevent news distortion leads to nothing more than the illusion of neutrality.

Editorial judgment inevitably entails selection. Although reporters are criticized for it,³⁸⁸ slant of some kind—defined as perspective and agenda—is unavoidable in reporting.³⁸⁹ News accounts do not stand outside culture, but are themselves products of culture—at least of journalism culture.³⁹⁰ “Framing” the news “is a question of slant, structure, emphasis, selection, word choice, and context.”³⁹¹ (As detailed in the Appendix, the real debate between CBS and the *Serafyn* complainants was a fundamental disagreement as to the proper frame for the account.)³⁹² And that is what the news distortion policy cannot fruitfully address except perhaps at the edges in exceptional cases. While traditional norms of objective reporting still pervade daily news reporting, reporters and editors cannot craft stories so neutral as to have no context and no interpretive framework against which they are to be read and understood. Even those journalists who hew to traditional norms of neutral and objective reporting affect the story they tell by their selection of sources to consult, experts to quote, and details to exclude.³⁹³ Cultural and institutional traditions influence even what makes events “news.” Journalists select particular stories from many possibilities according to the imperatives, at a minimum, of their professional culture.

Some media will clearly have explicit and particular political agendas and ideological perspectives on news issues. Others—the vast majority—will

commercial media ownership might take this position. See, e.g., BAGDIKIAN, *supra* note 337; HERMAN & CHOMSKY, *supra* note 339; MCCHESENEY, *supra* note 340. Another approach would be to deny the intelligibility of objectivity and neutrality even in principle—questioning whether there is a “real world to be objective about.” Michael Schudson, *The Sociology of News Production*, in SOCIAL MEANINGS OF NEWS 13 (Dan Berkowitz ed., 1997) (describing how proponents of the “social organization of newswork” approach to news production reject journalism’s objectivity assumption on such grounds).

388. See *supra* notes 337-47 and accompanying text.

389. See, e.g., ROBERT M. ENTMAN, DEMOCRACY WITHOUT CITIZENS 31 (1989); GANS, *supra* note 338. For a criticism of the view that some “slant” is inevitable, see, for example, Elliot D. Cohen, *Journalism, Rational Subjectivity, and Democracy*, 9 U. FLA. J.L. & PUB. POL’Y 191 (1998).

390. See generally MICHAEL SCHUDSON, THE POWER OF NEWS (1995).

391. JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD 57 (1997).

392. See *infra* Appendix B.

393. See, e.g., Cohen, *supra* note 389, at 192-93; Lili Levi, *supra* note 336, at 679-82 (citing other relevant sources therein); Jarol B. Manheim, *The News Shapers: Strategic Communication as a Third Force in News Making*, in THE POLITICS OF NEWS, THE NEWS OF POLITICS 94 (Doris Graber et al. eds., 1998).

reflect professional norms in the nature of their coverage.³⁹⁴ Those norms in turn may differ, change over time, or depend on circumstances such as the type of journalism, the form of media, or the category of programming. Media will also often program pursuant to structural or procedural requirements that affect coverage. This is not to say that the local television station will subtly but intentionally support the Republican or Democratic candidate in its news coverage. Rather, it is likely to generate a particular type of political coverage because of a tendency to cover political contests as horse races with a focus on the competitive aspect rather than on the contrasts between the substantive views of the candidates on policy issues.³⁹⁵

Whether one believes that this sort of "slant" is not too harmful because it does not entail any specific political influence, or rather, that it results from a problematic commercial ideology that is no less ideological for being more subtle and subtextual,³⁹⁶ it is surely dangerous and administrably problematic for the FCC to assess the degree of slant or distortion.³⁹⁷

The very realities of modern media catalogued by critics to justify reform ironically counsel regulatory timidity by the FCC regarding news content. Admittedly, with cross-ownership of entertainment and other media companies, there is doubtless pressure to shape news in cross-promotions and other ways that promote synergy among the various corporate elements of the conglomerate information entity. Further, control by corporate interests may well hinder most major media from presenting a particularly critical picture of prevailing economic power.³⁹⁸ At a minimum, few would argue that media today are not concerned about their news budgets. Economic

394. See SCHUDSON, *supra* note 390, at 8-14, 182-85.

395. See, e.g., JAMES FALLOWS, *BREAKING THE NEWS* (1996); THOMAS B. LITTLEWOOD, *CALLING ELECTIONS: THE HISTORY OF HORSE-RACE JOURNALISM* 1-5 (1998); SUNSTEIN, *supra* note 15, at 56-58; Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 *VILL. SPORTS & ENT. L.J.* 85, 201 n.349 (1996); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 *IND. L.J.* 689, 701-02 (1994). On "organizational biases" of commercial media, see, for example, Edward Jay Epstein, *Organizational Biases of Network News Reporting*, in *PHILOSOPHICAL ISSUES IN JOURNALISM* 244-49 (Elliott D. Cohen ed., 1992); Cohen, *supra* note 389, at 204-05.

396. For important arguments about the ways in which the modern free speech principle protects conservative ideology, see, for example, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 383 (identifying an "ideological drift" in the role of the First Amendment); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. COLO. L. REV.* 935 (1993).

397. Most would probably agree that there is a difference between the Hearst stations' explicit and substantive involvement in the news and politics of their day, and the more indirect "slant" or "bias" that results from the economic and structural imperatives of commercial radio and television stations today. However, it is unnecessary for the argument here to compare the degrees of harm to political discourse posed by different types of "slanting".

398. See, e.g., BAGDIKIAN, *supra* note 337 and text accompanying notes 337-42.

pressures, especially at the local news level, reduce searching news coverage and investigative reporting. Broadcasters place much reliance on government sources for information.

Regardless, the slant or point of view often will be so hidden—even from the journalists themselves—that it will not be susceptible to the kind of clear proof the Commission requires. Further, it may best express itself not in the specific way in which a station covers a particular story, but rather in what it chooses to cover—a kind of news suppression charge. Every one of these claims has been unsuccessful at the Commission.³⁹⁹

If the government applied the news distortion doctrine to address all these “deep” claims of news distortion, it would clearly have an extraordinarily invasive effect on broadcaster editorial decisions. On the other hand, if the doctrine cannot appropriately address such claims, then its application provides only the illusion of news neutrality. This, like the illusion of fairness fostered by the former fairness doctrine, may ultimately be more harmful to the values the distortion doctrine is designed to foster than the public acknowledgment of the perspectivalism of news coverage.⁴⁰⁰ Indeed, a news distortion doctrine may result in legitimizing news coverage that can only be considered neutral and objective if its narrow and uncritical character is wholly ignored.⁴⁰¹

In sum, while complaints about the democracy-degrading character of modern media can lead to renewed calls for FCC regulation to improve the quality of broadcast discourse, the reality of such regulation will undermine other democratic values—both in free expression and in the public’s perception of courts and the administrative state. It will undermine such values even more than did the fairness doctrine, will open the door to the deployment of chilling strategies by ideological interest groups, and all for little more than the illusion of neutrality. Even though various expansive rationales have developed to replace scarcity as the justification for broadcast content regulation, the news distortion issue is a fruitful context in which to begin crafting their limits.

399. See *supra* notes 81-86 and accompanying text.

400. This is not an argument based on the notion that the news distortion doctrine creates a false impression on the public. After all, only a small percentage of the public knows of the policy. The average viewer’s vision of how objective and neutral a news broadcast should be is not likely to rest on her knowledge of existing FCC policy.

401. There have been many critiques of the media’s claim of neutrality and objectivity. For one argument that neutrality norms privilege the status quo, see Shiffrin, *supra* note 395, at 700-10. For claims that objectivity norms were a response to publishers’ commercial considerations, see, for example, Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19, 21-23 (1998-99); Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 227 (1992).

C. The Democratic Value of Different Press Traditions

The preceding section has explored the negative argument counseling FCC withdrawal from the news distortion area—an argument grounded on the threats posed by well-meaning attempts to regulate press content. This Part seeks to make an affirmative argument for FCC retreat—one grounded on the democratic benefits to be gained from a diverse press culture whose content is not governmentally regulated. When we closely examine the actuality of news practices in today's electronic media, it appears that the application of the news distortion doctrine may well have disproportionate effects on particular kinds of news programming. This in turn diminishes a beneficial diversity of contending news traditions toward which we should strive.

Some media theorists would challenge the FCC's unstated assumptions about the direct causal relationship between unbiased news reports and participatory democracy. They would contend that “[w]ell-reported news, free from censorship, does not a democracy make.”⁴⁰² A national news culture may lead to the “informational” citizen, but does not necessarily lead to the “informed” citizen.⁴⁰³ Precisely what the media can do to enhance democracy is a complex question as to which not much evidence is available. Thus, perhaps the syllogism on which the FCC and, by implication, the D.C. Circuit, rely in support of the news distortion doctrine is unrealistic and ignores the multivalent character of news as culture. At a minimum, if perspective and error are inevitable, then perhaps the fundamental thing we can realistically ask of the media in terms of promoting democracy is diversity.

In fact, it is unclear that we as a society have reached consensus on what we would like the media to do in enhancing the public sphere. Indeed, media organizations today espouse (or at least are held to) any number of not altogether compatible roles. These roles include: providing fair and full information for citizen deliberation; providing coherent explanatory and interpretive frameworks to enable citizens to understand a complex political environment; serving as transmitters of contending viewpoints in society; representing the public and holding government accountable; functioning as a democratic instrument by providing a forum for dialogue among citizens; and even simply responding to the market's measure of how much (and what

402. SCHUDSON, *supra* note 390, at 169 (situating the press as a social institution and cultural form and questioning the extent of media power in shaping democracy).

403. SCHUDSON, *supra* note 390, at 169-88.

types of) news and informational programming the public desires.⁴⁰⁴ Under these circumstances, there may be an affirmative public benefit in contending forms of press traditions.

The reality of the modern press is one of multivalence and complexity on a number of fronts. Thus, television today airs daily “hard” news, some documentaries, and a variety of newsmagazines.⁴⁰⁵ These different formats reflect the simultaneous flourishing of both “objective” and investigative reporting. Press norms validate both the press as an informational conduit and the press as an investigator and detective.⁴⁰⁶ In terms of daily news reporting, the press still functions under the aspirational goal of objective and neutral reporting that has characterized press self-description in the latter half of the Twentieth Century.⁴⁰⁷ Even press cynics who complain about media bias implicitly assume the desirability of neutrality and balance as reportorial ideals. At the same time, however, the history of the press as muckraker persists. The post-Watergate press has the benefit of a mythology of hard-hitting investigative reporting that unearthed corruption even at the highest level of government and industry.⁴⁰⁸ Indeed, these two types of press roles conflict—the virtues of one are the vices of the other.

The different genres of news programming also have different rules, conventions, and styles. Broadcasters air television news for short periods of time during the day, use one or two anchors in a studio aided by feeds from various on-the-scene reporters, and effectively limit the news to the day’s headlines. Hard news—the lead stories in the newspaper and the nightly television news broadcast—is billed as needing to be current, accurate (to the degree permitted by time constraints), and objective, with reporters and anchors appearing as mere observers and rapporteurs of events.

By contrast, the newsmagazine format is based on a narrative, story-telling kind of journalism in which the reporter is participant and hero.⁴⁰⁹

404. *Id.* at 28-29.

405. Originated by *60 Minutes* in the 1960s, the newsmagazine format became increasingly popular as a number of competitors challenged the mainstream magazine programs in the early 1990s. Richard Campbell, *Don Hewitt’s Durable Hour: A Pioneering Newsmagazine Hits 25*, COLUM. JOURN. REV., Sept.-Oct. 1993, at 25. Although some of the competitive newsmagazines have failed, the format still remains popular. For a review of the development of newsmagazines, see WILLIAM C. SPRAGENS, *ELECTRONIC MAGAZINES: SOFT NEWS PROGRAMS ON NETWORK TELEVISION* (1995).

406. See, e.g., ROBERT MIRALDI, *MUCKRAKING AND OBJECTIVITY: JOURNALISM’S COLLIDING TRADITIONS* (1990).

407. See Isralowitz, *supra* note 401, at 243.

408. See generally MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* (1992); MICHAEL SCHUDSON, *THE POWER OF NEWS 142-43* (1995) (describing, then challenging, mythology).

409. Campbell, *supra* note 405, at 25. See also JOHN ELLIS, *SEEING THINGS: TELEVISION IN THE AGE OF UNCERTAINTY* 114 (2000) (distinguishing documentaries from news reports on the basis of

Newsmagazines present different types of news than the breaking news of the day. They often purport to result from investigative reporting.⁴¹⁰ By contrast to full-length documentaries, newsmagazine programs contain several segments. The various segments—much more detailed than daily news, but less so than documentaries—permit reporters to play a variety of roles. In some segments, the journalists are detectives discovering and solving a mystery.⁴¹¹ In other segments, they are analysts.⁴¹² In yet others, the formula consists of adventure⁴¹³ or arbitration.⁴¹⁴ The effect, if not the purpose, of this type of news programming is “consensus mythmaking,” in which the show “mythologiz[es] . . . the core culture.”⁴¹⁵ The television newsmagazine stories have a narrative structure—beginning, middle, and end—with characters, drama, and a moral. Because these shows are aired during prime time, against entertainment programming, producers talk differently about their journalism than about hard news.⁴¹⁶

Admittedly, each of the different approaches exhibits the vices of its virtues. Each can be criticized as practiced. The hard news format can be challenged by arguments that it is in fact far less neutral and objective than it purports to be and that its excessive reliance on official sources blunts its effectiveness as either government watchdog or simple reporter of events.

The newsmagazine format can be dismissed too. Critics argue that the conventions of the genre and the economic pressures on a television format which competes with entertainment shows will necessarily lead to more sensationalistic and simplistic programming. Newsmagazines compete for

their “complete narrative”; MADSEN, *supra* note 380, at 45, 93, 226 (discussing drama in *60 Minutes* production).

410. Some critics question whether television newsmagazines in fact engage in investigative journalism, suggesting that many simply dramatize stories that other media or other entities have broken previously. See, e.g., Christopher Georges, *Confessions of an Investigative Reporter*, WASH. MONTHLY, Mar. 1992, at 36.

411. Campbell, *supra* note 405; see also CAMPBELL, *supra* note 376, at 43 *et seq.*

412. CAMPBELL, *supra* note 376, at 68.

413. *Id.* at 93.

414. *Id.* at 113.

415. Campbell, *supra* note 405, at 25 (stating that *60 Minutes* “provides a ‘consensus narrative,’ . . . a group of stories that ‘articulate the culture’s central mythologies . . . an inheritance of shared stories, plots, character types, cultural symbols, and narrative conventions. Such a language is popular . . . because it is legible to the common understanding of a majority of the culture’”) (quoting David Thornburn, Professor, Massachusetts Institute of Technology). See also CAMPBELL, *supra* note 376, at 137-83 (describing *60 Minutes* as telling individualist and centrist narratives reinforcing consensus mythology).

416. See Tom Rosenstiel, *Not Necessarily the News*, ESQUIRE, Jan. 1995, at 76. In many newsmagazines, “[s]tories are ‘cast’ so that once you want to do a piece about a social problem, you find a compelling character to be the protagonist. Many techniques from entertainment are used—dolly shots, crane shots, dissolves—that have been forbidden on the evening news. The medicine is coated with sugar.” *Id.*

ratings with prime time entertainment programs. Thus, “they are under enormous pressure to tell clear, simple stories, with victims and villains, preferably illustrated with eye-catching video.”⁴¹⁷ As their numbers increase, they also compete with one another for stories. This, critics say, leads the newsmagazines to favor sensationalistic but simplified, “soft news” programming that is entertaining to the public.⁴¹⁸ It provides incentives for unambiguous stories that titillate viewers without unduly challenging mainstream values. The involvement of the reporters in the stories necessarily undermines the impression of detached and neutral reporting. To the extent that the newsmagazine reports are investigative, they may promote an adversarial and prosecutorial mindset which can serve as a structural bias against the investigator’s target.⁴¹⁹ As the D.C. Circuit put it in the context of a fairness doctrine dispute over an NBC documentary on private pension plans in the 1970s: “Investigative journalism is a portrayal of evils, and there may be a natural tendency to suspect that the evils shown are the rule rather than the exception.”⁴²⁰ Finally, critics have charged that, outside the hard news context, simplification and overstatement are more likely in the newsmagazine than in the full-length documentary format because of the shorter time available and the need to fit into particular narrative

417. Marc Gunther, *The Lion’s Share*, AMER. JOURNALISM REV., Mar. 1997, at 20. See also Rosenstiel, *supra* note 416, at 76.

[W]hat is most poorly understood about newsmagazines . . . [is] that they are both the best and worst programs produced by network news. The shows contain most of the investigative reporting on television and the most carefully edited and produced interviews. They have saved lives, caught criminals, and influenced legislation. They often surpass the best documentaries ever done on TV.

What’s more, thanks to the magazines’ success, news is no longer in danger on network television (for now).

....

But it’s the very success of the magazines that is driving their standards down, forcing them to strain for attention, and lowering the quality of some of their most serious work.

Id.

418. See, e.g., Rosenstiel, *supra* note 416, at 76.

419. Media analysts contend that some producers and correspondents “act more like prosecutors and judges than dispassionate reporters” because of “the pressures of prime time investigative reporting.” Marc Gunther, *supra* note 417. See also JAMES L. BAUGHMAN, *THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING, AND BROADCASTING IN AMERICA SINCE 1941*, at 165-67 (1997) (describing *60 Minutes*’ success and its hostile approach toward some subjects.); PETER BENJAMINSON & DAVID ANDERSON, *INVESTIGATIVE REPORTING* 3-4 (2d ed. 1990) (describing an investigative reporter as a person with “a faith that someone, somehow, is working against the public interest”); Ricard Harwood, *How Lies See the Light of Day*, WASH. POST, July 13, 1998, at A21 (describing “zealots who set out to prove a thesis regardless of the evidence”). Moreover, “[t]he very nature of an expose presumes a subjective, not objective, viewpoint, that is that whatever exposed is wrong, whether morally or legally.” BENJAMINSON & ANDERSON, *supra*, at 156.

420. *Nat’l Broad. Co., Inc. v. FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974).

conventions.⁴²¹ These concerns may be particularly apposite for the tabloid newsmagazines, as opposed to the more established and less sensational versions, such as *60 Minutes*. On this view, public discourse on controversial issues of public importance will be skewed given that the public believes newsmagazine accounts of events.⁴²²

What should not be forgotten among the criticisms is that newsmagazines like *60 Minutes* and investigative journalists in general have generated good and important stories with significant social impact.⁴²³ They have also generated mass interest in current events. They have sometimes provided an antidote to the mainstream press's susceptibility to the claims of official news sources.⁴²⁴ If anything, concerns about libel and other liability have led to more timorousness than might be warranted.⁴²⁵ Moreover, the long-form documentary is an endangered species in the commercial media because of the current economic climate. Finally, different television formats have cyclical life spans, thereby suggesting a future decline in the extreme ratings

421. Additionally, some argue that prime time ratings competition provides incentives to produce news for impact and not illumination. See Gunther, *supra* note 417, at 20.

422. Recent polls suggest that the public believes the newsmagazines more than the nightly news. Frank Newport, *A Matter of Trust (News Sources Americans Prefer)*, AMER. JOURN. REV., July-Aug. 1998, at 30.

423. From Ida Tarbell and Upton Sinclair at the beginning of the century, to Woodward and Bernstein with Watergate in the 1970s, investigative reporting has successfully exposed and helped remedy wrongdoing. See, e.g., FRED J. COOK, *THE MUCKRAKERS: CRUSADING JOURNALISTS WHO CHANGED AMERICA 65-96* (1972); MITCHELL STEPHENS, *A HISTORY OF NEWS 240* (1997); Sandra F. Chance, *The Media in the New Millennium: Exploring Myths and Misconceptions Before Shooting the Messenger*, 10 U. FLA. J.L. & PUB. POL'Y 157, 171 (1998).

424. Media critics argue that mainstream journalists were captives of their official sources in the McCarthy era and during the early years of the Vietnam War. A reinvigorated interest in investigative reporting provided an independence-promoting alternative for the press. Admittedly, some media critics claim that even investigative reporters, particularly those affiliated with the network newsmagazines, still rely too much on elite (and often official) news sources. See Levi, *supra* note 336, at 671-89 (citing other relevant sources).

425. See, e.g., James C. Goodale, *60 Minutes v. CBS and Vice Versa*, N.Y.L.J., Dec. 1, 1995, at 3 (analyzing potential Brown & Williamson claims against CBS for airing the interview with former B&W executive Jeffrey Wigand); Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39; Howard Kurtz, *'60 Minutes' Kills Piece on Tobacco Industry*, WASH. POST, Nov. 10, 1995, at A3 (reporting that CBS declined air taped interview of a former tobacco company representative because the network feared a lawsuit). CBS ultimately aired the Wigand interview several months later, after the *Wall Street Journal* published some deposition excerpts. See Bill Carter, *60 Minutes Set to Interview Ex-Tobacco Executive Tonight*, N.Y. TIMES, Feb. 4, 1996, § 1, at 30. This event became the basis of a Hollywood movie, *The Insider*. See also Jonathan Friendly, *Investigative Journalism Is Found Shifting Goals*, N.Y. TIMES, Aug. 23, 1983, at A16; Georges, *supra* note 410, at 36 ("The national media nurtures its reputation for accuracy, preferring to kill or delay a story rather than risk getting it wrong. And that's good. But at the same time, important stories often sit on the shelf until government blesses them with an official investigation.").

competition of the early 1990s newsmagazines.⁴²⁶ This will hopefully enhance the likelihood of true editorial judgment—rather than simply ratings competition—driving newsmagazine productions.

Perhaps most importantly, despite the litany of criticisms, there is surely a significant social benefit to having a variety of news outlets and news formats. Given that we cannot entirely eliminate the “bias” or point of view inherent in the enterprise of editorial selection and decision, a variety of options may benefit public discourse. Even if modern newsmagazines do not currently serve journalistic diversity as well as we might wish, it is not in the public interest to promulgate rules that would further speed their slide into entertainment. An invigorated news distortion policy would likely have its most significant effect not on “straight” news, but on certain other kinds of investigative and literary news reporting. To the extent that such reporting focuses on controversial public issues, public discussion would be disserved by administrative policies that create disincentives for such programming. At a minimum, the American press’s susceptibility to official sources and authoritative government accounts of news suggests that there is social value in a multiplicity of formats for the dissemination of news and information.

Ultimately, the scope and definition of the news staging issue effectively rests on a number of important assumptions, including assumptions about the relationship between the viewer and the media and what the viewer should be able to expect from the press. Even Commissioner Johnson, a champion of the public, stated in the news distortion context that “[i]t is not necessary or desirable that a citizenry take literally, and accept whole, everything that reaches it through the mass media. But a nation simply cannot function in a climate in which people think you can’t believe anything you hear now-a-days.”⁴²⁷ The issue becomes, what should the media be deemed to warrant to the public? What is the appropriate middle ground in Johnson’s spectrum between total gullibility and absolute distrust?

The public’s belief in the newsmagazines must be understood in context. Polls show that the public does not much trust the media as a whole,⁴²⁸ so a finding that viewers believe newsmagazines more than the daily news is not

426. Lawrie Mifflin, *Big Television Shocker: Tabloid Shows Go Soft; The Mainstream Networks are Co-opting What Was Once Too Lurid for Prime Time*, N.Y. TIMES, Jan. 18, 1999, at C1.

427. Inquiry into WBBM-TV’s Broad. on Nov. 1 and 2, 1967, of a Report on a Marihuana Party (Pot Party), 18 F.C.C.2d 124, 160 (1969) (Comm’r Nicholas Johnson, dissenting).

428. See, e.g., Clay Calvert, *The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later*, 22 VT. L. REV. 493, 498-99 (1998); Marta W. Aldrich, *Public Distrust of News Media Cuts Support for First Amendment*, ATLANTA J. & CONSTIT., July 4, 1999, at A17; Geneva Overholser, *The Public’s Growing Distrust of the Media*, CHIC. TRIB., Sept. 1, 1999, at 21.

dispositive as to viewers' assessment of journalistic accuracy. Moreover, poll respondents may say that they find newsmagazines more credible precisely because they do not claim the objectivity and neutrality of hard news. Given the mixed character of newsmagazine programming, it is also unclear whether viewers distinguish, regarding credibility, between investigative segments and other subtypes of the genre. Further, the polls do not appear to distinguish between the different sorts of newsmagazines and the different stories even within one sort.

Logic and experience suggest that viewers do not understand all journalistic efforts in the same way or believe them in the same degree. Some kinds of news reports—particularly the traditional sort of “objective” news reporting—are marketed as accurate and factual accounts of events. Whether or not they credit the daily press, many Americans no doubt believe that “front page” or “headline” news should constitute accounts of real events neutrally and objectively reported. Different kinds of news programs are designed to appeal to the American public in distinct ways, however. Readers know the difference between the first page and the editorial section in a daily newspaper; they have experience with opinionated news magazines. They must know what to expect from newsmagazines, whether the tabloid variety or the more serious examples.⁴²⁹ They understand that exposés presume a point of view—an implicit statement by the reporters that whatever is exposed is somehow wrong or harmful.

To the extent that we have a history of different kinds of press traditions which are interpreted differently by the public, a news distortion prohibition may needlessly promote one kind of journalism rather than another. Particularly when the traditions of the genre provide viewers interpretive cues, it would unnecessarily limit journalistic development and experimentation to apply prohibitions on news distortion that, in application, would target certain kinds of dramatic investigative reporting. What is at stake counsels government content-neutrality.

This is not to say naively that television news will never distort events and that such distortion will not harm public discourse. Rather, this Article suggests that the stringent application of a news distortion policy, such as the version proposed by the *Serafyn* court, is likely to lead to worse social harms.

This in turn does not mean that there is no recourse when faced with an increasingly degraded public discourse. Possible constraining influences include public clamor, evolving professionalism norms,⁴³⁰ and critical media

429. Gunther, *supra* note 417, at 23 (quoting former ABC President Rooney Arledge for the same point).

430. The press's own ambivalence toward surreptitious newsgathering techniques and mainstream

attention.⁴³¹ While not universally available, unprecedented communicative alternatives—such as the Internet—are now enabled by technology. Critics of news broadcasts can easily express their views on their web pages,⁴³² and interview subjects afraid of being misquoted by the press can simply post unedited videotapes or audiotapes of their interviews on the World Wide Web.⁴³³ In the competitive world of journalism itself, print outlets are ready to criticize broadcasters. Journalism magazines turn a skeptical eye on their own industry. The public will often be able to distinguish true from false and overstatement from accurate reporting. Finally, close FCC monitoring of the

journalists' criticisms of tabloid-style investigative reporting may affect the direction of journalistic ethics over time. In addition, the voluntary presentation of contrasting viewpoints may enhance public discourse. In the case of *The Ugly Face of Freedom*, while CBS read some critical letters on later editions of *60 Minutes*, it did not publicly address the letter-writing campaign and the intensity of the views of offended viewers.

431. Disciplining effects can occur in a variety of ways. For example, news outlets can criticize one another's coverage of particular news events. *See, e.g.*, James Boylan, *A Thousand Voices Bloom*, COLUM. JOURNALISM REV., Mar. 1, 2000, at 34-35; Roy Peter Clark, *Academia*, COLUM. JOURNALISM REV., Mar. 1, 2000, at 50; Neil Hickey, *Television*, COLUM. JOURNALISM REV., Mar. 1, 2000, at 42; James B. Kelleher, *Alternative Papers*, COLUM. JOURNALISM REV., Mar. 1, 2000, at 48-49; Jane Pauley, *Defending Dateline*, THE QUILL, Nov. 1994, at 63 (describing criticism from other news sources). While television news coverage was primarily criticized in the print press in the past, broadcaster self-criticism has become more common in the wake of sensationalized coverage of the Clinton and Lewinsky affair. *See, e.g.*, Bill Kirtz, *Disgust Within the Ranks*, THE QUILL, May 1998, at 8. Media critics represent another source of journalistic self-analysis, both with regard to coverage of particular stories and with regard to journalistic practices generally. *See, e.g.*, JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* (1996). Admittedly, media critics suggest that there is insufficient press self-criticism. *See, e.g.*, Kristie Bunton, *Media Criticism as Professional Self-Regulation*, in *HOLDING THE MEDIA ACCOUNTABLE: CITIZENS, ETHICS, AND THE LAW* 68 (David Pritchard ed., 2000); Richard M. Cohen, *Saving the Press From Itself*, THE NATION, May 12, 1997, at 11 (examining debate over national news councils); Geneva Overholser, *It's Time for Newspapers to Do Real Self-Criticism*, COLUMBIA JOURN. REV., Jan.-Feb. 2000, at 64; Sydney H. Schanberg, *The News No One Dares to Cover*, WASH. POST, Aug. 29, 1999, at B1 (decrying lack of press self-criticism).

432. *See, e.g.*, Lubomyr Prytulak, *The Ugly Face of 60 Minutes*, available at <http://www.ukar.org/60minart.shtml> (last visited Feb. 13, 2001) (criticizing CBS's broadcast of *The Ugly Face of Freedom*); Infoukes, available at <http://infoukes.com> (last visited Feb. 13, 2001) (providing articles that present alternative views on Ukraine).

433. *See, e.g.*, Bill Carter, *Anxious Pill Maker Puts Interview on Web*, N.Y. TIMES, Oct. 7, 1999, at A20 (describing diet-product company's posting of full unedited *ABC News* interview on the Internet "in an effort to publicize its concerns that ABC would broadcast an unfair report on the medical risks of its popular dietary supplement"). Although the article reports that broadcasters may ask interviewees to sign agreements preventing them from releasing tapes of network material before broadcast in order to prevent scoops by competitors, nothing would prevent postbroadcast dissemination of the tapes. *See also* Seth Lubove, *Gotcha!*, FORBES, Nov. 15, 1999, at 145; Daniel McGinn & Richard Turner, *Battle Behind the Screen*, NEWSWEEK, May 17, 1999, at 53 (describing Ford's self-help methods in connection with investigative report on Ford car safety, including hiring their own cameraman to videotape the *Dateline* interview).

diversity-lessening effects of media consolidation can serve as a structural lever less invasive than content rules such as the news distortion policy.⁴³⁴

VI. CONCLUSION

Electronic news media are by now increasingly consolidated. The cross-marketing promoted by such consolidations gradually blurs traditional lines between entertainment and information. At the same time, television currently provides the principal source of news and information for most Americans. Concerns about cost and a desire to satisfy the public's apparently voracious appetite for excitement have led to an explosion of relatively cheap, tabloid-type "news" programs. It is already a truism that broadcasters produce much local news pursuant to the maxim "if it bleeds, it leads." Fascination wars with distaste, however. Television triggers much public ambivalence. The American public grouses about the competence and integrity of the press. Despite its popularity, many cynically characterize news programming as generally biased or slanted. Some complain about substantive left- or right-wing bias. Others rue the social effects of television coverage that sensationalizes news and imposes simple story lines on complex issues. Yet others criticize the press for staging events in order to capture the most dramatic moment at the lowest cost. In sum, while the American public tunes into television for its news and public affairs, critics complain about the democracy-suppressing effects of the modern news media.

While the FCC has largely declined to regulate informational programming since the late 1980s, both a recent judicial gloss on the Commission's news distortion policy and the development of new regulatory justifications for Commission intervention have quietly provided a new avenue for administrative attempts to enhance public discourse on the air. The D.C. Circuit's decision in *Serafyn v. FCC*, by adopting a disturbingly extensive and invasive gloss on the FCC's shadowy old news distortion policy, has issued an invitation for a thoroughgoing review of the

434. Admittedly, the government's approval of the recent communications industry mega-mergers might suggest that FCC oversight is not particularly prohibitory. Nevertheless, the FCC recently refused to eliminate some of its broadcast ownership limitations, suggesting that the agency is still interested in promoting diversity of viewpoints indirectly through diversity of ownership. Biennial Review Report, 15 F.C.C.R. 11,058, available at 2000 WL 791562.

As for legislative attention, Congress has also held hearings on news distortion on several occasions in the 1960s and early 1970s. This obviously raises First Amendment concerns. See, e.g., Dyk & Goldberg, *supra* note 33, at 647-60 (questioning the appropriateness of congressional hearings into particular broadcast news programs). Congress's pointed inquiries would have an undeniable chilling effect. *Id.* at 627.

Commission's role in electronic news delivery.

Despite the settlement of the complaints that spawned the decision, the Commission will likely wish to clarify its interpretation of the news distortion policy. This Article—having identified difficulties both with the “new” model suggested by the court in *Serafyn* and with the traditional Commission policy—has argued that the agency should take this opportunity to eliminate the news distortion policy entirely. Otherwise, the Commission will face regulatory pressures to expand news distortion regulation to fill the void left by the elimination of the fairness doctrine, another rule designed to improve public discourse.

The version of the news distortion policy advocated by the *Serafyn* court interferes with broadcasters' editorial decisions by requiring them to justify their choices of experts to a governmental agency. Even more seriously, it permits courts to infer intentional, deliberate news distortion—and, indeed, generalized patterns of distortion—from “obvious” factual inaccuracies. The facts of *Serafyn* itself demonstrate how such a standard cannot avoid the governmental establishment of an “official truth” with respect to controversial programming in which conflicting interpretations of facts are likely to be strongly held by viewers. What might be seen by a court as “obvious” factual inaccuracies—such as the purported mistranslation of an epithet in *Serafyn*—in many instances will be far from obvious. For reasons ranging from underlying factual complexity to linguistic incommensurability and cultural contextuality, the very issues in which accuracy is most significant to the complaining party are unlikely to be “obvious” or easy to resolve. The possibility of the FCC and courts subjecting broadcasters to the ultimate sanction for a finding of “obvious and egregious” error, without more, would doubtless have a chilling effect on broadcasters' reporting of controversial issues. Certainly, in today's climate of cost-conscious and bottom-line-oriented news media, even the need to justify the content of its news to the FCC would likely cast a chill on reportorial risk-taking. Indeed, certain types of news formats—such as investigative journalism, tabloid shows, and newsmagazines—may be particularly susceptible to an enhanced enforcement of the news distortion policy. Neither Commission precedent or defamation law supports this expansion of the news distortion standard. In fact, such an expansion creates an unnecessary tension between administrative and tort law.

Even the traditional news distortion policy, before its recommended expansion by the court in *Serafyn*, results in greater costs than benefits. The difficulties inherent in its careful balance between truth and editorial freedom all too easily lead to the kind of challenge mounted by the *Serafyn* court. The vagueness of the extrinsic evidence standard and the malleability of the

significance requirement make the policy both under and overinclusive. They permit administrative second-guessing of broadcaster news judgments without assurance of significantly improved public discourse.

It may be possible, in a practical (if not entirely principled) fashion, to carve out a specific, narrow version of the news distortion doctrine to deal with the problem of news staging and fabrication. However, the Commission should eschew the option of an alternative, narrowed news distortion doctrine. Even a narrowed doctrine presents too great a danger of more expansive application—either far in the future or the next time a close case is passionately litigated by a well-organized group with a particular economic or ideological stake in the outcome. Despite the examples in recent memory of such classic news staging as the NBC truck fiasco, true staging seems to occur infrequently.

When it does, media competitors have a keenly-felt stake in exposing it. The journalism industry itself has incentives to reveal many of the clear fabrications that would likely be addressed by a workably narrow alternative news distortion doctrine. Thus, it is probably unnecessary to run the risks of the news distortion slippery slope simply to eliminate clear examples of staging.

It might be said that there is no need to eliminate the doctrine because the FCC can clarify its rejection of the D.C. Circuit's modifications in *Serafyn*, and because in its traditional application, the doctrine has not *in fact* posed much of a threat to the editorial processes of broadcasters. Such an argument, however, ignores both the pressure to enhance public discourse now that the fairness doctrine is gone and the newly developing regulatory rationales beyond scarcity that could be used to justify discourse-enhancing governmental engagement.

The call to regulate press bias presents itself as new rationales are developing to justify FCC content regulation. Scarcity has given way to the protection of children and the regulatory quid pro quo as the modern foundations for FCC intervention in broadcasting. That such rationales can be stretched to validate the Commission's news distortion policy in cases like *Serafyn* is an object lesson in their limitations.

The question whether the Commission should retain or even expand its news distortion policy is one that implicates conflicting democratic values. On the one hand, recent media developments about which critics complain *do* suggest that there are structural pressures on press objectivity. We cannot realistically deny that private media serve to constrain available public discussion; government is not the only speech suppressant. We might conclude that a salutary intervention by the FCC into the worst of the tabloid shows' unsavory journalistic practices would actually provide a long-term

benefit to the public. A wise Commission could help enhance both truth and press integrity, reducing public ambivalence about the information necessary to conduct its affairs.

Whatever the potential democratic benefits for public discourse of such governmental intervention, however, it conflicts with other democratic norms. The news distortion doctrine in fact presents far more serious dangers for democracy than the fairness doctrine ever did. It is ultimately incapable of application in a way that does not overly intrude into editorial judgments.

At best, the news distortion doctrine would provide the appearance of neutrality and objectivity without addressing the underlying problems catalogued by media critics. At worst, it would establish an “official truth” in many controversial issues of importance to public discourse. Such an official truth may well be wrong. In any event, it would be particularly problematic if it were established in response to the selective chilling strategy of organized interest groups with particular ideological aims. Unlike low value speech such as indecency,⁴³⁵ news distortion concerns the kind of speech at the core of First Amendment protection. Protecting editorial discretion in the context of political speech is central to the protection of the First Amendment and the democratic role not only of the press, but of the administrative and judicial processes as well.

Ultimately, news production is part of culture and in that sense media “bias” is unavoidable. The official authentication of news presents greater public dangers than media voices whose content can be challenged in a range of different venues.

435. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 744-51 (1978).

APPENDIX: APPLYING THE "OBVIOUS" NEWS DISTORTION STANDARD

A. *Close Analysis of Claimed Factual Inaccuracies in the 60 Minutes Broadcast*⁴³⁶

Having largely rested its analysis on the supposed mistranslation of "zhyd," the D.C. Circuit did not discuss each of the "other factual inaccuracies" raised by the *Serafyn* complainants. Instead, the court instructed the Commission on remand to "consider whether any other error was sufficiently obvious and egregious to contribute to an inference about CBS's intent, and therefore to qualify as 'extrinsic evidence.'"⁴³⁷

In attempting to narrow the sweep of its "obvious and egregious error" standard, the court articulated the following guidance for the Commission in that connection: "This is not to say that the Commission must investigate every allegation of factual inaccuracy; if the broadcaster had to do historical research or to weigh the credibility of interviewees, for example, then any alleged inaccuracy is almost certainly neither egregious nor obvious."⁴³⁸

The claims of inaccuracy in the *Serafyn* petition and supporting documents entail precisely that sort of calculus, however. Indeed, it is difficult to conceive of any program concerning controversial issues of public importance—and particularly dealing with historical matters—as to which claims of material errors regarding content will be obvious or incontestable. Despite the court's language, the *Serafyn* claims usefully demonstrate this point. They also serve to show the danger of the D.C. Circuit sanctioning historical revisionism—particularly in the Holocaust context.

Certain key claims of inaccuracy purportedly illustrating intentional distortion have been discussed above because of their specific role in the D.C. Circuit's decision. But the *Serafyn* complainants made a number of other claims of error. Because the parties settled the case, we will never know how the Commission would have addressed these claims. This Appendix will examine the additional claims in detail. The analysis is intended to serve as a concrete "object lesson" on the difficulty—if not impossibility—of applying the D.C. Circuit's news distortion standard

436. It is unnecessary to claim that my selection of historical sources is definitive. The account and minute analysis above clearly establish at least that there is sufficient dispute to make it completely inappropriate for the government to delve into the substantive details.

437. *Serafyn v. FCC*, 149 F.3d 1213, 1224 (D.C. Cir. 1998). Note the effect of the modifier "other". The use of this modifier reinforces the impression that the D.C. Circuit assumes that "zhyd" was mistranslated in the program and that there were other errors as well.

438. *Id.* at 1223-24.

usefully in the very contexts in which the policy will most likely be invoked.

This Appendix is not designed as an apologia for CBS's journalistic and editorial decisions in connection with *The Ugly Face of Freedom*. No doubt the broadcast contained some factual inaccuracies and linguistic ambiguities. No doubt some of its choice of language—particularly a reference to denials by the Ukrainian government of “genetic[] anti-Semiti[sm]” in its people—was ill-considered and inflammatory. The program's dramatic style gave significant emphasis to the story. As will be detailed below, different stories could have been told about post-Soviet Ukraine. This Appendix is designed to show two things: (1) that the *Serafyn* complainants' evidence did not support a claim of intentional news distortion and (2) that involving the FCC in such inquiries will inevitably require the agency to opine on the truth of historical claims.

1. *The Galicia Division of the Waffen SS*

The broadcast stated that “[t]housands of Ukrainians joined the SS and marched off to fight for Nazism. In the process, they helped round up Lviv's Jews, helped march more than 140,000 of them off to extinction, virtually every Jew in Lvov.”⁴³⁹ Arguing that the Ukrainian SS unit—the Galicia Division—was not established until 1943 (when virtually all of Lviv's Jews had already been killed) complainants characterized this statement as a “damnable lie” indicative of intentional news distortion.⁴⁴⁰ Moreover, they attacked the broadcast for later “invit(ing) [the viewer] to look on in horror as veterans of the Galicia Division return for a reunion, while Cardinal Lubachivsky, head of the Ukrainian Catholic Church, gives his blessing.”⁴⁴¹

There is in fact no dispute that the Galicia Division was not formed until 1943, by which time virtually all of the Jews of Lviv had been murdered. However, the broadcast did not say that the Galicia Division participated in these crimes. Rather, in a rather ambiguous narration line, the report stated that “[t]housands of Ukrainians joined the SS and marched off to fight for Nazism” and that “in the process” “they” helped round up Lviv's Jews.⁴⁴²

It is indisputably true that the Ukrainische Hilfspolizei (Ukrainian Auxiliary Police)—established shortly after the German occupation of Ukraine on the orders of Heinrich Himmler⁴⁴³—participated in the round-up

439. *60 Minutes*, *supra* note 100.

440. Reply to Opposition of CBS, Inc. to Pet. to Deny, at 13, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

441. *Id.* at 12.

442. *60 Minutes*, *supra* note 100.

443. ENCYCLOPEDIA OF THE HOLOCAUST 1531 (Israel Gutman ed., 1990) (noting that Himmler

and extermination of Ukrainian Jews.⁴⁴⁴ Given the broad historical support

ordered the establishment of the Ukrainian Auxiliary Police on July 27, 1941, shortly after the German occupation).

444. Shmuel Spector, a leading expert on the fate of the Ukrainian Jews, writes as follows about the role of the Ukrainian Auxiliary Police:

In the first few days of occupation, Ukrainian police, as an organized group or on an individual basis, participated in pogroms against the Jews, in Lvov, in the cities of Eastern Galicia, and in Volhynia. Later, when Ukrainian police escorted groups of Jews to places of work or were on guard duty in the ghettos, they extorted money from the Jews, harassed them, and frequently shot Jews merely for the sake of killing. When the ghettos were being liquidated, Ukrainian Auxiliary Police took part in *Aktionen*: blockading the ghettos, searching for Jews who had gone into hiding, and hunting those down who had escaped. They escorted Jews to their execution pits and served as the guards surrounding the murder sites, barring access to them. They were known for their brutality and killed many thousands of Jews who could not keep up on the way to the execution sites, or who tried to escape.

Schmuel Spector, *Ukrainische Hilfspolizei*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1531. Philip Friedman, a historian and one of Lviv's few Jewish survivors, provides a similar account:

The principal collaboration with the Germans was through the Ukrainian semimilitary and police formations. The Ukrainian auxiliary police, organized throughout the Ukrainian ethnic area, including the Galicia District, was in effect subordinate to the Germans. One of its functions was to assist the German police and the SS in their anti-Jewish campaigns. At first "assistance" was confined to seizing and arresting Jews and delivering them to the German authorities, or to participating in raids by the German police. But this "assistance" did not satisfy the Germans . . . Gradually the functions of the Ukrainian police were being extended. They kept watch over the ghetto in the anti-Jewish campaigns, convoyed transports to the extermination camps, and directly participated in the extermination of the Jews.

PHILIP FRIEDMAN, *ROADS TO EXTINCTION: ESSAYS ON THE HOLOCAUST 185-86* (Ada Friedman ed., 1980).

Raul Hilberg also writes of the important role the auxiliary police played in the extermination process:

We come now to a second and somewhat more efficient form of local cooperation [than pogroms], namely the help extended to the Einsatzgruppen [Nazi mobile killing units] by auxiliary police. The importance of the auxiliaries should not be underestimated. Roundups by local inhabitants who spoke the local language resulted in higher percentages of Jewish dead. This fact is clearly indicated by the statistics of the Kommandos that made use of local help. As in the case of the pogroms, the recruitment of auxiliaries was most successful in the Baltic and Ukrainian areas.

....

The Ukrainian auxiliaries appeared on the scene in August 1941, and Einsatzgruppe C found itself compelled to make use of them because it was repeatedly diverted from its main task [i.e., extermination of the Jews] to fight the "partisan nuisance." . . . The Ukrainians were used principally for dirty work. Thus Einsatzkommando 4a went so far as to confine itself to the shooting of adults while commanding its Ukrainian helpers to shoot children.

RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 312-14 (1985).

The role of Ukrainian collaborators is also emphasized in *A History of the Jewish People*:

The most active accomplices of the Germans in these acts of extermination were the Ukrainians and the Lithuanians. . . . Among the Ukrainians and Lithuanians, traditional hatred of Jews was combined with the political hopes they pinned on the victory of the Germans and the fulfillment of their nationalist plans. This accounted for their extensive participation in acts of extermination carried out by the Einsatzgruppen and in wiping out the ghettos. Their police personnel were willing to search tirelessly for days and even weeks in order to hunt down one concealed Jewish child.

for the view that Ukrainian police units were significant participants in the deportation and extermination of the Jews in Ukraine and elsewhere, the broadcast's arguably mistaken reference to the Galicia Division of the Waffen SS as the unit responsible for these crimes cannot reasonably be viewed as involving a significant matter. Moreover, whether the Galicia Division itself was involved in wartime atrocities is a matter of considerable historical dispute. There is no doubt that thousands of Ukrainians voluntarily joined this German-formed unit and fought on the side of the Nazis. There is support in historical accounts of the Holocaust for the conclusion that many of the Ukrainian police units, which in fact assisted in the extermination of the Jews in the early part of the German occupation, were later incorporated into the Galicia Division of the Waffen SS.

Many Ukrainian nationalists, however, contend that Ukrainians voluntarily joined the Galicia division not out of pro-German motives, but to fight against the Soviet Communists whose rule of portions of Ukraine had been marked by forced collectivization, mass starvation, and political terror.⁴⁴⁵ They also contend that the Galicia Division was purely a fighting unit that did not persecute civilians. This view is supported by the findings of Jules Deschenes, who in a report to the Canadian government on possible war criminals living in Canada concluded that “[c]harges of war crimes against members of the Galicia Division have never been substantiated.”⁴⁴⁶

A HISTORY OF THE JEWISH PEOPLE 1034 (H.H. Ben-Sasson ed., 1976). See also LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933-1945, at 400 (1975) (noting that “[t]he Baltic and Ukrainian populations collaborated voluntarily with the Germans in murdering the Jews”); *id.* at 279 (claiming that the Germans in the summer of 1941 “exploit[ed] the superstitious anti-semitic prejudices of the . . . Ukrainians” and “harnessed the violent energies of these willing collaborators to round up and kill the Jews”); REUBEN AINSZTEIN, JEWISH RESISTANCE IN NAZI-OCCUPIED EASTERN EUROPE 337-38 (1974) (“In the [Volhynian] towns the slaughter of Jews was organized by the Nazis with the help of the local Germans and carried out to a large extent by police battalions of local or Galician Ukrainians.”).

Historians also point to the use made by the Nazis of the Ukrainian auxiliary police in non-Ukrainian areas. As Philip Freidman writes:

The Germans dispatched them to Warsaw and to other Polish and Lithuanian ghettos. They were also used as guards to carry out the work of extermination in various concentration camps . . . and the death camps of Sobibor, Treblinka and others. Further, Ukrainian policemen were used to guard prisons that held Jews, such as the notorious Pawiak prison in Warsaw.

FRIEDMAN, *supra*, at 186.

445. See generally ROBERT CONQUEST, HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE (1986).

446. HONORABLE JULES DESCHENES, COMMISSION OF INQUIRY ON WAR CRIMINALS REPORT, PART I: PUBLIC 261 (1986). Sol Littman, whose views are further discussed in the text, has called the validity of Deschenes' findings into question. See Sol Littman, *The Ukrainian Halychyna Division: A Case Study of Historical Revisionism*, in HOLOCAUST LITERATURE: A HANDBOOK OF CRITICAL, HISTORICAL, AND LITERARY WRITINGS 279 (Saul S. Friedman ed., 1993). Littman tells the following story. In May 1945, the Division arranged to surrender to British forces in Austria. After the Division

Others take a sharply different view. Sol Littman, head of the Simon Wiesenthal Center in Toronto, Canada, has written that the Galicia Division was recruited largely from the same Ukrainian police units “that served as the chief executioners for the mobile killing squads known as *Einsatzgruppen*.”⁴⁴⁷ Citing Polish, Soviet, and Israeli sources, Littman describes a series of horrifying atrocities, largely against non-Jewish Polish villagers, allegedly committed by this unit. Philip Friedman also notes that “the official Polish investigation of German war crimes in Poland, conducted in 1945, listed a number of executions of Poles and Jews by the Ukrainian SS.”⁴⁴⁸ Echoing this finding, Reuben Ainsztein and Sol Littman write of the Galicia Division’s crimes against Poles.⁴⁴⁹

At the very least, there is a question of whether the Galicia Division was simply made up of patriotic Ukrainians who reluctantly joined forces with the Germans to fight the Red Army, or whether this military unit also committed numerous war crimes against helpless Polish and Jewish civilians. This is precisely the sort of contested historical “fact” about the actions of thousands of people in a war that neither the FCC nor the D.C. Circuit is competent to consider or resolve in a news distortion case.

In any event, even if the statements were in error and if we were to assume the mistake was deliberate, it should not support a claim of

had been held as prisoners of war in Rimini, Italy, for about three years, the British Labour Department agreed to the conditional admission of the former Galicia Division members to Britain. The prisoners were needed to meet a critical shortage of agricultural workers caused by the departure of German POWs and the incomplete demobilization of British troops. Under this arrangement, a new home was to be found for the Ukrainian Division members by 1950. After critical inquiries arose in Parliament as to how such an ill-reputed unit could be admitted to Britain and it was discovered that Division members had never been screened as possible war criminals, D. Haldane Porter of the Refugee Screening Commission was sent to Rimini to investigate.

According to Littman, Porter’s report is “a welter of contradictions.” *Id.* at 287. Porter, he writes, admitted that he had time to interview only a small number of Division members and that these interviews were handicapped by the fact that neither Porter nor any of his staff spoke Ukrainian. Porter “readily admitted that the officers of the division might be lying to him and that he had no alternative but to accept what they said because he was unfamiliar with the unit’s history.” *Id.* Ultimately, he concluded that, whatever the Division’s record, its members constituted no threat to security and could be admitted to Britain for agricultural work.

In 1950, the British government, to fulfill its commitment to remove the Galicia Division members that year, sought to place them in Canada, Australia, and New Zealand. Initially, Canada objected, but relented after receiving assurances that Division members had been fully screened regarding the commission of war crimes. Littman argues that when Deschenes was appointed in 1984 as a one-man Royal Commission to investigate the possible presence of war criminals in Canada, he chose to rely solely on the Haldane Porter report to conclude that charges against the Galicia Division were unsubstantiated. *Id.* at 291.

447. Sol Littman, *supra* note 446, at 283.

448. Despite this official finding, Friedman does allow that “it is possible that witnesses confused the Ukrainian auxiliary police and HiWi with the Ukrainian SS.” FRIEDMAN, *supra* note 444, at 187.

449. AINSZTEIN, *supra* note 444, at 253; Littman, *supra* note 446, at 282-83.

intentional news distortion. The mistake did not “involve a significant [matter] and not merely a minor or incidental aspect of the news report.”⁴⁵⁰ Under its precedents, the Commission should not sit as a national arbiter of truth, historical or otherwise. However, ample historical evidence exists as to the significant participation of Ukrainian militia and auxiliary police units in the round-up and murder of the Jews of Lviv and in Ukraine as a whole.

2. *Events in Lviv*

The next group of complainants’ allegations of intentional news distortion all deal with the events in Lviv shortly before and after the German occupation in late June 1941. The complainants alleged the following errors:

(1) Morley Safer erroneously stated in the broadcast that “even before the Germans arrived,” Ukrainian police went on a three-day killing spree in which, according to Simon Wiesenthal, between 5,000 and 6,000 Jews were murdered. Complainants claimed that the dead in Lviv were killed by the retreating Soviets and the invading Germans.⁴⁵¹

(2) There were no Ukrainian-initiated pogroms in Lviv. Complainants referred to a German document, quoted by Raul Hilberg, which stated that “[a]lmost nowhere can the [Ukrainian] population be persuaded to take active steps against the Jews.”⁴⁵²

(3) Historical footage identified in the broadcast as showing Ukrainian brutality against the Jews was actually a staged “propaganda film” made by the Germans, in which “street thugs” were recruited by the Nazis to strip and humiliate some “former mistress of the [Soviet) NVKD.” The film’s purpose was to create the false impression that the Ukrainian population was taking spontaneous anti-Jewish actions.⁴⁵³

450. Galloway v. FCC, 778 F.2d 16, 20 (D.C. Cir. 1985) (describing one element of the FCC’s requirements for news distortion claims); Serafyn v. FCC, 149 F.3d 1213, 1217 (D.C. Cir. 1998) (same).

451. Reply to Opposition of CBS, Inc. to Pet. to Deny (Serafyn Reply Brief) at 15, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027); Pet. to Deny Ex. 9, at 20-26, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). The historical argument of the initial complaint can be found in Petition to Deny Ex. 9, WGPR (No. 94-1027). That exhibit argued that “[p]rior to the arrival of the Germans, there was no anti-Jewish or anti-Communist violence” and that “[t]he most that the Germans could incite [was] a small number of Ukrainians to contribute [to the killing of 130 Jews].” Petition to Deny Ex. 9, at 22, 24, WGPR (No. 94-1027). The account further implies that such violence as the Germans were able to incite occurred in retaliation for purported Soviet atrocities that the population may have associated with Jews because “[i]t was commonly perceived by Ukrainians that Jews were disproportionately represented among the Communists inflicting . . . suffering upon Ukraine.” *Id.* Ex. 9, at 21.

452. Serafyn Reply Brief, WGPR (No. 94-1027) (quoting Holocaust historian Raul Hilberg); Petition to Deny Ex. 9, at 22-24, WGPR (No. 94-1027).

453. Serafyn Reply Brief, WGPR (No. 94-1027); Pet. to Deny Ex. 9, at 26-27, WGPR (No. 94-

(4) CBS used a discredited still photograph of a woman and girl following the above film in the broadcast “to show that the girl was a rape victim of Ukrainian anti-Semites.”⁴⁵⁴ Complainants noted that the photograph was originally published in *Time* magazine, which subsequently retracted its identification and apologized for its misuse.⁴⁵⁵

a. The Pre-occupation “Killing Spree”

There is no question that widespread pogroms lasting four days followed immediately after the Germans entered Lviv on June 30, 1941. While historical evidence supports Ukrainian participation in the Lviv pogroms, there does not appear to be evidence to support the broadcast’s statement that the Ukrainian police engaged in massacres in Lviv “before the Germans arrived.”⁴⁵⁶ However, there was a long history of pogroms against the Jews in Ukraine long before World War II and the 1941 Lviv pogrom.⁴⁵⁷ And given the overwhelming evidence of the pogroms which took place immediately after the German occupation and later, the factual misstatement should not be considered significant.

1027).

454. Serafyn Reply Brief, at 16, *WGPR* (No. 94-1027); Petition to Deny Ex. 9, at 27, *WGPR* (No. 94-1027).

455. Serafyn Reply Brief at 14, 16, *WGPR* (No. 94-1027); Petition to Deny Ex. 9, at 27, *WGPR* (No. 94-1027).

456. As Aharon Weiss writes of the beginning of the *Petliura days* on July 25, 1941:

[Groups of peasants] assembled in the courtyards of the Ukrainian police stations and then, joined by the Ukrainian police and armed with sticks, knives and axes set out on their rampage. . . . The next day, July 26, the participation of the Ukrainian policemen was especially prominent. In groups of five, they raided Jewish houses and took the Jews they found inside to the warehouses of the Axelbrod bakery on Zulkeyewska Street or to the Lunecki prison. There all the Jews were severely beaten. Some were released after paying a ransom, some were killed on the spot, and most of the others were killed the following day.

ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1126. See also John-Paul Himka, *Ukrainian Collaboration in the Extermination of the Jews During World War II, Sorting out the Long-Term and Conjectural Factors* (suggesting that, although the pogroms were “largely inspired by the Germans, . . . there was also an element of spontaneity in them”), available at <http://www.math.ualberta.ca/~amk/zwoje16/text11.htm> (last visited July 18, 2000). With regard to a different area of Ukraine, Martin Dean has recently contended that persecution of the Jewish population by local Ukrainians in the former Polish district of Volhynia “began even before the Germans had arrived.” MARTIN DEAN, *COLLABORATION IN THE HOLOCAUST: CRIMES OF THE LOCAL POLICE IN BELORUSSIA AND UKRAINE* 20, 177 n.33 (2000).

457. W. BRUCE LINCOLN, *RED VICTORY: A HISTORY OF THE RUSSIAN CIVIL WAR 317-28* (1989); RICHARD PIPES, *A CONCISE HISTORY OF THE RUSSIAN REVOLUTION* (Peter Dimock ed., 1996); GERALD REITLINGER, *THE FINAL SOLUTION: THE ATTEMPT TO EXTERMINATE THE JEWS OF EUROPE*, 228-29 (1968); Schmucl Spector, *Ukraine*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1525-27. See also Aharon Weiss, *Petliura Days*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1126 (“Petliura . . . was responsible for large-scale pogroms against Jews in 1919.”).

b. The Pogroms in Lviv

The pogroms which took place in Lviv in June and July 1941 are indisputably established by historians. For example, writing in the *ENCYCLOPEDIA OF THE HOLOCAUST*, Aharon Weiss relates:

On June 30, 1941, the Germans occupied Lvov. The killing of Jews began that same day, committed by Einsatzgruppe C, . . . German soldiers, Ukrainian nationalists and plain rabble. The Germans and Ukrainians spread a rumor that the Jews had taken part in the execution of Ukrainian political prisoners whose bodies had been discovered in the dungeons of the NVKD (the Soviet political police). In four days of rioting, ending on July 3, 1941, four thousand Jews were murdered. . . . From July 25 to 27 the Ukrainians again went on the rampage, murdering two thousand more Jews. These pogroms became known as the Petliura days.⁴⁵⁸

This account is echoed by that of Holocaust historian Lucy Dawidowicz:

Exploiting the superstitious anti-Semitic prejudices of the Lithuanians, Balts, and Ukrainians and activating their accumulated hatred for the Soviets, the Germans harnessed the violent energies of these willing collaborators to round up and kill the Jews. . . . In Lwow the Germans and Ukrainians, in house-to-house hunts for Jews, shot them randomly on the spot. Belatedly avenging the assassination—by a Jew back in 1926 — of Semyon Petlura, notorious anti-Semite and Ukrainian national hero, the Ukrainians staged mammoth pogroms, slaughtering thousands and carrying off other thousands of Jews to Einsatzgruppen headquarters. Within hours or days, those Jews who had been taken away were machine-gunned en masse at some remote desolate area. The disaster was epic⁴⁵⁹

458. Aharon Weiss, *Lvov*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 928-29.

459. DAWIDOWICZ, *supra* note 444, at 279. Gerald Reitlinger writes that Ukrainian militia “killed [Jews] in the prisons, the streets, and in the sports stadium.” REITLINGER, *supra* note 457, at 229. *See also* DEAN, *supra* note 456, at 177 n.33 (citing Leon Berk’s estimate that in Lvov “some 6000 Jews were killed on the three days from 30 June 1941, as the Germans gave the Ukrainians *carte blanche* to murder them”) Philip Friedman describes the pogrom as follows:

From June 30 to July 3, German soldiers spread through the streets of the city in the company of Ukrainian nationalists and an unruly mob of the local population. They fell upon Jews in the streets, beat them murderously, and dragged them away for “work”—especially for cleansing of prisons filled with corpses and blood. Thousands of Jews were seized and conveyed to the prisons . . . and to the Gestapo headquarters. . . . A deadly fear gripped the Jews. They hid in cellars and ceased to show themselves on the streets of the city. Then the destroyers, chiefly the newly

The German perspective on events is reflected in a report dated July 16, 1941 to the Reich Security Main Office:

During the first hours after the departure of the Bolsheviks, the Ukrainian population took praiseworthy action against the Jews. In their assault upon the Jews inhabiting Lwow, they seized about 1,000 of them and brought them to a prison that had previously belonged to the [Soviet] GPU and was now in the hands of the German army. About 7,000 Jews were seized and shot by the police in retaliation for the inhuman acts of cruelty [allegedly perpetrated by the Jews before the departure of the Russians]; 73 persons regarded as officials and spies of the NKVD were also shot. Forty persons were liquidated on the basis of substantive information from the inhabitants [of Lwow]. The age of most of the Jews seized was 20-40. To the extent feasible, the artisans and experts among them were set free.⁴⁶⁰

Against this evidence, complainants based their apparent denial of the Lviv pogroms on a single report from Einsatzgruppe C—quoted and commented on by Raul Hilberg—which complained of the unwillingness of elements of the Ukrainian population to aid the Nazis in the destruction of the Jews. The German report in question, dated September 18, 1941, states in relevant part:

Almost nowhere can the local population be persuaded to take active steps against the Jews. This may be explained by the fear of many people that the Red Army may return. . . . In order to meet the fear psychosis, and in order to destroy the myth which, in the eyes of many Ukrainians, places the Jew in the position of the wielder of political power, Einsatzkommando 6 on several occasions marched Jews before their execution through the city. Care was taken to have Ukrainian militiamen watch the shooting of the Jews.⁴⁶¹

organized Ukrainian militia, began to roam through Jewish houses, to remove men—and frequently women also—ostensibly for “purification of prisons.” Most of the Jews thus taken to the prison courtyards never emerged again. They died after grievous agonies and tortures, or were shot outright. Eyewitnesses who escaped from the hoodlums during these terrible days, relate that the courtyard walls of the Brygidki prison were spattered with fresh blood up to the second floor, and with human brains.”

FRIEDMAN, *supra* note 444, at 246-47. Eyewitnesses Leon Wells and Simon Wiesenthal also provide accounts which are consistent with those quoted above.

460. FRIEDMAN, *supra* note 444, at 248. See also REITLINGER, *supra* note 457, at 228.

461. 1 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 309 (Holmer & Meier eds., 1985). Commenting on this report, in a passage quoted by the *Serafyn* complainants, Hilberg writes: “This ‘deflation’ of the Jews in the public eye did not have the desired effects. After a few weeks,

The use of these statements is misleading in connection with the Lviv pogroms. The September 1941 Nazi document and quotation from Raul Hilberg on which complainants rely—which describe events in an entirely different area of Ukraine—lend no credence to their denial of the pogroms which took place in Lviv during the summer of 1941.

By July 1941 Einsatzgruppe C was deployed in the Zhitomir region, which is far distant from Lviv and was east of the pre-September 1939 border between Poland (of which Lviv was then part) and the Soviet Union.⁴⁶² By November 1941, the unit was deployed even further east near Kiev, having in the interim participated in the infamous massacre at Babi Yar.⁴⁶³ Aside from the fact that events in one area of a country or region say little about what occurred hundreds or thousands of miles away, the difference in attitude toward the Jews between the population of the Western Ukraine and those Ukrainians living east of the pre-1939 Polish border has been the subject of specific historical comment.⁴⁶⁴

c. Historical Footage of Ukrainian Brutality

The broadcast included certain historical footage accompanied by the following narration: “These are remnants of a film the Germans made showing Ukrainian brutality.”⁴⁶⁵

While agreeing that the Germans made the film, the complainants contended that it was a staged “propaganda film” in which the Nazis recruited “street thugs” to strip and humiliate some former “mistresses of the

Einsatzgruppe C complained once more that the inhabitants did not betray the movements of hidden Jews.” *Id.*

462. *Id.* at 299. This is shown by maps in Hilberg’s book, which appear only a few pages from the quoted passages.

463. *Id.* at 300.

464. Historian Reuben Ainsztein writes that “when the Germans occupied the Western Ukraine in 1941, they found there hundreds of thousands of people who . . . were ready to torture, massacre and rob their Jewish neighbors.” AINSZTEIN, *supra* note 444, at 250-51. Noting that this “was something exceptional even in Eastern Europe,” Ainsztein quotes a number of Nazi documents which report the reluctance of various local populations to take spontaneous action against the Jews, including the document the *Serafyn* complainants relied on. However, this document describes the behavior of the inhabitants in *Soviet* Ukraine. *Id.* at 251-52. In that region, Ainsztein writes that the only people who enthusiastically helped the Nazis murder the Jews were “the scum of the Ukrainian nation . . . [and] the local Volksdeutsche.” *Id.* He concludes that:

The basic difference between the Ukrainians east of the 1939 border between Poland and the Soviet Union and those west of it can be gauged from the fact that when the Ukrainian nationalists began to massacre Poles in Volyn in 1943, many fled into the Zhitomir Region which lies east of the pre-1939 Polish-Soviet border. There they were safe among the Soviet Ukrainians.

Id. at 252.

465. See *60 Minutes*, *supra* note 100.

[Soviet] NVKD.”⁴⁶⁶ The film’s purpose was to create a *false* impression that the Ukrainian population was taking spontaneous anti-Jewish actions.⁴⁶⁷

The complainants cited no evidence to support this interpretation, other than an article in a Ukrainian weekly newspaper.⁴⁶⁸ But even assuming complainants’ characterization of the film was correct, no evidence was offered to show that CBS personnel *knew* it to be a hoax. Moreover, even assuming this fact as true, the Commission’s standards for making out a *prima facie* claim of intentional news distortion would not be met. There is overwhelming evidence to support the essential facts reported—for example, that large scale pogroms took place in Lviv in June and July of 1941. Even if proven, therefore, *60 Minutes*’ knowing identification of generic German “atrocities” footage as actually showing those events would constitute no more than the kind of journalistic “window dressing” that the Commission has expressly said before *Serafyn* would not support a news distortion claim.⁴⁶⁹

Regardless of whether it had been staged, the film did actually show Ukrainians brutalizing Jewish women, even according to the *Serafyn* complainants’ version of the facts.⁴⁷⁰ The complainants’ argument is an attempt not to deny the fact that what took place on the film actually happened, but more generally to use the staging argument to claim that Ukrainians did not willingly participate in the Lviv pogroms. In light of the overwhelming evidence based on historical and eyewitness accounts of the Lviv pogroms against Jews and the participation of Ukrainians, the claim about the alleged staging of the brutality footage supports neither the falsity of the footage nor the falsity of the general claims about the Lviv pogroms.

Moreover, the complainants interpreted the historical footage as “not of the Ukrainian populace attacking Jews, but rather the roughing up of Communist collaborators.”⁴⁷¹ To the extent that even nationalist historians attribute many Ukrainians’ anti-Semitism to their association of Jews with Bolsheviks,⁴⁷² the complainants’ interpretive distinction appears somewhat facile.

466. Reply to Opposition of CBS, Inc. to Petition to Deny, at 16, *WGPR, Inc.*, 10 F.C.C.R. 8140 (1995) (No. 94-1027); Petition to Deny Ex. 9, at 26-27, *WGPR, Inc.*, 10 F.C.C.R. 8140 (1995) (No. 94-1027).

467. See *Serafyn* Reply Brief, at 15-16, *WGPR* (No. 94-1027).

468. *Id.*

469. *Serafyn v. FCC*, 149 F.3d 1218 (D.C. Cir. 1998).

470. Moreover, much has been written about Ukrainian anti-Semites of the time associating Bolsheviks with Jews. See, e.g., DEAN, *supra* note 456, at 13.

471. See *Serafyn* Reply Brief, at 16, *WGPR* (No. 94-1027).

472. See *infra* notes 480 and 497.

d. The Time Magazine Photograph

The footage discussed above was followed immediately in the broadcast by a still photograph of a young woman screaming in apparent agony. CBS used this photograph in the broadcast without accompanying narration. In 1993, the same photograph was published in *Time* magazine over the caption “a Jewish girl raped by Ukrainians in Lvov, Poland in 1945.”⁴⁷³ As complainants noted, several weeks later *Time* ran a correction stating that it had been “[un]able to pin down exactly what situation the photograph portrays” and expressing regret that the caption “may well have conveyed a false impression.”⁴⁷⁴ Complainants in *Serafyn* contended that CBS executives “must have known” of *Time*’s statement regarding the photograph, and that CBS’s use of the picture to illustrate Ukrainian pogroms against Jews constituted extrinsic evidence of intentional news distortion.

There was no evidence that anyone at CBS used the picture in the broadcast for the purpose of misleading the public. Even if CBS employees could be shown to have been aware of doubts concerning what the photo depicted, its use in the report was mere “window dressing” which did not go to a significant matter—such as the 1941 Lvov pogroms. And there is enough historical dispute about the picture that the Commission could not possibly determine what it did and did not show.

The *Serafyn* parties quoted only a carefully selected portion of the *Time* correction. A fuller version of *Time*’s lengthy explanation of the controversy surrounding the photograph reads as follow:

More than 750 readers have written us so far about the photograph of the young woman that accompanied our story on rape and the war in Bosnia. . . . The picture’s caption, which said it showed a “Jewish girl raped by Ukrainians in Lvov, Poland, in 1945,” struck a nerve with readers of Ukrainian descent . . . Except for the date, the information describing the events in the photo was obtained from an employee of a Holocaust museum in Israel. Subsequent research into the picture’s somewhat murky past has turned up the following:

The photo was taken not in 1945 but in 1941 in Lvov (its Russian name), or Lviv (its name today), Ukraine, shortly after the Germans captured the city from the Soviets on June 30. Chaos in the form of

473. Lance Morrow, *Unspeakable (Rape in Former Yugoslavia’s Civil War)*, TIME, Feb. 22, 1993, at 48, available at 1993 WL 2931734.

474. *Wartime Atrocities*, TIME, Apr. 19, 1993, at 7.

pogroms, rapes and killings swept the town at that time. The picture is one of a series showing women being stripped, harassed and chased by civilians. One school of thought holds that the women were Jewish victims of the pogroms in Lvov. The Germans spread rumors that Jews were responsible for the murders of several thousand political prisoners found in the cellars of Soviet NKVD buildings, thus fueling the hatred and the acts of revenge against local Jews that followed. Other historians insist that the majority of the women pictured in the series of photographs were mistresses the Soviets abandoned when they fled Lvov to escape the German troops. The defenseless collaborators were then attacked by resentful residents for consorting with the Soviet enemy. Still another theory suggests the public humiliation of the women was orchestrated by the occupying Nazis in order to shoot an anti-Semitic propaganda film.

Despite our best efforts, we have not been able to pin down exactly what situation the photograph portrays. But there is enough confusion about it for us to regret that our caption, in addition to misdating the picture, may well have conveyed a false impression.⁴⁷⁵

In this statement, *Time* magazine—like every other mainstream journalistic outlet or academic source—treated the Lviv pogroms of 1941 as historical fact. More substantively, however, the *Time* correction forcefully demonstrates why the Commission should not attempt what *Time*'s editors did not—to determine which “school of thought” concerning this photograph is the correct one.

3. *The Ukrainian “Boy Scouts”*

The broadcast contained a number of scenes of marches and demonstrations by UNO/UNSO, which has been widely described in the press as being an extreme right wing, ultranationalist group.⁴⁷⁶ One of these scenes near the end of the broadcast showed a torchlight parade, in which

475. *Id.*

476. See, e.g., Taras Kuzio, *Paramilitary Groups in Ukraine*, JANE'S INTELLIGENCE REV., Mar. 1994, at 123. See also Union of Councils for Soviet Jews, UCSJ Position Paper, Ukraine, Jan. 1, 1998 (describing UNA-UNSO's circulation of anti-Semitic tracts), available at <http://www.fsumonitor.com/stories/asem1uk2.shtml> (last visited Sept. 24, 2000) [hereinafter UCSJ]; Taras Kuzio, *Ukrainian Paramilitaries*, JANE'S INTELLIGENCE REV., Dec. 1992, at 540; Julian Borger, *Ukraine's Far Right Dons Khaki for Dry Run*, THE GUARDIAN (London), Mar. 21, 1994, at 9; James Rupert, *Ukraine Patriarch's Unruly Burial Brings Church-State Ties to a Low*, WASH. POST, July 23, 1995, at A16; Bill Sloat, *A Conflict with Russia Emerges*, PLAIN DEALER, Sept. 1, 1993, at 7B.

some rather young people were seen participating. Without any supporting affidavits, complainants asserted (1) that these were “Boy Scouts” whom CBS sought to portray as “Hitler Youth” and (2) that CBS “overlayed the soundtrack with the sound of marching boots” in order to “lend an ominous militaristic flavor to the scene.”⁴⁷⁷ The complainants did not provide any evidence, however, other than their own conclusions from the broadcast, that *60 Minutes* deliberately and intentionally mischaracterized Boy Scouts as fascists and enhanced the marching sounds in the segment. Indeed, the credibility of the complainants’ assertion would appear to be drawn into question by news accounts describing UNA officials as wearing “red and black armbands featuring a black Germanic cross, intertwined with the Greek letter alpha in white”—a description which matches the banners carried by the putative “Boy Scouts” in the footage seen in the *60 Minutes* broadcast.⁴⁷⁸

4. CBS’s Alleged Slander of Ukrainian “National Heroes”

The complainants’ argument that CBS intentionally distorted the news by slandering a number of Ukrainian “national heroes” is another example of their effort to have the Commission act as the judge of historical truth. Simply put, evidence shows that each of these individuals is, to say the least, controversial.

a. Stefan Bandera

Stefan Bandera was a principal leader of the Organization of Ukrainian Nationalists (OUN). While complainants state the broadcast’s alleged description of Bandera as “the leader of a notorious army of murderers” is merely “old Soviet propaganda,”⁴⁷⁹ sources characterize OUN as fascist and Bandera’s followers as killing many Jews and Poles.⁴⁸⁰ Bandera did indeed

477. Serafyn Reply Brief, at 17, *WGPR* (No. 94-1027).

478. See *Borger*, *supra* note 476. See also *60 MINUTES*, *supra* note 100. According to CBS, the footage in question was obtained from the news agency Reuters. Telephone conversation with Howard F. Jaeckel, Esq., Vice President and Associate General Counsel, CBS Corporation (July 28, 2000).

479. Serafyn Reply Brief, at 19, *WGPR* (No. 94-1027).

480. See, e.g., AINSZTEIN, *supra* note 444, at 252-54; See JOHN A. ARMSTRONG, UKRAINIAN NATIONALISM 42 (2d ed. 1963); Littman, *The Ukrainian Halychyna Division*, *supra* note 446, at 296-97. EINSATZGRUPPEN REPORTS, *supra* note 175, at 195 (describing Bandera members as “finishing off Jews and Communists”). Indeed, a contemporaneous German account quotes an OUN position letter as resting on an anti-Semitic platform. *Id.* at 210 (describing OUN letter calling for “greater independent Ukraine without Jews, Poles and Germans” by sending “Poles behind the San, Germans to Berlin, [and] Jews to the gallows”). See also SCHMUEL SPECTOR, THE HOLOCAUST OF THE VOLHYNIAN JEWS 268 (1990) (explaining that the OUN movement “identified with the Nazi ideology

fight the Nazis, as complainants claimed—after having fought *with* them until they rejected his proclamation of Ukrainian independence and imprisoned him in Sachsenhausen concentration camp.⁴⁸¹ He and his followers also fought the Russians and the Poles—not to mention Jewish partisans and refugees in the forests.⁴⁸²

b. Simon Petlura

Simon Petlura headed the government (called the “Directory”) of a short-lived independent Ukrainian state that was formed in 1918 during the civil war which broke out following the Russian Revolution. The broadcast stated that “[t]o Ukrainians Petlyura was a great general, but to the Jews, he’s the man who slaughtered 60,000 Jews in 1919.”⁴⁸³

A wide body of Jewish opinion holds Petlura responsible for the massive pogroms his forces committed during the civil war that broke out following the Russian revolution.⁴⁸⁴ Some argue that Petlura was not an anti-Semite, but was simply unable to control his troops.⁴⁸⁵ But whatever the truth of the matter, it is incontestable that Petlura’s armies massacred some 60,000 Jews.⁴⁸⁶

and its aim to destroy the Soviet state [and] concurred with its view of the Jews as carriers of the Bolshevik menace”). *Accord* ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 145-46, 153-32, 1029-30; FRIEDMAN, *supra* note 444, at 179-80, 187-89; SPECTOR, *supra*, at 234-35, 268, 270 (1990). *See also* OREST SUBTELNY, UKRAINE: A HISTORY 441-43 (1988) (describing Ukrainian “integral nationalism” during inter-war period).

481. *See* AINSZTEIN, *supra* note 444, at 252. Bandera was released in 1944 and his supporters signed an agreement with the Nazis to engage in a joint struggle against the Soviet Union. *See* Schmuell Spector, *Bandera, Stefan*, in ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 146; Schmuell Spector, *Ukrainska Povstanska Armyia*, in ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1532.

482. *See, e.g.*, SPECTOR, *supra* note 480, at 270; ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1029, 1097.

483. *See supra* Part II.B.2 (transcript of *60 Minutes* broadcast).

484. *See, e.g.*, Aharon Weiss, *Petluria Days*, in ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1125; ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1525-26. *See also* LINCOLN, *supra* note 457, at 320 (describing the killing of Jews by Petliurist forces).

485. For example, Sol Littman cites Stefan Possony for the proposition that Petlura created a Ministry of Jewish Affairs in the Directory cabinet and “warn[ed] his troops that the death sentence would overtake the perpetrators of pogroms.” Littman, *The Ukrainian Halychyna Division*, *supra* note 446, at 294.

486. *See, e.g.*, 5 SIMON DUBNOV, HISTORY OF THE JEWS: FROM THE CONGRESS OF VIENNA TO THE EMERGENCE OF HITLER 844 (Moshe Spiegel trans., 1973); PIPES, *supra* note 457. In a 1994 report, National Public Radio stated that “[b]y the end of 1919, during the civil war that followed the Russian Revolution, the Ukrainian nationalist gangs of Simon Petlyura had slaughtered 60,000 Jews.” *Ukraine Experiences Ugly Resurgence of Anti-Semitism* (National Public Radio, April 1, 1994), available at 1994 WL 8690228. Lucy Dawidowicz has described Petlyura “as a notorious anti-Semite.” DAWIDOWICZ, *supra* note 444, at 279. And in HISTORY OF THE JEWS, Simon Dubnov writes:

It was evident that the supreme command deemed it impossible to halt the wave of pogroms

In the context of reporting on Jewish fears of a revival of anti-Semitism in Western Ukraine, and the reaction of Jews to the naming of a street after Petlura, the broadcast stated that “to Jews” he was the man who had murdered 60,000 people.⁴⁸⁷ This could not possibly be the basis for a prima facie finding of intentional news distortion.

c. Roman Shukhevych

Complainants admit that Shukhevych was an officer of the Nachtigall (Nightingale) battalion and was later the commander in chief of the Ukrainian Insurgent Army (known as the UPA), but they also insist that “there is no evidence indicating involvement of Nightingale [or UPA] members in anti-Semitic atrocities.”⁴⁸⁸

The Nachtigall and Roland battalions were Ukrainian military units formed by the Germans in 1941 with the full support of Ukrainian nationalist leaders such as Stefan Bandera.⁴⁸⁹ The Ukrainians, believing the breakdown of the Nazi-Soviet Pact to be inevitable, sought German military assistance to expel the Soviets from Ukraine, planning then to establish an independent state; conversely, the Nazis (although regarding Ukrainians as *untermenschen*) saw Ukrainian nationalists as a potentially useful ally in the invasion of the Soviet Union.⁴⁹⁰

The Nachtigall entered Lviv along with the first German units. *The Encyclopedia of the Holocaust* notes that “[t]he soldiers of the battalion participated, with the Germans and the Ukrainian mob in the city, in the riots and the killing of Jews that took place between June 30 and July 3.”⁴⁹¹ When the Nachtigall and Roland units were disbanded in December 1942, Roman Shukhevych became the commander in chief of the UPA, which had earlier

without detriment to the *esprit de corps*, which thirsted for Jewish blood. It is said that when a Jewish delegation at one time appealed to Petlura to end the pogroms, he replied: “Please, don’t get me into any quarrel with the army!” Shortly after that, the city of Zhitomar was subjected to a second pogrom. Petlura happened to be at the railway station, a Jewish delegation turned to him for help; he refused to receive the delegation. In the course of the first half of 1919, the pogroms, by Petlura’s followers and other gangs, persisted throughout the Ukraine.

DUBNOV, *supra*, at 842-43.

487. See *60 Minutes*, *supra* note 100.

488. Serafyn Reply Brief at 20, *WGPR* (No. 94-1027).

489. See Schmucl Spector, *Bandera, Stefan*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 146; Schmucl Spector, *Orhanizatsiya Ukrainskykh Natsionalistin*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1097.

490. See, e.g., ALEXANDER DALLIN, *GERMAN RULE IN RUSSIA, 1941-1945: A STUDY OF OCCUPATION POLICIES* 118-22 (1957); *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1029, 1096-97.

491. *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1029, 1096-97. See also DALLIN, *supra* note 490, at 119.

been formed by elements of the OUN and units commanded by Maksim Borovets ("Taras Bulba"). Although the UPA fought mostly against Soviet partisans,

[i]n the course of the fighting, UPA units murdered Jews who had taken refuge in the forests and in the villages. In March the UPA also embarked upon the mass murder of Poles, first in Volhynia and later in Eastern Galicia. The number of victims among the Poles is estimated at forty thousand.⁴⁹²

Reuben Ainsztein provides a similar description of UPA atrocities:

Assured of German assistance in arms and, when necessary, outright military cooperation, the UPA gangs, which became known as Banderovtsy [after Stefan Bandera], proved themselves under the command of Shukhevych, now known as Taras Chuprynka, the most dangerous and cruel enemies of surviving Jews, Polish peasants and settlers, and all anti-German partisans.

. . . .

The fanaticism and nationalistic madness of the Banderovsty, Bulbovsty and other Ukrainian nationalist gangs reached depths that appeared incredible even to Soviet and Jewish partisans whose ability to be horrified by what man could do to man was blunted by their daily experiences of the Nazi New Order. The Jewish partisan Bakalczuk-Felin . . . has left us a description of entire Polish villages wiped out, their inhabitants invariably tortured and raped before being slaughtered with knives and axes, the babies and children murdered with the same kind of savagery as had been the fate of Jewish children.⁴⁹³

Whatever the proper role of the Commission in a news distortion case, it cannot be to conclude—as a matter of historical truth—that “there is no evidence” that the Nachtigall battalion, and Roman Shukhevych’s UPA, were “involve[d] . . . in . . . atrocities.”⁴⁹⁴

If *Serafyn* had not been settled, the Commission should have found that the errors identified by the complainants were not sufficient—even under the D.C. Circuit’s expansive test—to trigger a news distortion hearing. Despite

492. Schmucl Spector, *Ukrainska Povstanska Armyia*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, *supra* note 443, at 1531.

493. AINSZTEIN, *supra* note 444, at 253-54.

494. Serafyn Reply Brief at 20, *WGPR* (No. 94-1027).

that plausible outcome, however, the detailed review above of the complainants' claims of inaccuracy in the broadcast demonstrates the degree to which the Commission would be required to referee a factual dispute as to historical truth amidst conflicting sources, at best.

Some Ukrainian nationalist historians virtually deny any institutional or widespread Ukrainian persecution of Jews or collaboration with the Nazis.⁴⁹⁵ Those sympathetic to this approach criticize what they suggest is an excessive public focus on Jewish suffering to the exclusion of Ukrainian persecution.⁴⁹⁶ On this view, while regrettable instances of violence against Jews may have occurred in Ukraine during World War II, no generalizations about anti-Semitism in Ukraine follow therefrom. Still other Ukrainian historians, while admitting to atrocities against Jews committed by Ukrainians, attempt to provide nationalistic and political explanations for the behavior rather than entrenched anti-Semitism or, instead, point to duress by the occupying Germans.⁴⁹⁷

By contrast, many non-Ukrainian historians focus on the history of anti-Semitic violence in Ukraine. Though there are disagreements as to the exact numbers of Jews killed,⁴⁹⁸ these sources agree that anti-Semitic attitudes and

495. For denials of significant pogroms by Ukrainians against Jews, see Lubomyr Prytulak, *The Ugly Face of 60 Minutes* (denying 1941 Lviv pogrom and suggesting that "during the very interval that Morley Safer claims that Ukrainians were killing Jews by the thousands, in fact it was Jews that were killing Ukrainians by the thousands"), available at <http://www.ukar.org/60minart.shtml> (last visited July 19, 2000). Prytulak's statement is an apparent reference to NKVD violence against Ukrainians as Soviets departed the region.

496. For this view, visit documents authored by Lubomyr Prytulak at <http://www.ukar.org> (last visited Sept. 24, 2000).

497. For example, despite a history of nineteenth century pogroms, some attribute Ukrainian anti-Semitism to the population's association of Jews and Bolsheviks. See, e.g., LINCOLN, *supra* note 457, at 320-22; SUBTELNY, *supra* note 480, at 363-64; Taras Hunczak, *Ukrainian-Jewish Relations During the Soviet and Nazi Occupations*, in UKRAINE DURING WORLD WAR II HISTORY AND ITS AFTERMATH 39 (Yury Boshyk ed., 1986); Spector, *Ukrainische Hilfspolizei*, *supra* note 444, at 1530. See also John-Paul Himka, *supra* note 456. On this interpretation, Ukrainians blame Jews for the Soviet agricultural policies that led to mass famine in Ukraine in the early 1930s. See also UCSJ, *supra* note 476. Note, however, the conclusion in Martin Dean's recent book that although "the perception among many non-Jews, reinforced by their own prejudices, was that the Jews supported and profited most from the Soviet system[.]" in fact "few local Jews obtained positions of power under Soviet rule." DEAN, *supra* note 456, at 13. Even those historians who do not explicitly adhere to the Bolshevik-oriented explanation argue that the degree to which Ukrainians collaborated with the Germans had less to do with overwhelming anti-Semitism than with overwhelming nationalistic and anti-Soviet sentiment. See, e.g., Orest Subtelny, *The Soviet Occupation of Western Ukraine, 1939-41: An Overview*, in UKRAINE DURING WORLD WAR II HISTORY AND ITS AFTERMATH 5, 14 (Yury Boshyk ed., 1986). For accounts of Ukrainian collaboration as pragmatic and designed to promote Ukrainian independence, see, for example, SUBTELNY, *supra* note 480, at 471; Hunczak, *supra*.

For a charge that Ukrainian nationalist historians have not yet adequately addressed the issue of Ukraine's role in the Holocaust, see Jack F. Matlock, Jr., *The Nowhere Nation*, NY REV. OF BOOKS, Feb. 24, 2000, at 41, 43.

498. See, e.g., ENCYCLOPEDIA OF THE HOLOCAUST, *supra* note 443, at 1547 ("In the western

anti-Jewish violence were not new to Ukraine in World War II, that the Jewish population of Ukraine was decimated in the Holocaust, and that Ukrainian collaborators participated in the genocide voluntarily. Whether they cite anti-Semitism as the principal motivation for anti-Jewish actions or simply one of several impulses, these historians document “widespread and active collaboration in the Holocaust”,⁴⁹⁹ by local Ukrainians.⁵⁰⁰

In sum, as one chronicler of the Holocaust has noted, “[a] wide chasm exists between Jewish and Ukrainian historians in the interpretation of their joint history. The former emphasize the violence visited upon Jewish communities by brutal Jew-hating Ukrainians, while the latter tend to minimize the frequency and severity of the pogroms that periodically swept through the Ukraine.”⁵⁰¹ It is not properly the FCC’s role to purport to establish the official truth of the matter.

B. On Perspective: Multiple Readings of The Ugly Face of Freedom

The story of post-Soviet Ukraine that underlies the *Serafyn* litigation is complex and can be characterized completely consistently in several different ways. The meaning of the program itself can be described at various levels of generality. Yet, as described in text above, a stringent application of the news distortion policy puts the Commission in the position of choosing a particular account, with a particular meaning, out of a multiplicity of readings. Indeed, it may put the Commission in the position of substituting its own news judgment for that of the broadcaster. When evidence shows that an

Ukraine . . . the local population, assisted by the UKRAINISCHE HILFSPOLIZEI (Ukrainian Auxiliary Police), staged pogroms in which thousands of Jews were murdered . . . in Lvov, 5,000 Jews were murdered in two of these pogroms.”); PAUL ROBERT MAGOCSI, *A HISTORY OF UKRAINE* 631 (1996) (stating that “about 4000 Jews were massacred between 30 June and 7 July [1941] by German extermination task forces with the assistance of what some sources describe as ‘Ukrainian auxiliary police’”).

499. DEAN, *supra* note 456, at 166. Dean’s account cites anti-Semitism as one among a number of rationales for anti-Jewish violence. Dean states that, although there was anti-Semitism in Ukraine, “without the presence of the Nazis with their radical ideology, a systematic programme of genocide would have been unthinkable. Nevertheless, it was relatively easy for the Nazis to recruit people locally who were prepared to carry out their terrible policies for a variety of different motives [including anti-Semitism].” *Id.* at 13.

500. The heroic efforts of thousands of Ukrainians to save Jewish lives during the Holocaust, at the risk of their own, is also a matter of historical record. *See, e.g.*, FRIEDMAN, *supra* note 444; NORA LEVIN, *THE HOLOCAUST: THE DESTRUCTION OF EUROPEAN JEWRY 1933-1945* (1968) (discussing the actions of Metropolitan Sheptytsky). Over 5,000 Ukrainians are honored as “Righteous Among the Nations” at Israel’s Holocaust memorial, Yad Vashem. *See* Yad Vashem, *The Righteous Among the Nations*, available at http://www.yadvashem.org/righteous/index_righteous.html (last visited Jan. 25, 2001).

501. Littman, *supra* note 446, at 293.

interpretation is plausible, even if ultimately wrong, it should be difficult to conclude that there was intentional news distortion.⁵⁰²

Moreover, when there are a number of stories to tell about something topical, it should not be the FCC's role to decide that the broadcaster did not tell the best or smartest of the stories it could have reasonably told. There are many stories that can be told about Ukraine. Admittedly, the *Serafyn* complainants would propose a contending story instead of the one told by Morley Safer. On that account, we would focus on democratic nation-building emerging out of bloodless revolution. Despite a transition period of economic difficulties and nationalism, the middle-of-the-road democratic state would be pictured as emerging victorious against the constraining forces of totalitarianism, excessive nationalism, and isolationism. Perhaps such a story can function as a bulwark against antidemocratic developments. From the point of view of a newly independent Ukraine with a democratic government, a weak economy, and the need to build structures of stability and legitimacy for the post-Soviet state, this version of the story may have been both true and necessary to tell in that particular way.⁵⁰³

In The Ugly Face of Freedom, CBS chose not to present the more

502. *The Ugly Face of Freedom* may serve as an object lesson. CBS has characterized the program most recently as follows: "In the view of the CBS parties, the report legitimately focused on the revival of anti-Semitism among certain ultra-nationalistic groups in Ukraine, the historical background of anti-Semitic atrocities committed in Ukraine under German direction in World War II, and the resultant fears among the Jewish population." Joint Pet. for FCC Approval of Settlement Agreement, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).

A cursory reading of the transcript suggests the following additional possible messages, among others: (1) Given the history of anti-Semitic sentiment and violence in Ukraine, Ukrainian Jews are particularly disturbed by the public renaissance of anti-Semitic expression and are leaving the country; (2) Lest we be lulled into unquestioning celebration of the demise of the Soviet Union, journalists must show us the nationalistic and anti-Semitic developments undermining the new democracy; (3) Ukrainian culture has such a deep vein of anti-Semitism that it resurfaces even after generations of Communist anti-clericalism; (4) Transitions from totalitarian states to democracy are hardly ever smooth sailing. Whether due to economic problems or because of a lack of a philosophical or cultural tradition of democratic norms and institutions, such transitions can often be dangerous. Indeed, it may be the particular characteristic of democracy—a political theory grounded in a people's freedom to choose their leaders and institutions—that it is open to being undermined by its own tolerance toward self-determination; and (5) Globalism and homogenization as a result of convergence at every turn (from communications to forms of government) trigger nationalism, entrenchment, the need to define and maintain boundaries and history.

503. CBS could have told other stories yet. One such alternative story could have been a more nuanced study of anti-Semitism in modern Ukraine. For example, the program could have addressed the relationship between the democratic federal government in Ukraine—with its liberal policies on ethnicity—and the regional and local governments that apparently experience greater difficulties dealing with ethnic relations issues at the local grass-roots level. A position paper of the Union of Councils for Soviet Jews suggests that the central government's liberal rhetoric did not effectively regulate local governments, which were more retrograde and anti-Semitic. Union of Councils for Soviet Jews, UCSJ Position Paper, Ukraine, Jan. 1, 1998, available at <http://www.fsumonitor.com/stories/asemluk2.shtml> (last visited Sept. 24, 2000).

balanced of the various stories. The program did not focus on what the current government in Ukraine had done to improve the situations of minority ethnic groups. Nor did it study the structure of anti-Semitism in Ukraine. The program contained some unnecessarily inflammatory language and told an old story—and maybe even half the story. Instead, one might say, the important story about Ukraine at that time could have been about the new direction of tolerance expressed by the central government as much as about the rise of nationalism and anti-Semitism. CBS could have focused on the renaissance of Jewish life in Ukraine since the country's independence.⁵⁰⁴ The story CBS chose to tell was a warning: lest one believe all the claims about functioning democracy in this fledgling postcommunist state, look at all the danger signs—signs that are particularly troubling because of the historical background of anti-Semitism in the region.

At the time of the *60 Minutes* broadcast, there was a rather consistent flow of news about the worsening economic situation in the former Eastern bloc, as well as press attention to the rise of nationalism and its unfortunate partnership with antiminority sentiment.⁵⁰⁵ The region was still in the early stages of its transition from Soviet communism. In times of initial self-definition, controversy and disagreement about social direction are inevitable. Uncertainty about the role and status of various socio-political movements can be expected. Given the uncertainty and controversy over the fundamental character of societies and political regimes still in flux, there is bound to be a particularly significant degree of journalistic discretion, and disagreement, in reporting. It is precisely when the issues are timely, important, and controversial that the Commission's regulations should promote—rather than chill—broadcaster news coverage and issue analysis.

Ultimately, what may have been the triggering factor in the Ukrainian-American reaction to *The Ugly Face of Freedom* may have been the program's implication that Ukrainians are “genetically anti-Semitic.”⁵⁰⁶ While at the most literal level, the statement reports the Ukrainian government's denial of genetic anti-Semitism in Ukrainians,⁵⁰⁷ the phrase provocatively suggests that despite governmental efforts, Ukrainian Jews still see non-Jewish Ukrainians as “genetically anti-Semitic.” The use of the word “genetic” in such a claim is particularly provocative in light of the Twentieth

504. See, e.g., Jane Perlez, *Out of Ukraine's Torment, A Jewish Flowering*, N.Y. TIMES, Jan. 6, 1995, at A3.

505. See, e.g., Frank Brown, “It's the Jews' Fault,” JERUSALEM REP., Nov. 23, 1998, at 64.

506. *60 Minutes*, *supra* note 100.

507. “The Church and government of Ukraine have tried to ease people's fears, suggesting that things are not as serious as they might appear, that Ukrainians, despite the allegations, are not genetically anti-Semitic.” *Id.*

Century's history of genocide. Especially in light of the Hitlerian attribution of genetic inferiority to the Jews and the persistence of policies of ethnic cleansing elsewhere in the world even today, the attribution of any "genetic" ideology—including anti-Semitism—is doubtless inflammatory. Although it is unlikely that the sophisticated American audience of the *60 Minutes* program would interpret the "genetic" statement as a literal, biological claim about all Ukrainians, they might well interpret it as rhetorical hyperbole, as a metaphor for persistent cultural myths despite the passage of time. They might interpret the language as triggering the intense post-Hitler debate on collective memory and collective guilt. Even though CBS did not literally support the claim, *The Ugly Face of Freedom* might be viewed as giving implicit credence to the charge that anti-Semitism is so culturally well-grounded in Ukraine that it survived years of Communist leveling and anticlericalism and remains foundational for all Ukrainians.

As a matter of editorial judgment, it was surely an error to use language that, in context, would naturally be so highly charged. The use of such dramatic and provocative language is in keeping with the theatricality often associated with the newsmagazine format in television. Yet, this is probably as good an example as any of the excesses to which the newsmagazine genre can fall prey. Finally, however, the real issue is whether the FCC could reliably measure the distortive character of such hyperbolic claims with a neutral and informed yardstick. This Article has argued that the Commission cannot do so. Nevertheless, the lengthy story of the *Serafyn* litigation should serve as an object lesson to television newsmagazines at a minimum to avoid inflammatory "rhetorical hyperbole"⁵⁰⁸ unnecessary to the story.

508. In its settlement agreement, CBS asserted that "nothing in the broadcast was intended to suggest that the Ukrainian people as a whole are anti-Semitic." Joint Petition for FCC Approval of Settlement Agreement, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027). The Joint Petition for FCC Approval of Settlement Agreement contains the following language about the parties' settlement:

While the UCCA Parties criticized the broadcast and the CBS Parties continued to stand by it, they nevertheless resolved to put their legal disputes behind them. In so doing, the UCCA Parties maintained their strongly held belief that the Ukrainian people were unfairly portrayed in the broadcast, in particular in the report's failure to make any reference to the vigorous efforts of the current Ukrainian government to protect the civil rights of all its citizens, especially its ethnic minorities, and promote Jewish life, and in a narration line which they believe suggested that the Ukrainian people are "genetically anti-Semitic." For their part, the CBS Parties reiterated that nothing in the broadcast was intended to suggest that the Ukrainian people as a whole are anti-Semitic. In the view of the CBS Parties, the report legitimately focused on the revival of anti-Semitism among certain ultra-nationalist groups in Ukraine, the historical background of anti-Semitic atrocities committed in Ukraine under German direction in World War II, and the resultant fears among the Jewish population. Although the broadcast was not intended as a comprehensive treatment of Jewish-Ukrainian relations during the German occupation, the CBS Parties are well aware of the heroic actions of Metropolitan Andreas Szeptycki and other Ukrainians to save Jews during the war, sometimes at the cost of their own lives.

Id. at 5.

Appendix A to the Settlement Agreement was a letter to the UCCA Parties' attorney, Arthur V. Belendiuk, from CBS's General Counsel, Louis J. Briskman:

Thank you for arranging our recent meeting concerning settlement. As a follow-up to those discussions, let me again express regret on behalf of CBS over the fact that Ukrainian-Americans were offended by the October 23, 1994 "60 MINUTES" feature entitled "The Ugly Face of Freedom" and saw it as a generalized condemnation of persons of Ukrainian ancestry. CBS did not intend to convey such an impression.

Indeed, I want to squarely address the suggestion that our broadcast intended to imply that Ukrainians are somehow genetically anti-Semitic. Nothing could be further from the truth. This was not our intention when we first broadcast the report nor is it our belief today. In fact, our broadcast in 1994 contained an interview with Deputy Cardinal, Monsignor Dacko in which he stated that identifying the entire Ukrainian society as anti-Semitic would be an injustice. We certainly agree. Moreover, we are aware that, since its independence, the government of Ukraine has vigorously defended the civil rights of all citizens, especially ethnic minorities.

While CBS and your clients may not agree about the merits of the "60 MINUTES" broadcast and may have differences concerning possible future programs, I am hopeful that our meeting helped to promote mutual respect and understanding. In this regard, let me assure you that CBS has no "agenda" with regard to the Ukrainian people and country. Our desire is to maintain good relations with all segments of the television audience and, obviously, the Ukrainian/American community is no exception.

Finally, let me note that CBS typically consults with recognized experts representing a broad spectrum of viewpoints on controversial issues. Should "60 MINUTES" or another CBS news documentary program produce a further news feature focusing on Ukraine, you may be assured that CBS will follow this practice and specifically consult with persons knowledgeable about Ukraine. Of course, as you know, the ultimate editorial determination with respect to any news report must remain solely with CBS. However, as always, we will be interested in having access to differing points of view.

Joint Pet. for FCC Approval of Settlement Agreement app. A, WGPR, Inc., 10 F.C.C.R. 8140 (1995) (No. 94-1027).