WHITE OUT: THE ABSENCE AND STEREOTYPING OF PEOPLE OF COLOR BY THE BROADCAST NETWORKS IN PRIME TIME ENTERTAINMENT PROGRAMMING

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> [F]or too long, women and minorities have faced barriers to working in front and behind the camera. . . . Our nation benefits when television better reflects the diverse market it serves.[1]

I. INTRODUCTION

In the fall of 1999, the then-new television schedule was announced and "none of the twenty-six new fall programs starred an African American in a leading role, and few featured minorities in secondary roles."[2] This absence caused the National Council of La Raza to organize a protest called a "National Brownout" in

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1. Former FCC Chairman William Kennard, Statement Regarding the NAACP Public Hearing on Diversity in Network Television (Nov. 29, 1999) (praising the NAACP for prompting a national dialogue about the glass ceiling in television), *available at* http://www.fcc.gov/Speeches/Kennard/Statements/stwek969.html; *see also* Sherri Burr, *Television and Societal Effects: An Analysis of Media Images of African Americans in Historical Context*, 4 J. GENDER RACE & JUST. 159 (2001).

2. Gary Williams, *Don't Try to Adjust Your Television—I'm Black: Ruminations on the Recurrent Controversy over the Whiteness of TV*, 4 J. GENDER & JUST. 99, 100 (2000); *see also* Liz Leyden, *NAACP's Mfume Warns of TV Boycott*, WASH. POST, Nov. 4, 1999, at C7.

which they advised their members to refrain from watching television during the week of September 12, 1999.[3] At the same time, Kweisi Mfume, the President of the National Association for the Advancement of Colored People ("NAACP"),[4] threatened a boycott[5] and legal action against the networks' broadcasting licenses based on the belief that the networks were violating the 1934 Communications Act.[6] The major networks scrambled to add actors of color to their previously all-white shows.[7] The NAACP held hearings in Los Angeles in November of 1999.[8] The NAACP reported that each network was invited to submit testimony to the NAACP panel, but only CBS sent its CEO, Leslie Moonves; the other three networks sent lower-ranking executives.[9] When only Mr. Moonves was allowed to speak at the hearing, the executives from the other three networks walked out.[10] Ultimately the major networks and the NAACP announced an agreement in which FOX, CBS, ABC,

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3. Michael Fletcher, *Latinos Plan Boycott of Network TV: Goal of "Brownout" Is Better Roles for Hispanics*, WASH. POST, July 28, 1999, at C1; Claudia Kolker, *Latino Groups Urge Boycott of Network TV Media: Coalition Decries the Lack of Industry Jobs for Minorities and the Negative Portrayals on Screen*, L.A. TIMES, July 28, 1999, at A12.

4. This was not the first time, in recent history, that the NAACP, at least a local branch, has criticized media portrayals of African Americans. In 1997, three local African-American groups led by the Beverly Hills/Hollywood chapter of the NAACP (along with Mothers in Action and the Brotherhood Crusade) launched an attack against television comedies that portray blacks in a buffoonish manner. The groups targeted eight series that aired on FOX, WB, and UPN networks. Greg Braxton, *Groups Call for Changes in Portrayals of Blacks on TV*, L.A. TIMES, Feb. 8, 1997, at A1. The programs targeted were: *Martin*, *Wayan Brothers*, *The Jamie Foxx Show*, *Homeboys in Outer Space*, *Goode Behavior*, *Sparks*, *In the House*, and *Malcolm and Eddie*. Billie J. Green, President of the NAACP chapter stated that:

> I know comedy is comedy, but there's a fine line when people are laughing with you and people are laughing at you. Right now people are laughing at us. What's on these shows is horrible. Parents do not want their kids watching these shows. It is not a fair representation of black America. What we are seeing is like *Amos 'n' Andy* and Stephin Fetchit. In fact, *Amos 'n' Andy* was a better show than what we're seeing now.

Id. The groups did not want the shows canceled; they just wanted the offensive stereotypes removed. The groups backed down due to pressure by the national NAACP. Greg Braxton, *Rift Slows NAACP Protest of 8 Shows: Television: An Old Disagreement Between the National Office and a Local Chapter is Delaying Resolution of the Latter's Objections to Alleged "Buffoonish" Portrayals*, L.A. TIMES, Feb. 22, 1997, at F1. The timing of the criticism was embarrassing because it came on the eve of the organization's annual Image Awards honoring black entertainers, and one of the nominees, Martin Lawrence, starred in *Martin*, one of the shows criticized by the local NAACP chapter. *Id.*

5. Leyden, *supra* note 2.

6 Williams, *supra* note 2, at 100.

7. *Id.*

8. Sharon Waxman, *NAACP: Networks Both Take Offense: Only CBS Testifies at L.A. Hearing*, WASH. POST, Nov. 30, 1999, at C1.

9. NAACP, OUT OF FOCUS—OUT OF SYNC 7 (2001), *available at* http://www.naacp.org/news/releases/tv2001.pdf.

10. *Id.* (noting that the walk-out created a perception that the other three networks were resistant to correcting the problem).

and NBC agreed to hire more actors, producers, writers, and directors of color.[11] All four networks have hired a vice president of diversity to monitor their progress in hiring writers, directors, actors and executives from diverse backgrounds.[12] However, ABC's vice president of diversity reports to the senior vice president of human resources whereas at the other three networks the vice president of diversity reports directly to the network president.[13] The agreements have been called "vague" because they have no specified goals or timetables.[14] In its report, *Out of Focus—Out of Sync*, the NAACP noted that FOX and CBS established diversity advisory boards that are actively involved in various stages of development, sometimes influencing casting decisions.[15] Neither ABC nor NBC have established a comparable institutional structure to promote diversification.[16]

To great fanfare, CBS launched a predominately black drama series entitled *City of Angels*, produced by Steve Bochco, the creator of such television hits as *LA Law, Hill Street Blues, and NYPD Blue*.[17] Unfortunately *City of Angels* lasted for only two seasons.[18] In addition, PBS debuted a drama called *American Family* about a Latino family in Los Angeles. Originally the show was developed for CBS's 2000–2001 lineup, but the network failed to include it on its schedule.[19]

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11. *Id.* at 29; *see also* Greg Braxton, *Anticipating "City of Angels" Television L.A. Professionals Give It an Enthusiastic Response at a Preview Screening, But Some Have Reservations: Boccho Worries About Burden on Show's Historical Significance*, L.A. TIMES, Jan. 13, 2000, at F58; Brian Lowry, *NAACP May Encourage TV Network Regulation*, L.A. TIMES, Jan. 27, 2000, calendar section, at F59; Sharon Waxman, *CBS, Fox Sign Pact on Ethnicity: Agreements with Civil Rights Coalition Come After Threats of Boycott*, WASH. POST, Feb. 4, 2000, at C7 (As part of the agreement, all four major networks have promised to establish internships and mentoring programs for minorities, to buy more goods and services from minority-owned businesses and to reward managers for hiring minorities in executive ranks.).

12. NAACP, *supra* note 9, at 30; *see also* Waxman, *supra* note 11; Williams, *supra* note 2, at 133 (discussing the steps taken by television studios to help diversify the medium).

13. NAACP, *supra* note 9, at 38.

14. What is also disturbing, but will not be addressed in this Article, is the stereotyping that occurs on news programs. This stereotyping may be more insidious and pernicious than what occurs in entertainment programming, because people may be more likely to accept news as accurate representations, even if those reports present a skewed picture of reality. *See generally* ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND, MEDIA AND RACE IN AMERICA 46–77 (2000). Pew Research Center survey reported that sixty-four percent of the U.S. public relies on local television as its principal source of news, down from seventy-seven percent in 1993. Jennifer Schulze, *Four Model Stations*, 37 COLUMBIA JOURNALISM REV. 74 (1999).

15. NAACP, *supra* note 9, at 31–36.

16. *Id.* at 36–40.

17. Brian Lowry, *If at First You Do Succeed, Write, Write Again*, L.A. TIMES, Oct. 19, 1999, at F1.

18. Steve Johnson, *Getting Color on Television: African Americans on TV: A History of Talent, Ambition and Frustration*, CHI. TRIB., Feb 1, 2002, at 1.

19. Allisa MacMillan, *All in the Familia*, N.Y. DAILY NEWS, Jan. 20, 2002, at New York Vue Section, 3, *available at* 2002 WL 3164276.

The networks do know how to program shows that draw from what they at least think is black life. For example, those networks that emerged over the last ten years tend to program to those members of society that are not represented by the established networks. It gives the new network an automatic market niche that is otherwise not being filled. So it was no surprise that, in the early years, the FOX network programmed several shows with mostly minority casts like *Martin*, *Living Single*, *New York Undercover*, and *In Living Color*.[20] However, once FOX became established and won acclaim for some of its other shows like the *X-Files* and *Ally McBeal*, it abandoned this programming and demographic and its programming became as white as that of the other major networks.[21]

Some fear that the two newest networks, UPN and WB, may abandon their current emphasis on the minority demographic once they become more established.[22] In 1999, thirty-two percent of UPN, and twenty-seven percent of WB, viewers were African American.[23] Forty-five percent of the characters on UPN, and twenty-three percent of the characters on WB, were African American.[24] Despite the presence of African Americans on these networks, the WB programs seemed to be targeted more towards young, white audiences,[25] and the UPN black-oriented shows were segregated to Monday nights.[26]

Before reaching agreement, Kweise Mfume stated that the NAACP was considering a wide range of action against the networks including litigation alleging that the absence of minorities on television programs violates the 1934

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20. Brian Lowry et al., *Networks Decide Diversity Doesn't Pay With No Ethnic Actors Starring in New Shows: The Fall Prime Time Season Is a Step Back From Promises. Advertisers Don't Care—They Just Want Young Viewers*, L.A. TIMES, July 20, 1999, at A1.

21. John Patterson, *Friday Review: Hollywood Reporter: Extreme Prejudice: Why Bush Is Bad News for Black People in the Media*, THE GUARDIAN, Feb 23, 2001, at 5.

22. It has been reported that UPN and WB may be moving away from programming black-themed shows. Steve Hall, *BLACKLASH Networks Scramble After NAACP Criticizes Fall Lineups for Their Lack of Minority Characters*, INDIANAPOLIS STAR, July 29, 1999, at E01.

23. Mark Dawidziak & Tom Feran, *Is TV's Racism Black and White or Just Green? Network Programmers Deal With Charges From NAACP That Minorities on Small Screen Don't Reflect Big Picture*, PLAIN DEALER, Aug. 15,1999, at 1A (noting that the other networks have much smaller percentages of African Americans as part of their overall audience. Thirteen percent of FOX's audience is African American; twelve percent of CBS's audience is African American; eleven percent of ABC's audience is African American; and eight percent of NBC's audience is African American).

24. *Minorities Are Relatively Prevalent on Television: Study Says*, STAR TRIB., Sept. 28, 1999, at 8E.

25. Brian Lowry et al., *supra* note 20, at A1 (noting that the "right demographics" usually are "hip teenagers" and eighteen to thirty-four year old viewers with years of buying power ahead of them). During the sale of advertising for the 1999–2000 season, WB saw its sales increase by fifty percent to $459 million. *Id.* With shows like *Dawson's Creek*, WB aimed directly at this youth market. Advertisers are willing to pay a premium for programs that can attract the "right demographics."

26. Tom Long, *Networks Score Poorly in Reflecting Diverse Audience*, SEATTLE TIMES, Dec. 11, 2002, at F5 (noting that all of the UPN black-focused sitcoms are "ghettoized" to Monday nights).

Communications Act.[27] The networks and the NAACP have agreed on how to diversify the shows and their writing staffs.[28] However, in August 2001, Mfume said that he found that the major networks had made little progress in diversifying what we see on television.[29] In fact, prior to the events of September 11, 2001, he said that he would probably propose to the NAACP Board of directors that ABC, CBS, NBC, and FOX be singled out for a "massive, targeted and sustained economic boycott."[30] Last year, a multi-ethnic coalition (consisting of the NAACP, National Latino Media Council, American Indians in Film & Television, and the Asian Pacific American Coalition) gave low marks to the networks for diversity in their programming.[31] This coalition gave ABC a D-minus, CBS a D-plus, FOX earned a C-minus, and NBC received the highest grade of a C.[32]

Children Now's 2001–2002 Prime Time Diversity Report indicated that dramas were five times more likely than comedies to feature people of color as recurring cast members.[33] The Report indicated that thirty-nine percent of dramas featured mixed opening credit casts compared to seven percent of situation comedies.[34] More than two-thirds of the drama series featured at least one racial minority character in a primary recurring role.[35] The Report indicated that the 2001–2002 season featured more programming with racially homogenous casts that were either all black or all-white.[36] Only twenty-five percent of the season's programs featured casts that were racially mixed.[37] Most of the diversity gains over the past three years have been attributable to non-recurring and secondary characters. For example, in the 2001–02 season, Latinos(as) comprised four percent of the entire prime time population but only two percent of the opening credit cast.[38] Similarly,

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27. Greg Braxton, *NAACP Will Fight Network TV Lineups*, L.A. TIMES, July 12, 1999, at A1 (Mr. Mfume also stated that he would call for Congressional and Federal Communications Commission hearings on network ownership, licensing and programming; he also indicated that a viewer boycott of the networks and of advertisers was also under consideration.).

28. *NAACP Reports Little Progress in Network Diversity*, TELEGRAPH HERALD, Aug. 17, 2001, at B8.

29. Greg Braxton, *Mfume Appears to Delay Boycott Television: Associates of the NAACP's President Say Plans to Protest a Lack of Diversity at the Major Networks May Be on Hold But Not Derailed*, L.A. TIMES, Oct. 17, 2001, at F1.

30. *Id.*

31. Greg Braxton, *Networks Aim to Improve Diversity Effort Television* Some in the Industry Welcome the Auditions: Others Have Their Doubts*, L.A. TIMES, Jan. 21, 2002, at F1.

32. *Id.*

33. CHILDREN NOW, FALL COLORS 2001–2002 PRIME TIME DIVERSITY REPORT 12 (2002), *available at* http://www.childrennow.org/publications.html (Children & the Media, Fall Colors Highlights).

34. *Id.*

35. *Id.*

36. *Id.* at 35.

37. *Id.*

38. *Id.*

Asian Americans comprised three percent of the total prime time population but only one percent of the opening credit cast.[39]

Several members of Congress have been concerned about the media's negative minority stereotypes. In August 2001, Congressmen Eliot Engel, Michael Makoto Honda, and Bobby Lee Rush introduced legislation to amend the Communications Act so as to direct the FCC to establish an office on victims of media bias.[40] Several other countries handle the problems of negative media stereotypes by actually regulating content of their broadcasters.[41]

The Federal government has an interest in regulating these absences and stereotypes because it owns the electronic spectrum through which the broadcast signal travels.[42] Under the Communications Act of 1934, the FCC awards licenses to broadcasters in trust for, and as fiduciaries of, the American public.[43] Because of the electronic media's almost-omnipresence in the lives of our citizens, it has a very strong influence over the cultural, political, social, and racial attitudes of our society.[44] Ninety-eight percent of U.S. homes have a television set; forty-nine percent have more than one set.[45] The average family watches over seven hours of television a day.[46]

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39. *Id.*

40. H.R. 2700, 107th Cong. (2001); *see also Lawmaker Wants FCC to Be Watchdog Against Stereotyping*, MILWAUKEE J. SENTINEL, Aug. 8, 2001, at 12B; *see infra* notes 498–99.

41. *See* Steve Mark, *Is Conciliation of Racial Vilification Complaints Possible?, in* WITHOUT PREJUDICE 3 (1991) (discussing that the New South Wales Anti-Discrimination Act was amended to include racial vilification as a ground of discrimination); *see also* CANADIAN BROADCAST STANDARDS COUNCIL, SEX ROLE PORTRAYAL FOR TELEVISION AND RADIO PROGRAMMING (Oct. 26, 1990) (guide for broadcasters sets standards to equalize the portrayal of men and women by broadcasters), *available at* http://www.cbsc.ca/english/codes/sexrole.htm.

42. *See generally*, Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & ECON. 133, 146–70 (1990) (noting that Congress passed the 1926 Radio Act expressly for the purpose of ensuring that no private rights to the broadcast spectrum "would be recognized and requiring that the broadcasters immediately sign waivers giving up their rights and disclaiming any vested interests").

43. *See* 47 U.S.C. §§ 307(a), 309(a) (2001); *see also* Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring "Diversity of Voices,"* 38 B.C. L. REV. 497, 506 (1997) (discussing the Communications Act).

44. Sherryl Browne Graves, *Television and Prejudice Reduction: When Does Television as a Vicarious Experience Make a Difference?*, 55 J. SOC. ISSUES 707, 707–08 (1999).

45. Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 162 (1984).

46. Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 759 (1994); Edward Rubin, Response, *Television and the Experience of Citizenship*, 68 TEX. L. REV. 1155, 1158 (1990); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 490 (1985); Christopher S. Lentz, Note, *The Fairness in Broadcasting Doctrine and the Constitution: Forced One-Stop Shopping in the "Market Place of Ideas,"* 1996 U. ILL. L. REV. 271, 309; Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

The absence and the stereotyping of people of color by the mass media is a source of concern for all.[47] Since we live in a relatively segregated country, many whites often have more electronic, rather than personal, encounters with people of color.[48] Therefore, their attitudes and actions are likely to be shaped by what they see on television.[49] Some African Americans and Latinos(as) may also have similarly limited encounters of whites. Some live in hyper segregated communities with few contacts with members of other racial groups.[50] Broadcast television and its images and representations are very important because television can be the common meeting ground for all Americans. However, since Nielsen surveys show that African Americans and Latinos(as) are watching different programming than white Americans,[51] broadcast television fails to play this important role as the societal meeting ground. In addition, broadcast television fails to serve the minority audiences, which comprise almost thirty percent of the U.S. population, by neglecting to provide these groups with programming they desire. This failure is bad business[52] and violates the broadcasters' public interest obligations under the Communications Act[53] and should be grounds for FCC disciplinary action against the broadcasters.[54]

The purpose of this Article is not to advocate censorship or to point fingers at any single television program or network. The purpose of this Article is to start the process of engaging in a useful and productive dialogue on the media's responsibility to portray full-bodied and realistic depictions of all people of color on television in entertainment programming. The depictions of people of color by the media should avoid the perpetuation of harmful stereotypes.

This Article explores how the television networks currently depict racial and ethnic minorities, and explores what the FCC should do, pursuant to the Federal Communications Act, to correct this situation. Borrowing from the Fair Housing Act jurisprudence, this Article suggests that the FCC should take action to revoke licenses of (or invoke other sanctions against) broadcasters who have no people of color in their prime-time programs or disproportionately portray people of color in a stereotypical manner. This Article gives the FCC a possible way to resolve this recurring problem by evaluating network programs for discrimination, through the

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47. Ragiv Chandrasekaran, *Politics Finding a Home on the Net: Post-Election Surveys Show the Web Gains Influence Among Voters*, WASH. POST, Nov. 22, 1996, at A4.

48. Graves, *supra* note 44, at 707–08.

49. *See generally* ENTMAN & ROJECKI, *supra* note 14, at 46–77.

50. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1993).

51. *See* James Sterngold, *A Racial Divide Widens on Network TV*, N.Y. TIMES, Dec. 29, 1998, at A12.

52. Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819 (2003).

53. *See infra* Section VIII.B.

54. The FCC may refuse to renew the license of a broadcaster who fails to serve the public interest. 47 U.S.C. § 309 (k) (2001). Moreover, the FCC can impose a forfeiture, which is a financial penalty, against a broadcaster who violates a specific rule. Forfeiture Proceedings, 62 Fed. Reg. 43,474 (Aug. 14, 1997) (codified at 47 C.F.R. §§ 1.1–1.8004 (2001)). Finally, the FCC can grant the licensee a short-term renewal for less than the customary license term, as a sort of probationary period.

lens of the "ordinary viewer" a test analogized from the Fair Housing Act's "ordinary reader" test.[55]

Section II of this Article examines how American law now abhors stereotypes of racial minority groups. Section III examines how discrimination by the advertising industry affects the broadcasters' choice of programming. Section IV explores how casting decisions are made. Section V examines how African Americans, Latinos(as), Asian Pacific Americans and Native Americans, respectively, are portrayed by the entertainment media. Section VI analyzes the social consequences of these stereotypical character portrayals. Section VII considers why cable television is not a substitute for broadcasting when it comes to minority depictions. Section VIII explores whether the absence and stereotyping of people of color in entertainment programming is actionable under the Federal Communications Act. In Section IX, this Article describes and advocates that the FCC adopt an "ordinary viewer test"[56] to find broadcasters in violation of the Federal Communications Act when they fail to cast people of color or when they broadcast patently offensive images of them. Section X analyzes the "ordinary viewer test" under the First Amendment. Finally Section XI concludes that the "ordinary viewer test" is constitutional.[57]

II. THE ABHORRENCE OF STEREOTYPES

Historically, prominent people of color have decried how society stereotyped them and believed that a correlation existed between media portrayals and their status in society. These commentators have analyzed how their group was depicted by the larger society and how these stereotypes can affect one's ability to succeed in society. Very often the identity of people of color is two-pronged. The first prong involves the individual's personal view of him- or herself and the second derives from society's view of the racial group to which the individual belongs.

W.E.B. DuBois described this two-pronged identity, stating:

> [T]he [African American] is sort of the son, born with a veil, and gifted with second sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others . . . One ever feels his two-ness . . . The history of the [African American] is the history of this strife,—this

55. *See infra* notes 498–99 and accompanying text.

56. The "ordinary viewer test" is borrowed from the "ordinary reader test" for evaluating similar types of discrimination under the Fair Housing Act. *See infra* notes 498–99 and accompanying text.

57. In a related Article, this Author suggests that the broadcast executives may also have breached their fiduciary duty to the corporation and to the shareholders because of absences and stereotypes of people of color on primetime entertainment programs. Baynes, *supra* note 52.

> longing to attain self-conscious manhood, to merge his double self into a better and truer self.[58]

Author Zora Neale Hurston has also written eloquently about her experience of a double identity:

> I remember the very day that I became colored. Up to my thirteenth year I lived in a little [African American] town of Eatonville, Florida . . . [Then] I was sent to school in Jacksonville. I left Eatonville . . . as Zora. When I disembarked from the river-boat at Jacksonville, she was no more. . . . I was now a little colored girl.[59]

Professor Juan Perea has written about how Latinos(as) feel like *Olvidados* ("Forgotten People") because there are so few media images of Latinos(as) making them invisible in American society.[60]

Over the last several years, several prominent black entertainment figures and organizations have criticized network depictions of African Americans. Film director Spike Lee criticized the networks for airing shows that feed stereotypes about blacks, stating "I would rather see *Amos and Andy* . . . . At least they were just straight-up Uncle Tommin. We've gone backwards."[61] Bill Cosby has said that he "finds it difficult, often painful, to watch television" because he sees himself "as an African American who is exploited,"[62] and that he "can't believe the way African Americans are being portrayed on the small screen."[63] Bill Cosby's wife, Dr. Camille Cosby, conducted a study for the American Psychological Association and found that "ethnic minorities [were still] negatively stereotyped [on television] as criminals, dangerous characters, or victims of violence."[64] Dr. Cosby found that "negative

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58. W.E.B. DuBois, THE SOULS OF BLACK FOLK 38–39 (David W. Blight & Robert Gooding-Williams eds., Bedford Books 1997) (1903).

59. Zora Neale Hurston, *How It Feels to Be Colored Me, in* I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE 152–53 (Alice Walker ed., 1979).

60. Juan F. Perea, Essay, *Los Olvidados: On Making of Invisible People*, 70 N.Y.U. L. REV. 965, 972 (1995).

61. S. Craig Watkins & Rana A. Emerson, *Feminist Media Criticism and Feminist Media Practices*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 161 (2000) (noting Spike Lee's criticism of the misrepresentation of black Americans in the industry); Joseph H. Brown, *Worse By Far than Amos 'n' Andy*, TAMPA TRIB., Mar. 9, 1997, at 6. Spike Lee specifically criticized United Paramount and Warner Brothers television over the program *Homeboys in Outer Space. Id.*

62. Brown, *supra* note 61.

63. Laura B. Randolph, *Life After the Cosby Show: Activist-Actor Celebrates 30 Years of Wedded Bliss: Continues Fight Against Black Stereotypes on TV*, EBONY, May 1, 1994, at 100. Cosby leveled specific criticism at *Def Jam Comedy*. He said that it was the *Amos 'n' Andy* of the 1990s. "When you watch it," he said, "you hear a statement or a joke and it says niggers. And sometimes they say we niggers . . . ." *Id.*

64. CAMILLE O. COSBY, TELEVISION'S IMAGEABLE INFLUENCES: THE SELF-PERCEPTIONS OF YOUNG AFRICAN AMERICANS 133 (1994).

television imageries of African Americans instruct African Americans to hate themselves . . . [and] instruct other ethnic people to dislike African Americans."[65]

Whites, on the other hand, do not have to worry about white media absences or stereotypes for several reasons.[66] First, few media genres exist where whites are wholly absent. It is more often that the white images dominate. These all-white images "explicitly and implicitly connote whose values, points of view, and symbols are important."[67] "Dominant white images authenticated a world that did not include blacks."[68] Second, there are very few negative stereotypes against whites as a group.[69] Whites often are seen more as individuals rather than as members of a group.[70] Thus, if there is a negative depiction of a white person, it would be seen as related only to that particular white individual and not ascribed to whites as a group.[71] The negative stereotypes that do refer to whites are usually isolated to some specific group of whites—such as those who live in trailers, those who are from Appalachia, and those who might have certain southern European origins.[72] These stereotypes do not apply to all-whites as a class or group, just to some particular subcategories. In other words, it is not the "whiteness" of the group members that account for the stereotype against them, but some other perceived characteristic. As a consequence of being the

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65. *Id.* Dr. Cosby quotes from a study by Nagueyalti Warren, which identifies the prominent stereotypes of blacks as follows:

> Savage African, happy slave, devoted servant, corrupt politician, irresponsible citizen, petty thief, social delinquent, vicious criminal, sexual superman, superior athlete, unhappy non-white, natural-born cook, perfect entertainer, superstitious churchgoer, chicken and watermelon eater, razor and knife "toter," uninhibited expressionist, mental[ly] inferior, and natural-born musician.

Nagueyalti Warren, *From Uncle Tom to Cliff Huxtable, Aunt Jemima to Aunt Nell: Images of Blacks in Film and the Television Industry, in* IMAGES OF BLACKS IN AMERICAN CULTURE: A REFERENCE GUIDE TO INFORMATION SOURCES 51–52 (Jessie Carney Smith ed., 1988) (citing Lawrence Reddick, *Of Motion Pictures, in* BLACK FILMS AND FILMMAKERS: A COMPREHENSIVE ANTHOLOGY FROM STEREOTYPE TO SUPERHERO 3–24 (Lindsey Patterson ed., 1975)).

66. *See generally* Thomas Ross, *Being White*, 46 BUFF. L. REV. 257 (1998) (book review).

67. Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM & MARY L. REV. 69, 74 (1995).

68. *Id.* at 75.

69. *See* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291, 295–96 (Richard Delgado & Jean Stefancic eds., 1997) (noting generally that non-whites have to worry about how their behavior, appearance, and many other things reflect on the group whereas whites are judged individually).

70. *See id. But see* Jane Tuv, *Controversial Differences*, INDIANAPOLIS RECORDER, Jan. 11, 2002, at N.2, B5.

71. *See* Robert Jensen, *White Privilege Shapes the U.S.: Affirmative Action for Whites is a Fact of Life*, BALT. SUN, July 19, 1998, at 1C (noting that his flaws are most likely to be forgiven because he is white).

72. *See generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); Karen Brodkin Sacks, *How Did Jews Become White Folks?, in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 395 (Richard Delgado & Jean Stefancic eds., 1997).

dominant group in society, whites are often less vulnerable to the consequences of media absences and stereotypes.[73]

Most whites today do not overtly espouse racist views of minority groups.[74] It is estimated that only twenty percent of whites hold such traditional overtly racist views.[75] Whites are more likely to have more ambivalent feelings about race issues and individuals of different races.[76] These feelings are often conflicted, ranging from animosity at times to admiration.[77] On one hand, many whites admire Colin Powell and his accomplishments;[78] they are astonished over Michael Jordan's ability to play basketball;[79] they love and are comforted by Oprah Winfrey's compassion and understanding;[80] their kids listen to hip hop music;[81] and they work side by side with some people of color. However, many whites still have stereotypical views of people of color.[82] For instance, in a 1990 General Social Survey from the University of Chicago, 52.8 percent of respondents considered violence as a characteristic of African Americans, 42.8 percent considered violence as an attribute of Latinos(as), 21.3 percent considered violence as a characteristic of Asian Americans, and only 18.8 percent considered violence as a characteristic of whites.[83] The same survey found that 57.1 percent believed African Americans prefer welfare to work, 45.6 percent believed the same true of Latinos(as), 19.1 percent believed the same for Asian Americans, and only 4.6 percent believed that whites prefer welfare.[84] In 1996, the survey results indicated that 27.8 percent of the respondents believed that African Americans were lazy, 18.1 percent believed that Latinos(as) were lazy, and 7 percent

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73. *See* IGNATIEV, *supra* note 72, at 276.

74. *See A Conversation on Race: America, Seen Through the Filter of Race*, N.Y. TIMES, July 2, 2000, at 4.11; Leonce Gaiter, *Put to Rest the "Spirit of Proposition 209": Racism: Whites Like to Think They Instantly Voided Their History of Prejudice*, L.A. TIMES, Aug. 4, 1999, at B7; Jack E. White, *Prejudice? Perish the Thought*, TIME, Mar. 8, 1999, at 36 (noting that a *New England Journal of Medicine* study found that physicians were forty-nine percent less likely to order sophisticated cardiac tests for African Americans.).

75. ROBERT M. ENTMAN ET AL., MASS MEDIA AND RECONCILIATION, A REPORT TO THE ADVISORY BOARD AND STAFF, THE PRESIDENT'S RACE INITIATIVE 9 (1998) (The Report indicates that the percentage amount to a large number of people noting that there are three white racists for every two African Americans.).

76. *See* HOWARD SCHULMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 7 (rev. ed. 1997).

77. *See* ENTMAN & ROJECKI, *supra* note 14, at 16.

78. ENTMAN ET AL., *supra* note 75, at 49; *see also* Dave Murphy, *Through the Looking Glasses: Workers Have Different Views on Discrimination on the Job*, S.F. CHRONICLE, Jan. 6, 2002, at J1, *available at* 2002 WL 4009362.

79. ENTMAN ET AL., *supra* note 75, at 49.

80. *Id.*

81. Christopher Vaughn, *Russell Simmons' Rush for Profits*, BLACK ENTERPRISE, Dec. 1, 1992, at 66, *available at* 1992 WL 11283800 (noting that white males are the most loyal consumers of hip hop music).

82. *See A Conversation on Race*, *supra* note 74; Gaiter, *supra* note 74; White, *supra* note 74.

83. ENTMAN ET AL., *supra* note 75, at 49.

84. *Id.*

believed that whites were lazy.[85] These results rate whites most favorably and African Americans least.

These negative stereotypes of people of color are learned from the prejudices of friends and family members. Some of these stereotypes may be learned through limited, but bad experiences. Since we live in a fairly segregated society, however, most of these stereotypes are probably learned through electronic encounters, i.e., what people see on television.[86] Consequently, the absence and stereotyping of people of color by the broadcast media has an effect on the attitudes that white people have towards people of color and the attitudes that each group has about itself.[87] These stereotypical views influence policy. The programs or issues that are more likely to be perceived to be directed at, or to effect, people of color are profoundly influenced by negative stereotypes.[88] For example, if I hold the views of a majority of whites believing that African Americans and Latinos(as) prefer welfare to work, but whites prefer work over welfare, I would support candidates who require welfare recipients to work in almost all circumstances.[89] If I believe that African Americans and Latinos(as) are more violent than whites, I would also support stiff penalties for convicted criminals in almost all circumstances.[90] These negative stereotypes not only influence policy, but they also influence us in our every day dealings with each other.[91] These negative stereotypes may lead to discrimination against people of color in procuring employment, in renting housing, and in every day life.

The U.S. Supreme Court has consistently taken notice of the consequences of negative racial stereotypes. It has invalidated legislation based on impermissible

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85. *Id.* (The survey only had results for Asians as to laziness for 1990 in which fifteen percent found that Asians were lazy.).

86. *See, e.g.*, Robert Jensen, *supra* note 71.

87. ENTMAN & ROJECKI, *supra* note 14. *See generally* Ira Teinowitz & Cara Beardi, *Urban Media Face Ad Bias Study Shows*, ADVERTISING AGE, Jan. 1, 2001, at 1 (noting the discrimination that minority-owned and focused radio stations have in attracting advertisers).

88. *See, e.g.*, ENTMAN & ROJECKI, *supra* note 14, at 94–106 (discussing how the broadcast networks do not broadcast news reports on poverty and how poverty and welfare are perceived to be black issues, even though most poor people, and most people on welfare, in the United States are white).

89. *See generally id.*

90. *Id.* at 78–93 (discussing how broadcast news leads viewers to believe that African Americans are the face of crime).

91. For example, consider the colloquy between then-President Bill Clinton and audience member, Mr. Morgan:

> Mr. Morgan: I have my own prejudices, whereas if I'm walking downtown on a street and I see a black man walking towards me that's not dressed as well, I might be a little bit scared.
>
> The President: Do you think that's because of television crime shows, or because of your personal experience?
>
> Mr. Morgan: It would have nothing to do with my personal experience. Just from the media, television shows, and things that I have heard.

The White House Office of the Press Secretary, *Discussion Remarks in Town Hall Meeting on One America—President Clinton's Initiative on Race* (Dec. 3, 1997), *available at* http://clinton4.nara.gov/textonly/Initiatives/OneAmerica/19971204-2751.html.

racial stereotypes. In *Brown v. Board of Education*, plaintiffs introduced psychological evidence showing that African-American children were harmed by segregation because it made them think less of themselves.[92] The lower court found (and the Supreme Court agreed) that:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[93]

In *Loving v. Virginia*, the U.S. Supreme Court invalidated Virginia's miscegenation laws that made it a crime for whites and people of different races to marry.[94] The Court found that statute unconstitutional on equal protection grounds and that it was designed to maintain white supremacy.[95]

Even more recently, the Supreme Court has spoken disapprovingly of the use of stereotypes specifically in cases concerning affirmative action, voting rights, and jury selection. Justice O'Connor's dissent in *Metro Broadcasting, Inc. v. FCC* stated that race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to criterion barred to Government by history and the Constitution."[96] Justice O'Connor further stated that stereotypes cause serious harm to society.[97]

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court invalidated the City of Richmond's affirmative action plan for hiring contractors, finding that such a policy impermissibly relied on racial stereotypes.[98] In doing so, the Court again criticized the use of stereotypes stating:

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92. 347 U.S. 483, 494 (1954) (Dr. Kenneth Clark's work, which is cited in this case, showed that African-American children were more likely to identify with white dolls than black dolls.).

93. Brown v. Bd. of Educ., 374 U.S. 483 (1954) (citing Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951)).

94. Loving v. Virginia, 388 U.S. 1 (1967).

95. *Id.*

96. Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J. dissenting) (citations omitted). In *Metro Broadcasting*, plaintiffs challenged the FCC's affirmative action program, which provided enhancements for minority applicants in the then-existing comparative hearing process used to allocate broadcast licenses. The majority held that the FCC program was constitutional under an intermediate scrutiny test. The Court found that diversity was an important governmental interest that would satisfy intermediate scrutiny. *Id. But see* Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995) (where the Supreme Court overruled the intermediate standard of review used in the *Metro Broadcasting* case).

97. *See generally Metro Broad.*, 497 U.S. at 602–05.

98. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by *illegitimate notions of racial inferiority* or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was *illegitimate racial prejudice or stereotype.*[99]

In *Shaw v. Reno*, the Supreme Court addressed the constitutionality of a voting district reapportionment plan submitted by North Carolina, which provided for a majority-black voting district.[100] The Supreme Court stated that:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as *impermissible racial stereotypes.*[101]

The *Shaw* Court further stated that racial stereotypes counteract the concept of equality and hinder the battle for racial equality.[102] In *Miller v. Johnson*, the Supreme Court found that bizarre shape alone was not a threshold requirement for establishing a claim of racial gerrymandering."[103] However, the Court found that an allegation that race was the legislature's dominant and controlling rationale in drawing district lines was sufficient to state a claim invalidating Georgia's congressional redistricting plan.[104] The Court reasoned that it was impermissible for government to group citizens together solely on the basis of race because doing so is based on the assumption that all members of a group think alike and share the same political interests and ideas.[105]

In *Holland v. Illinois*, the U.S. Supreme Court found that the prosecuting attorney's assumption that an African-American juror would be partial to the black defendant simply because he was black was based on an impermissible stereotype.[106] The prosecutor's attempt to strike this juror based on the stereotype was a violation of Equal Protection.[107] In *Edmonson v. Leesville Concrete Co.*, the plaintiff, an

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99. *Id.* (emphasis added).
100. Shaw v. Reno, 509 U.S. 630, 646–47 (1993).
101. *Id.* (emphasis added) (citations omitted).
102. *Id.* at 648.
103. Miller v. Johnson, 515 U.S. 900, 913 (1995).
104. *Id.* at 919–20.
105. *Id.* at 920.
106. Holland v. Illinois, 493 U.S. 474, 484 n.2 (1990).
107. *Id.*

African-American construction worker, brought suit to recover damages for injuries received while working on the job.[108] During *voir dire*, defendant's attorney used two of three peremptory challenges to remove black persons from the jury.[109] Plaintiff requested that the defendant provide a race-neutral explanation for striking the two African-American prospective jurors.[110] The district court denied plaintiff's request.[111] On review, the Supreme Court held "that in a civil trial exclusion on account of race violates a prospective juror's equal protection rights"[112] and stated that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of *race stereotypes* retards that process and causes continued hurt and injury."[113]

These Supreme Court cases evidence the illegality of the use of racial stereotypes in government decision making. These cases have dealt solely with situations where the government is directly using racial stereotypes in its decision making.[114] In the case of broadcast invisibility and stereotypes, it is the broadcasters, not the FCC, that may be employing the negative stereotypes. The broadcasters may be following the lead of the advertisers who buy air time on networks' television shows.

III. ADVERTISING DISCRIMINATION

In the broadcast industry, profit maximization depends on the quantity and the price of the commercials sold.[115] Advertisers often say they are looking for the right demographics and will often pay higher advertising rates for a younger, more affluent (and most likely white) audience.[116] This "search" for the "right audience

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108. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614 (1991).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 628.

113. *Id.* at 630–31 (emphasis added).

114. This Author does not believe that affirmative action programs use invidious stereotypes against people of color. *See, e.g.*, Leonard M. Baynes, *An Investigation of the "White Man's Burden" in the Implementation of an Affirmative Action Program in Telecommunications Ownership*, 30 RUTGERS L. J. 731 (1999) (comparing the Rudyard Kipling poem, *The White Man's Burden*, to the arguments against affirmative action programs in minority telecommunications ownership programs). Although this Author disagrees with the Supreme Court's affirmative action jurisprudence, this Author nonetheless gleans from these Supreme Court cases that the Supreme Court is hostile to the use of negative racial stereotypes in governmental decision making.

115. *See* Deborah M. Wilkerson, *Power Beyond the Remote Control*, BLACK ENTERPRISE, Dec. 1996, at 75, *available at* 1996 WL 8333851.

116. The recent situation involving the possibility that ABC would drop Ted Koppel's *Nightline* for David Letterman's *The Late Show* is a case in point. The actual difference in audience size between *Nightline* and *The Late Show* was not that large; however, *The Late Show* has a younger audience than *Nightline*, for which advertisers were willing to pay a premium. *See* Noel Holston, *What's the Bottom Line on the News? Networks Need More Ad Dollars: Younger Viewers*, NEWSDAY, Mar. 12, 2002, at B2. *But see* Linda Winer, *Critical Mass/Age Jokes Are Getting Old*, NEWSDAY, Apr. 21, 2002, at D2. Ultimately David Letterman

demographics" is reminiscent of past advertiser practices in refusing to place spots on *The Nat "King" Cole Show*, *East Side West Side*, or *I Spy* because of fear of Southern boycotts of their products.[117] This "search" may merely be a pretext designed to avoid advertising on programs that have large minority viewership. Since advertising drives programming, and advertisers search for certain demographics, advertisers will avoid airing commercials during programs that they believe do not appeal to the desired demographic. In turn, broadcasters will air programming that appeals to the "right' demographic to win advertising. The discrimination that exists against people of color by the broadcast network is driven by the profit structure of the broadcast industry, which relies almost exclusively upon advertisers for their revenues. Since the market fails to remedy advertising discrimination and its corollary effect on broadcast discrimination, it is appropriate for the government to regulate.

A recent FCC study on advertising practices may be illustrative of the fact that advertisers have engaged in prejudicial thinking in deciding where to place advertisements.[118] In terms of minority-formatted and minority-owned radio stations, some advertisers had practices, called "No Urban/Spanish Dictates" that prohibited the placement of advertisements on radio stations that air urban, black or Spanish-language formats.[119] When these radio stations did receive advertising, the rates were often discounted from what other stations received.[120] Consequently, even though these minority-formatted stations in certain markets may have larger audiences[121] than other stations, the minority-formatted radio stations earn less advertising revenue per listener than other radio stations.[122] The study indicated that approximately ninety percent of the minority broadcasters encountered the "No Minority/Spanish Dictates."[123] The minority broadcasters estimated that sixty-one percent of the advertisements placed on their radio stations were discounted, and they estimated the size of the minority discount to be fifty-nine percent.[124] The No Minority/Spanish Dictates together with the minority discounts were estimated to reduce revenues for these stations by sixty-three percent.[125]

The FCC Study contains anecdotal evidence that the advertisers stereotyped the minority consumer, resulting in the advertisers' lack of interest in placing

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decided to stay with CBS, and ABC decided to keep *Nightline*. Verne Gay, *FLASH/Disney Boss Finally Backs Nightline*, NEWSDAY, Apr. 9, 2002, at A12.

117. *See generally* Baynes, *supra* note 52, at 867.

118. CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATION, *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study (last visited May 3, 2002).

119. *Id.*

120. *Id.*

121. For example, in the New York, Washington D.C., and Detroit radio markets, the minority-formatted stations reach a larger audience than the other stations because those cities are comprised largely of members of minority groups.

122. CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, *supra* note 118, at 49.

123. *Id.* at 29.

124. *Id.* at 32.

125. BRIEFING NOTES ON ADVERTISING STUDY 4 (Dec. 15, 1998), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/adver.html.

advertisements on minority-formatted radio stations. Several of the most outrageous comments reported follow. In a written report to its sales force, Katz Radio Group stated: "Get buyers to understand that WABC is one of the most upscale select stations in New York. We must get the buying community to understand and appreciate the unique qualitative, personality, and foreground profile of WABC. Advertisers should want prospects not suspects."[126] Minority station salespeople soliciting an advertisement from the Beef Council were told that the Council was not going to buy advertising time on urban formatted radio stations because "Black people don't eat beef."[127]A major mayonnaise manufacturer refused to buy commercial time based upon the perception that "Black people don't eat mayonnaise."[128] One of the study respondents reported:

> I recall being in front of a buyer and we were discussing at the time Ivory Soap and the buyer was telling me they were not going to buy the stations. And the question was: "Why not?" And they said, "Well, we have studies that show that Hispanics don't bathe as frequently as non-Hispanics."[129]

The report noted that there are categories of products in which people of color are predominant customers. For example, African Americans represent sixty to seventy percent of the purchasers of expensive cognacs, but advertisers almost never directly target them.[130]

Latinos also may overspend whites on groceries. One of the interview respondents, Tom Castro, President and Chairman of El Dorado Communications, reported that Hispanics "overspend on groceries compared to everybody else. So if you use the index of 100 with 100 being the norm, Hispanics might index at 120 or 130 for groceries."[131] Mr. Castro posited that Latinos spend more on groceries because the size of their households tends to be larger, and because of a cultural practice that families eat meals at home with each other.[132] But Mr. Castro noted that instead of patronizing Latino-oriented broadcasters, advertisers admit that, "Well, we don't advertise to Hispanics. Or when we do it's a 'token buy,' as opposed to really seriously going after the consumer."[133]

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126. CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, *supra* note 118, at 43.

127. *Id.* at 1–2 (conversation took place at National Association of Black Owned Broadcasters, Spring Conference, 1996).

128. *Id.*

129. *Id.* at 37 (interview with Luis Alvares, Local Sales Manager, WSKQ and WPAT, Spanish Broadcasting System).

130. *Id.* at 35 (interview with Byron Lewis, chairman and CEO of The UniWorld Group). Of course, there might be some justified criticism if the manufacturers of certain potentially unhealthy products focused their advertisements exclusively on African-American consumers. But it is still noteworthy that when the advertisers plan to market a supposedly high-end product, they use mostly white models and advertise to largely white audiences.

131. *Id.* at 41 (interview with Tom Castro, Chairman and President of El Dorado Communications).

132. *Id.*

133. *Id.*

In the FCC Study, Mr. Castro speculated that the reason that some advertisers are not acting in an economically rational manner in the case of Latino(a) consumers is that there is "prejudice, which is hard to quantify and prove, but is there."[134] Advertisers will say "Well, I don't want Hispanics in my grocery store."[135] They only know about Hispanics from what "they watch on TV and most of the people on TV that are Hispanic are pimps, prostitutes, illegal aliens, drug dealers, somehow on the opposite side of the law. And so, to them it's not an attractive market."[136]

Advertisers are sometimes concerned that advertising to customers of color will cause too many of them to actually patronize their businesses. For example, Michael Banks, Station Manger of the urban formatted station, WBGE-FM, was told by one potential advertiser "Your station will bring too many Black people to my place of business."[137]

Sometimes the advertisers are explicit in stating they do not want too many customers of color because they believe that these customers will steal from them. Mr. H. Bates, the co-owner of WUPA AM & FM in Huntsville, Alabama reported that a business owner in a strip mall said, "I know I need your audience. Your people spend more than the average white customer that comes in here. And let me try you."[138] So the business owner placed an advertisement on the radio station and the African-American clientele increased. The business owner then told Bates that he was going to cancel his advertisements with the station. When Bates asked why, the business owner told Bates, "Well, my pilferage rate is higher."[139] Although the business owner could not prove the increase in pilferage, he maintained, "I have suspicious people coming in here. And I believe they're shoplifting."[140]

Luis Alvarez, the Sales Manager of WSKQ and WPAT, Spanish Broadcasting System reported that he had a similar experience.

> I was managing a station where the sales [representative] came back and she was practically in tears because the agency had told her that [Macy's Department Store] said that the reason they don't advertise in the Hispanic market . . . was because their pilferage will increase.[141]

The FCC Study reviewed the practices of the advertisers only with respect to minority-owned and minority-formatted radio stations. The FCC Study reported that there were very few minority-owned or minority-formatted televisions stations. The FCC study did not evaluate the advertising practices on network television shows. But it seems likely that advertisers probably hold the same views towards advertising on network television shows that have minority themes.

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134. *Id.*
135. *Id.*
136. *Id.*
137. BRIEFING NOTES ON ADVERTISING STUDY, *supra* note 125, at 6.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 42.

The FCC's failure to act against the broadcast networks and their possible complicity in the discrimination by advertisers may make the FCC a passive participant in the broadcast networks discrimination. Justice O'Connor has found discrimination as a result of passive participation sufficient grounds for establishing a race-based affirmative action program.[142] For example, if prime contractors on a government project were discriminating against minorities and this discrimination became known to the government, the government might be deemed sufficiently complicit (a kind of joint tortfeasor, coconspirator, or aider and abettor) to allow for remedial action.[143] Nevertheless, regardless of whether it is possible to consider the FCC as passively participating in the broadcasters' discrimination, the federal government does regulate discriminatory speech in other private-actor contexts, most importantly in the housing advertisement context under the Fair Housing Act. The cases interpreting the Fair Housing Act, discussed in Section VIII.E., establish an "ordinary reader test" for determining whether a housing advertisement is discriminatory. This Article advocates invoking an analogue of that standard—an "ordinary viewer test"—to determine whether a broadcaster is discriminating in violation of the Communications Act.

IV. CASTING DECISIONS

As scripts develop, casting directors stay in touch with writers and producers. Specific descriptions of characters are sent to agents and posted on the Internet.[144] Rene Balcer, the white executive producer of the NBC crime drama *Law & Order*, said that the story dictates "who's going to be what."[145] Balcer indicated that "there is a phenomenon that if you don't specify race in a script, nine times out of ten a white person will be cast—that if you want a person of color[146] you write it down and if you want a white person you don't write it."[147] Casting decisions are not about who is best qualified for the role or who is the best actor, but instead are about fitting a certain type that the directors and writers want in the role.[148] The personality of a television show is subtly shaped by its actor's stature, height, weight, features, skin, and hair

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142. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989). Justice O'Connor reasoned that "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax [dollars] of all citizens, do not serve to finance the evil of private prejudice." *Id.*

143. *See* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586 (3d Cir. 1996).

144. *See generally* Breakdown Services, Ltd., *at* http://www.breakdownservices.com (last visited Apr. 3, 2003); *see also* Dana Calvo, *The Dearth of Minority Faces on the Air Begins at the Writing and Casting Phase, Where Characters Are Usually Assumed to Be White*, L.A. TIMES, Nov. 20, 1999, at F1 (noting that there is a consensus among casting directors and agents that the character in the breakdown is assumed to be white).

145. Kinney Littlefield, *Getting the Call TELEVISION: What Goes on in Closed-Door Casting Sessions Paints Racial Mix of Prime Time*, ORANGE COUNTY REG., Dec. 12, 1999, at F10 .

146. *See also* Williams, *supra* note 2, at 109–10 (explaining that many casting directors feel compelled to follow the race agreed upon by the writers and studio executives).

147. Littlefield, *supra* note 145.

148. Williams, *supra* note 2, at 110.

color.[149] By failing to consider people of color for these roles, it appears that the casting directors consider these factors only when it comes to white actors but not for actors of color.[150] These casting decisions appear to eliminate actors of color almost by default. How can a television show occurring in New York City, like *Friends* or *Seinfeld*, have an all-white cast? Since New York City has a majority minority population, the casting decisions in *Seinfeld* and *Friends* are not reflective of New York's reality. Instead, it is someone's fantasy. Of course, television need not portray reality, but the absence of racial and ethnic groups from the media becomes a problem to the extent it suggests the excluded groups do not matter or do not exist. Correspondingly, when the presented images of people of color are stereotypical, the larger society relies upon these images to define the group.[151]

This absence of minority images has an effect on the availability of acting roles for actors of color. In 1998, African-American actors filled 13.4 percent of all roles in television series, movies and miniseries.[152] But on the four major networks, only ten percent of all characters were African American in 1998, compared with seventeen percent in the 1992–93 season.[153] Hispanic actors filled 3.3 percent of the remaining roles in 1998, while Asian American actors filled 1.9 percent and Native American actors 0.2 percent. White actors held 78.9 percent of the roles in 1998.[154] Of the 839 writers currently employed on prime time network shows, only fifty-five are African American.[155] Eighty-three percent of those African-American writers are employed on black-themed shows.[156] Only eleven Latino and three Asian American writers were working on prime-time series in 1999.[157] There are no Native American writers employed on a prime-time series.[158] There is also a dearth of minority directors.[159] A recent Directors Guild of America study shows that, of the forty most popular series of the 2000–2001 season, eighty percent of the drama and comedy episodes were directed by white males.[160] African-American males directed three percent of the total, Latino males two percent, Asian American males about one

149. *Id.*

150. *Id.*

151. Ediberto Roman, *Who Exactly Is Living La Vida Loca? The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 41 (2000) (discussing the effects of stereotyping on targeted groups).

152. Lewis Diuguid & Adrienne Rivers, *The Media and the Black Response*, 569 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 132; *see also* Williams, *supra* note 2, at 106 (noting the study).

153. Hall, *supra* note 22.

154. *Id.*

155. Williams, *supra* note 2, at 106.

156. Greg Braxton, *Survey Cites Low Number of Minority Writers on Series Television: NAACP Lack of Diversity on Staffs is More Blatant than Among the Casts of New Fall Series*, L.A. TIMES, Oct. 9, 1999, at F2.

157. *Id.*

158. *Id.*

159. Greg Braxton, *Director Diversity Seen as Lacking Studios and Production Companies Lag in Hiring Female and Minority Directors for Prime-time Shows: A DGA Study Says*, L.A. TIMES, Jan. 30, 2002, at F1.

160. *Id.*

percent.[161] White women directed eleven percent.[162] The participation of women of color as directors was limited to only two Asian American women.[163]

V. BROADCAST MEDIA STEREOTYPES

Historically, people of color have either been absent or stereotyped by the media. In the film documentary, *Ethnic Notions*, Marlon Riggs shows how African Americans were historically stereotyped by the society and the media.[164] African Americans are not the sole victims of racial stereotypes. Richard Delgado and Jean Stefanic have written about the different yet subtly common ways that members of American racial and ethnic minority groups have been stereotyped.[165] The following Sections describe how each of the major minority racial groups—African Americans, Latinos(as), Asian Americans, and Native Americans—have been portrayed by broadcast television.[166]

A. Depictions of African Americans

Even though there was an absence of new roles for African Americans in new shows in the 1999–2000 prime time season, more African Americans were featured in primetime television shows[167] than ever before.[168] African Americans comprise an ever larger and growing segment of the viewing audience. Black households watch an average of seventy hours of television per week as compared to fifty hours for other households.[169]

Historically, the networks have had difficulties in seeing the possible audience ratings success of some previous African American themed shows like, *I Spy*, *Julia*, *The Jeffersons*, and *Sanford and Sons*.[170] The networks have also historically succumbed to boycotts and threats from Southern-affiliated stations and advertisers who objected to African Americans in network series.[171] In the past fifteen years, a few very thoughtful, well-defined, and full-bodied depictions of black

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Ethnic Notions* (KQED-TV San Francisco, 1986); *see also* Burr, *supra* note 1 (discussing the history of how African Americans have been depicted on television for the past fifty years).
165. Richard Delgado and Jean Stefanic, *Images of the Outsider in American Law and Culture*, 77 CORNELL L. REV. 1258 (1992).
166. *See also* Burr, *supra* note 1, at 172.
167. Williams, *supra* note 2, at 133 (noting that roles for African Americans increased in the fall 2000 television season).
168. The broadcasters also negatively portray and stereotype women, but such stereotypes are not the subject of this Article.
169. Williams *supra* note 2, at 132; Greg Braxton, *TELEVISION Where More Isn't Much Better: African Americans are Increasingly Welcome in Prime Time, But Some Observers Say the New Shows Fail to Rise Above Stereotypes*, L.A. TIMES, Oct. 4, 1992, at 3.
170. *See generally* Baynes, *supra* note 52, at 832–42.
171. *Id.*

characters appeared in several network drama series.[172] In the 1980s, *The Cosby Show* was a ratings success and eschewed the stereotypical depictions of black families by presenting a strong and very successful black family.[173] NBC even consulted Dr. Alvin Poussaint, noted Harvard psychiatrist, to advise on the script and character development. But the network executives were initially concerned about broadcasting *The Cosby Show*. Dr. Poussaint recalled that "some of the networks shied away from [*The Cosby Show*] because they didn't think that it would appeal to the white audience."[174] "When it became the most popular series of the decade, the same network executives were stunned and confounded."[175] It has been more than ten years since *The Cosby Show* was aired during prime time. It seems as though *The Cosby Show* was in a class by itself, as many of today's sitcoms still present very stereotypical images of African Americans. In the 1990s, the newer networks produced a lot of African-American situation comedies that were panned by the critics and by the African-American community. Much of the criticism was directed at the short-lived UPN show *Homeboys in Outer Space*, which was about a pair of twenty-third century "brothers" who "hung out" in the universe at large, hopping from one galaxy to another in their "Space Hoopty."[176] *My Wife and Kids* is the first major network family sitcom about an African-American family to achieve wide popularity with white audiences since *The Cosby Show*.[177] It is also the first black family sitcom to succeed on one of the major networks since NBC canceled *The Fresh Prince of Bel-Air* in 1996.[178] In addition, FOX debuted *The Bernie Mac Show*, which was the number one ranked show for African Americans for the 2000–2001 season.[179]

1. Drama Series

While at least one network had developed the almost-all-black drama *City of Angels*, the networks need to encourage and safeguard these shows. The networks need to give these types of dramas an opportunity for the audience to grow. Several attempts have been made to create an all-black family drama series. *Under One Roof* debuted in 1995, and starred James Earl Jones, Joe Morton, and Vanessa Bell

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172. Characters on shows like *LA Law*, *ER*, *Chicago Hope*, and *Homicide* come to mind.

173. *The Cosby Show* raises other issues. A study found that many white viewers used the upper-middle class status of the fictional Huxtable family as proof that black Americans no longer faced any barriers in the real world. David Zurawik, *Eye on the Black Experience*, EVERY DAY MAGAZINE, Feb. 9, 1995, at 1G, *available at* 1995 WL 3291409.

174. Don Aucoin, *TV Networks Under Fire for Diversity Gap*, BOSTON GLOBE, July 15, 1999, at A1.

175. *Id.*

176. *See* Frederic M. Biddle, *"Homeboys": Lost in Outer Space?*, BOSTON GLOBE, Aug. 27, 1996, at E8.

177. Greg Braxton, *A Cosby for our Time? As Far as Damon Wayans Is Concerned, Father Really Does Know Best, and He Is Set to Prove It on the Hit Family Comedy "My Wife and Kids,"* L.A. TIMES, Nov. 25, 2001, at F8.

178. *Id.*

179. Donna Petrozzello, *Black-White Ratings Gap Is Widening*, N. Y. DAILY NEWS, Apr. 16, 2002, at 90 (reviewing results of 2001 study by Manhattan-based advertising buyer, Initiative Media).

Calloway.[180] Even though it was critically acclaimed, CBS canceled it for low ratings.[181] In the early 1990s, NBC developed the show *I'll Fly Away*, which involved a multiracial drama during the 1950s (at the start of the Civil Rights Movement).[182] NBC cancelled the show for low ratings even though it was critically acclaimed.[183] At present few, if any, network programs depict "normal" every day black life from a non-comedic perspective.

2. Sitcoms

Less than one-fifth of network sitcoms have racially mixed casts.[184] This lack of racial diversity may derive from the fact that whites and blacks have different viewing patterns in watching sitcoms. This divergence in viewing patterns developed in the 1990s.[185] For instance, NBC called its Thursday night "Must See TV."[186] It had some of the network's most popular shows like *Friends* and *Seinfeld*—often ranked in the top ten by the Nielsen Ratings.[187] But most of the viewers of these shows were white.[188] Ironically, despite taking place in New York City, neither of these shows had any regular minority characters. Most of the black viewers, in the 1996 season, were watching FOX shows—*Martin*, *Living Single*, and *New York Undercover*.[189] The

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180. Greg Braxton & Brian Lowry, *Small Screen, Big Picture, TV's Diversity Dilemma*, L.A. TIMES, JULY 23, 1999, at F1.

181. *Id.*

182. Tamar Jacoby, *Adjust Your Sets*, NEW REPUBLIC, Jan. 24, 2000, at 21; Paul Farhi, *TV's Skin-Deep Take on Race: False Harmony, Not Lack of Black Shows, Called Problem*, WASH. POST, Feb. 13, 2000, at G01; Greg Braxton, *Television Still Eyeing the Prize Taylor Branch Spent a Decade Trying to Get a Movie Made of "Parting the Waters," His Pulitzer-winning Civil Rights Chronicle. Now He's Shifted His Sights to an ABC Miniseries*, L.A. TIMES, Jan. 24, 1999, at 3; John J. O'Connor, *PBS Revives a Series on Race and America*, N.Y. TIMES, Oct. 11, 1993, at C16 (discussing the cancellation of *I'll Fly Away* and praising it for its treatment of race); Duane Dudek, *Drama Series Goes Against TV's Grain*, MILWAUKEE J. & SENTINEL, Oct. 1, 1993, at 4C; Drew Jubera, *Race Oriented "I'll Fly Away" Off to Rocky Start*, ST. LOUIS POST-DISPATCH, Feb. 26, 1992, at 1F.

183. O'Connor, *supra* note 182, at C16 (discussing the series cancellation and praising it for its treatment of race).

184. Jonathan Storm, *Why TV Comedies Are in Black and White While Dramas Come in Color. Life Is Integrated at Work: at Home, It's Not.*, MILWAUKEE J. SENTINEL, June 19, 1996, at 1. In contrast, approximately fifty percent of the television dramas have racially mixed casts. *Id.*

185. *See generally id.*

186. Stephen Battaglio, *NBC Gets Nothing from Seinfeld for Christmas: He's Reportedly Offered $5 Mil. an Episode*, HOLLYWOOD REPORTER, Dec. 29, 1997, at 1 (noting that NBC's Thursday night schedule was called "Must See TV.")

187. Tom Feran, *Black, White Preferences in Viewing Vary Widely*, PLAIN DEALER, Feb. 26, 1997, at 5E.

188. *Id.; see also* Storm, *supra* note 184, at 1.

189. The 1997 FOX cancellation of most of this all-minority line up caused controversy and led to African American protests. As a result of the protests, the television program, *Living Single*, was saved from cancellation for a few months. *Living Single* revolved around several young, professional black male and female characters living and working in New York City. Lowry et al., *supra* note 20, at A1.

divergence in viewing patterns between African American and all other viewers held true for the 1999–2000 season where the highest Nielsen-ranked television show for most black viewers was UPN's *The Parkers*[190] while the highest Nielsen-ranked show for all others was ABC's *Who Wants To Be A Millionaire.*[191] *The Parkers* story line revolves around two large, loud, dark-skinned African-American women who play a mother and daughter and are contemporaneously attending college.[192] Their "signature" greeting to each other is "Heeyyy."[193] Director Spike Lee has harshly criticized *The Parkers*, stating that "the stereotypes in it weren't much different from those in the minstrel shows" that he lampooned in the movie *Bamboozled.*[194]

A similar divergence in viewer demographics also occurred in the 2001–2002 primetime season. Only seven of TV's twenty top-ranked shows in African-American homes made white viewers' top twenty list.[195] This demographic divergence in viewer preference was actually worse (by one show) than the previous year.[196] In the 2000–2001 primetime season, the number one-ranked show for African-American viewers was FOX's *The Bernie Mac Show* and for whites it was NBC's *Friends.*[197] In contrast to *The Parkers*, *The Bernie Mac Show* has won critical acclaim and received a 2002 Emmy for writing in a comedy series.[198] Comedian Bernie Mac plays himself and is a "reluctant father figure" to "three obnoxious children" that his sister left with him while she is in drug rehabilitation.[199] Ironically, during the 2002–2003 season FOX and ABC have scheduled in the same time slot the only two shows on the major networks that feature middle class African-American families, *The Bernie Mac Show* and *My Wife and Kids.*[200] *My Wife and Kids* stars comedian Damon Wayans as "a not-so-modern man in a modern society."[201] *My Wife and Kids* has been described as "not as innovative in its approach as *The Bernie Mac Show*" and perhaps "a bogus representation of blackness."[202]

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190. Nielsen Media Research, *Top Primetime Programs-African American Homes* (chart of 1999–2000 television season), *available at* http://www.nielsenmedia.com/ethnicmeasure/african-american/programsAA.html (last visited Apr. 3, 2003).

191. Nielsen Media Research, *Highest-Rated Primetime Programs—"All Other" Homes* (chart of 1999–2000 television season), *available at* http://www.nielsenmedia.com/ethnicmeasure/african-american/programsOther.html (last visited Apr. 3, 2003).

192. *See generally BET Reaches Syndication Deal with Paramount TV* (Jan. 8, 2003), *at* http://www.bet.com/articles/0,,c3gb-5825,00.html; *see also* Tom Long, *TV's Newest Odd Couples*, DETROIT NEWS, Oct. 15, 2002, at 1E (noting that *The Parkers* is one of the rare instances in which a very large woman is linked with a traditionally handsome man).

193. *BET Reaches Syndication Deal with Paramount TV*, *supra* note 192.

194. Scott Sandell, *Television & Radio Tuned In: Even a Nostalgic Guest Turn Can't Help a Lackluster "Parkers,"* L.A. TIMES, Nov. 11, 2002, at E14.

195. Petrozzello, *supra* note 179, at 90.

196. *Id.*

197. *Id.*

198. Fred McKissack, *Black TV Families Are Back*, MADISON CAPITAL TIMES, Oct. 15, 2002, at 1D.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

B. Depictions of Latinos(as)

The viewing patterns for Latinos(as) are also different from those of whites. For instance, in 1996 most Latinos(as) were watching shows that featured Latino(a) actors like *New York Undercover*[203] on FOX while most of the white viewing audience was watching other shows.[204]

When Lucille Ball proposed that her then-real-life husband Desi Arnaz play her television husband on the *I LOVE LUCY* show, the network initially refused.[205] The network was concerned that the viewing audience would not accept Desi Arnaz as Ms. Ball's television husband because he was Cuban American.[206] The network finally agreed to let Arnaz play her husband, and the show was one of the most successful in the history of television.[207]

Very few Latino(a) actors have starred in nighttime dramas[208] or situation comedies.[209] Jimmy Smits starred in *LA Law* in the 1980s and starred in *NYPD Blue* in the 1990s. More recently Hector Elizondo stars in *Chicago Hope*, and Martin Sheen stars in the nighttime drama, *The West Wing*. In each of these cases, the racial identities of the characters that the actors play are "e-raced" since they play non-Latino(a) characters.[210] The casting of Latino(a) actors in non-Latino(a) roles gives

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203. Robin Dougherty, *When the Spanish Language is Spoken On Prime Time TV Today, There's No More "Splainin" To Do: Yiddish Already Blazed That Trail*, CHI. TRIB., Apr. 3, 1997, at 1 (noting the use of the Spanish language in the show, *New York Undercover*, which story line focuses on the detective work and lives of an African American and Puerto Rican undercover detectives).

204. *Hispanics Now Watching More of Same Hits as Other Viewers*, HOUSTON CHRON., Oct. 18, 1996, at 5 (noting, however, that the disparity between Latino(a) viewing tastes and other viewers was narrowing); *see also Latinos Like "Friends," "ER," "Seinfeld," Too*, MARKETING NEWS, Nov. 18, 1996, at 6 (also noting the narrowing disparity in viewer tastes).

205. *See* Richard Zoglin, *The TV Star, Lucille Ball*, *available at* http://www.time.com/time/time100/artists/profile/lucy.html (last visited Oct. 15, 2002).

206. Mark A. Perigard, *Crossing the Border Although Desi Arnaz Captured America's Heart 40 Years Ago, a New Generation of Latino Actors is Still Struggling for Acceptance*, BOSTON HERALD, Apr. 23, 1995, at 6.

207. *See* Christopher Anderson, *I Love Lucy*, *available at* http://www.museum.tv/archives/etv/I/htmlI/ilovelucy/ilovelucy.html (last visited Oct. 30, 2002). The show "spent four of its six prime-time seasons as the highest-rated series on television and never finished lower than third place." *Id.*

208. CNN has a twenty-four hour network in Spanish. Small nuggets of Spanish dialogue have been incorporated into some mainstream television shows. Dougherty, *supra* note 203, at 1 (noting that Spanish dialogue was incorporated, during the 1996–1997 season, in the following television shows: *Chicago Hope*, *New York Undercover*, *The X-Files*, *Cosby*, *ER)*.

209. *See generally* Perigard, *supra* note 206 (listing Latino(a) sitcoms aired during prime-time).

210. *See generally* James Poniewozik, *What's Wrong With This Picture? The U.S. Hispanic Population Has Grown 58% In 10 Years, to 35 Million. On TV Latinos Are Down 2% of Characters. Why the Brownout?*, TIME, May 28, 2001, at 80.

some Latino(a) actors more opportunities[211] to work their craft in ways that African-American actors are usually not able to, unless they can pass for white. As a result of this "erasure" of some Latino(a) actors in television dramas, the audience does not have the opportunity to counter any of their negative stereotypes about Latinos(as) by experiencing positive modern-day images.

Galan Enterprises has contracted with FOX to bring Latino(a)-themed programs to the United States in English and for distribution in Spanish to Latin American countries.[212] In some locations basic cable includes feeds from Mexico and features a mix of variety shows, news, novellas, and MTV Latina (MTV's Spanish counterpart). Of course, the foreign cable feed does not reach a majority of households. Further the existence of these foreign cable channels does not excuse U.S. broadcasters from developing more domestic Latino(a) programming as the absence of such domestic programming leaves unchallenged the stereotype of Latinos(as) as foreigners.

According to a study commissioned by the National Council of La Raza, Latino(a) characters are either absent from television or presented in stereotypical portrayals.[213] For one month during the 1992 fall season, the researchers surveyed approximately 300 shows with 7,000 characters.[214] Comparing the content of the 1992 season to the 1950s, the study found that the number of Latino(a) characters on television in 1992 declined to one percent of all characters, even though Latinos(as), at the time, were nine percent of the population.[215] In contrast, in the 1950s Latinos(as) were approximately three percent of all television characters even though they were a smaller percentage of the population.[216] According to the study, sixteen percent of the Latino(a) characters committed crimes as compared to four percent of the African American and white characters.[217] Approximately twenty-eight percent of the Latino(a) characters were poor as compared to twenty-four percent of the African American and eighteen percent of the white characters.[218] Only one Latino(a) was depicted as a business executive.[219]

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211. The National Council of La Raza, in making its ALMA awards for film, TV, and music, gives an award each year to a Latino(a) actor who plays a non-Latino(a) character. *See generally id.*

212. *Id.*

213. Susan Ferris, *Prime Time Latino Characters Now TV's Favorite Criminal Target*, CHI. TRIB., Sept. 27, 1994, at 5.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.; see also* Roman, *supra* note 151, at 42 (explaining that most Latino(a) characters portray gang members or undocumented workers, and not working professionals or business leaders).

Offensive images of Latinos(as) declined by almost half from the 1992–93 television season to the 1994–95 season.[220] However, the reality-based televisions shows[221] disproportionately depict Latinos(as) and African Americans as criminal perpetrators.[222] Latinos(as) are often portrayed as drug pushers, as violent and as foreigners with no ties to the United States."[223]

A study conducted by Professor George Gerbner of the Annenberg School for Communication found that Latino(a) characters make up only one percent of the roles in prime time and 0.5 percent on children's shows even though Latinos(as) make up about ten percent of the U.S. population.[224] According to the Gerbner study, sixty percent of those portrayals of Latino males were negative stereotypes.[225] The Latino male character was either a failure or ineffectual.[226] In comparison, white characters were failures only twenty-three percent of the time.[227] Negative portrayals of Latinos(as) and cultural insensitivity in the media contributes to many Latinos(as) turning to Spanish-language broadcasts.[228] The Spanish-language broadcasts are perceived to be more balanced.[229]

When presented as characters on sitcoms, Latinos(as) are sometimes shown disrespect. For example, the penultimate episode of *Seinfeld* angered many Puerto Ricans when Kramer inadvertently burned the Puerto Rican flag and stepped on it to put out the flames at the Puerto Rican Day parade in New York City.[230] In response

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220. Darlene Superville, *Stereotypes of Hispanics Still on TV: Study Shows*, FORT WORTH STAR-TELEGRAM, Apr. 20, 1996, at 38A (the Study was conducted by the Center for Media & Public Affairs for La Raza).

221. *See* Ferris, *supra* note 213. Shows like *Cops* and *America's Most Wanted* are called reality based because they involve "real events." In *Cops*, cameramen shoot footage by traveling with police officers on their activities in particular city. *See Fox Bringing "COPS" Back For 11th Season*, CHI. TRIB., Apr. 16, 1998, at 9. They move from city to city over the course of the season. *Id.* at 9. *America's Most Wanted* reenacts unsolved crimes and displays photos of the alleged perpetrator in an effort to solicit the public's assistance in catching them. *See* Ken Parish Perkins, *Love and Smaltz: Will Viewers Cozy Up to Reality-Based Romance on TV?*, CHI. TRIB., Sept. 9, 1994, at 3.

222. Superville, *supra* note 220, at 38A.

223. *Id.*

224. *See* NATIONAL COUNCIL OF LA RAZA, OUT OF THE PICTURE: HISPANICS IN THE MEDIA, STATE OF HISPANIC AMERICA 1994, at 3 (1994).

225. *Id.* at 6; *see also* George Gerbner, *Casting the American Scene: Fairness and Diversity in American Television*, *available at* http://www.sag.org/diversity/gerbner.html (last updated 1998)

226. NATIONAL COUNCIL OF LA RAZA, OUT OF THE PICTURE: HISPANICS IN THE MEDIA, STATE OF HISPANIC AMERICA 8, at fig. 3 (Latino characters had the lowest success rate at fifty-four percent, and the highest failure rate at thirty-four percent.).

227. *Id.*

228. *See* Maria T. Padilla, *Hispanics Decry Negative Image in Media Stereotypes, Causes Many Latinos to Turn to Spanish-Language Broadcasts: Leaders Say*, ORLANDO SENTINEL, Sept. 12, 1997, at A1.

229. *See id.*

230. *Puerto Rican Coalition Accepts Apology: Commitment from NBC to Cut Re-runs of Offensive "Seinfeld" Episode*, U.S. NEWSWIRE, June 10, 1998, *available at* 1998 WL 5686596; Shauna Snow, *Arts and Entertainment Reports from the Times, National and*

to the criticism, the creators of *Seinfeld* promised not to rerun the episode, although they refused to promise that it would not be rerun in syndication.[231] Ironically, during the Hispanic Brownout in the fall of 1999, the premiere episode of the sitcom *Will & Grace* had an offensive scene in which a white character Karen Walker used an ethnic slur against her Salvadoran maid.[232] In the scene, the white character notices that the Salvadoran character is engaging in conversation and has paused from working.[233] The white character tells the Salvadoran character, "Hey, you're on the clock, *tamale*. Get to work."[234]

The National Hispanic MEDIA Coalition urged the networks to put a Latino(a)-themed series on the air and increase the number of Latino(a) actors in supporting roles on the other shows.[235] Felix Sanchez of the National Hispanic Foundation for the Arts has said that "Latinos are mad as hell, and we're not going to take it anymore."[236] Alex Nogales said, "We're tired of talking to networks about the same thing, day in and day out, with nothing changing at the end of the day."[237] Mr. Nogales said that "if you don't want us in Hollywood, if you're not going to hire us, we're not going to consume your product."[238]

In the 2002–2003 season, ABC debuted *The George Lopez Show*, which is the first successful network show starring Latino characters in over twenty years.[239] The sitcom stars Latino comedian George Lopez who plays a plant manager with a stay-at-home wife, two kids, and a difficult mother.[240] Mr. Lopez has described the show as not trying to "represent the average Latino. But it meshes with the aspirations of many children and grandchildren of immigrants who worked hard to advance and achieve a better life for their kids."[241] Although the characters on the show principally speak English without accents, they occasionally speak Spanish like using the

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International, L.A. TIMES, Jun. 12, 1998, at F2; Dan Janison, *NBC: Sorry About Seinfeld: Puerto Rican Coalition Accepts Apology for Flag-Burning Plot*, NEWSDAY (New York), Jun. 12, 1998, at A8 (outlining plot of *Seinfeld* episode with flag-burning incident); Scott Williams, *"Seinfeld" Episode Flagged By NBC*, N.Y. DAILY NEWS, Jun. 11, 1998, at 7.

231. *Puerto Rican Coalition Accepts Apology*, *supra* note 230; Janison, *supra* note 230; Snow, *supra* note 230; Williams, *supra* note 230.

232. Lynn Elber, *Amid Hispanic Boycott Comes Slur on NBC*, SUN-SENTINEL, Sept. 21, 1999, at 4E.

233. *Id.*

234. *Id.* (emphasis added).

235. Russell Shaw, *Latino Group Protests Lack of Hispanics on ABC*, ELECTRONIC MEDIA, May 8, 1995, at 33. The Coalition chair, Alex Nogalas, planned to boycott ABC because he said that ABC reneged on a promise to put a Latino(a)-themed show on the air and increase the number of Latino(a) actors in supporting roles by fall 1994. *Id.* The Coalition sent letters to about 180 ABC radio and television affiliates urging them to put pressure on the network and implying that their licenses could be challenged if an examination showed that Latinos (as) are under-represented among station employees. *Id.*

236. Kolker, *supra* note 3, at A12.

237. *Id.*

238. *Id.*

239. Eduardo Porter, *Latinos Tune in to Watch as George Lopez Pursues American Dream on ABC*, WALL ST. J., Dec. 31, 2002, at A9.

240. *Id.*

241. *Id.*

Mexican slang "chi-chis" to describe a woman's breasts.[242] ABC also broadcasts the show in Spanish on its secondary audio program, hired a Latino public relations firm to market the show, and placed advertisements promoting the show on Spanish language media.[243]

Although approximately twenty percent of Latinos(as) in the United States have incomes below the poverty line, "the fantasy of *The George Lopez Show* is attainable in an upwardly mobile sort of way."[244] Lisa Navarette, spokeswoman for the National Council of La Raza said, "It's not so beyond the pale. He's not a dot-com billionaire."[245] Ms. Navarette also said that "Latinos like [the show] because it's an extraordinary thing to turn on the TV and see somebody that is just like your dad, just like your uncle."[246] The show generally does not pander to ethnic stereotypes,[247] except one episode where Lopez defends his daughter's aversion to taking swimming lessons by joking: "Why does she need to learn to swim? We're already here."[248]

Among English-language programs for the eighteen-to-forty-nine aged Latino(a) audience, the ratings for *The George Lopez Show* are now second only to *Friends*.[249] The Nielsen Media Research found that *The George Lopez Show* was ranked number forty-five for the general eighteen-to-forty-nine demographic,[250] but it is the top-rated show in its time slot for this particular demographic.[251] *The George Lopez Show's* viewers are very diverse: eleven percent are Latino(a);[252] sixty-three percent are non-Latino white;[253] and eighteen percent are African American.[254]

Some progress is being made by the fact that ABC took the risk to broadcast *The George Lopez Show*. Hopefully, the ratings success of the show will encourage the other networks to take similar risks. However, having only one network show focusing on a Latino family is still woefully insufficient.

C. Depictions of Asian Pacific Americans

In the 1994 television season, *All American Girl* debuted as the first all-Asian American sitcom. It starred Margaret Cho, a Korean-American stand-up comic.[255] The Asian Pacific American community had mixed reactions to the pilot.[256]

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242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. Tom Jicha, *Comedian's Sitcom Too Short on Comedy*, SUN-SENTINEL, Mar. 27, 2002, at 3E.
248. Porter, *supra* note 239, at A9.
249. *Nielsen Ratings: Viewers Go Eye to Eye with CBS' "Survivor,"* ST. PAUL PIONEER PRESS, Dec. 25, 2002, at 4B.
250. Porter, *supra* note 239, at A9.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *See* Jefferson Graham, *Who's That "Girl"? Press Gets a Closer Look*, USA TODAY, July 18, 1994, at 3D.

Guy Aoki, head of the Media Action Network for Asian Americans, praised the sitcom.[257] Sumi Haru, President of the Association of Asian Pacific artists said: "I'm glad television is finally doing something with Asian Americans, and the buzz is good. This is healthy stuff, to show the generational and cultural differences that all of us go through. It's very true to life and should generate a lot of stories."[258] In contrast, Jerry Yu, Executive Director of the Korean American coalition, said some members of his community group were "bothered" by the pilot for *All American Girl*. He said, "[A] lot of people didn't think it was funny. It showed the older people in the family not speaking English well. There was a funny confusion of various Asian cultures. Much of the stuff from the show was not from the Korean culture."[259]

Despite hiring two Asian-American writers and a consultant on Korean culture, *All American Girl* received this mixed reaction form the Asian Pacific American community, and the show was canceled in its first season.[260] In the 1997–1998 television season, only one network show that had an Asian-American as the lead character,[261] *Mystery Files of Shelby Woo*, starring actress Irene Ng.[262] The 1998 fall schedule included a new CBS program called *Marshall Law*,[263] starring Sammo Hung, Kelly Hu and African-American actor Arsenio Hall.[264] The show was about an Asian American police officer who uses martial arts to apprehend criminals.[265] Even though the show has Asian American characters, it often portrayed them in a stereotypical setting—practicing Kung Fu.[266] In the late 1990s, Lucy Liu was one of the supporting actresses in the hit FOX series *Ally McBeal*, but she also played to stereotypes as the bitchy dragon woman.[267]

Very few Asian Pacific Americans star in any television series. Some television shows still use white actors to portray Asian Pacific American characters.[268] For example, in *Kung Fu*, a show that was on in the 1970s starring a white actor, and

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256. *See* Greg Braxton, *It's All in the (Ground-Breaking) Family Television: As a Sitcom Centered on Asian Americans, "All-American Girl" Is Being Monitored by Advocacy Groups Concerned About Racial Stereotypes. Welcome to the Pressure Cooker*, L.A. TIMES, Sept. 14, 1994, at 1.

257. *Id.*

258. *Id.*

259. *Id.*

260. Jae-Ha Kim, *Just What She Wants: Comic-Actress Margaret Cho Takes Control*, CHI. SUN-TIMES, Sept. 23, 1999, S2, at 50.

261. *See* Sylvia Lawler, *Irene Ng as Shelby Woo*, THE MORNING CALL, Mar. 17, 1996, at T3.

262. *Id.*

263. Judith Michaelson, *Morning Report*, L.A. TIMES, Oct. 11, 1998, calendar section, at F2.

264. Dawidziak & Feran, *supra* note 23.

265. Michaelson, *supra* note 263, at F2.

266. *See, e.g.*, Ziauddin Sardar, *China Syndrome: Depictions of the Chinese in Movies*, NEW STATESMAN, May 22, 2000, at 46.

267. Steve Johnson, *Asia Minor: Among TV's Neglected Minorities, Asian Americans May Be the Most Underrepresented of All*, CHI. TRIB., July 16, 1999, at 1.

268. *See* Don Aucoin, *NBC Pledge on Diversity*, BOSTON GLOBE, July 30, 1999, at D1.

has been revised in the 1990s as *Kung Fu: The Legend Continues* with the same white actor playing the lead character.[269] Scott M. Sassa, President of NBC West Coast and the highest ranking minority in network television, stated that "Seeing David Carradine in [Kung Fu] as a Chinese guy really [ticked] you off . . . ."

Some shows have used Asian Americans to provide comic relief. For instance, *The Tonight Show* with Jay Leno featured many appearances of the "Dancing Itos," which was a very disparaging reference to Judge Lance Ito, the presiding judge in the O.J. Simpson criminal case, but led to high ratings for *The Tonight Show*.[270] As a result of their appearances on the Tonight Show, they received commercial offers.[271] Some shows have ridiculed Asian Pacific Americans by having someone speak in a stereotypical, heavily accented Asian Pacific American dialect—all feeding into the stereotype that Asian Pacific Americans are foreign born.[272]

D. Depictions of Native Americans

Native American characters historically have been depicted as "fearsome warriors and savages,"[273] "bloodthirsty scalpers," "treacherous scouts," "inscrutable squaws," "noble primitives," "beatified victims," and "new Age-y healers."[274] The current representations of Native Americans still focus on the Nineteenth Century or the 1970s conflict at Wounded Knee.[275] Very few Native Americans are depicted on broadcast television and, of those, most are not modern depictions.[276] The depictions of Native Americans focus on their "spirituality" or tends to "appropriate" Indian culture.[277] Some Native American commentators believe that "Hollywood's interest in Indian spirituality redresses a movie slur of the past, the charge of heathenism . . . ."[278] Others believe that spiritual devotion "feminizes" or "un-mans" Native Americans "thereby implicitly neutraliz[ing] him as a social or political threat."[279] As for appropriation of Native Americans, some believe that the "new impulse [is] to claim indigenous tribes as the pre-Philadelphia founding fathers"

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269. *Id.*

270. Keith Marder, *O.J. Simpson Trial Verdict Top TV Moment of Year*, TIMES UNION, Dec. 31, 1995, at H1; Chuck Taylor, *Stars of '95-TV*, SEATTLE TIMES, Dec. 31, 1995, at 3, *available at* 1995 WL 11230109.

271. Judy Hevrdejs & Mike Conklin, *Oscar Night Means Plenty of Pomp and Little Happenstance*, CHI. TRIB., Mar. 27, 1995, at 12.

272. *See generally* FRANK WU, YELLOW, RACE IN AMERICA BEYOND BLACK AND WHITE 79–87 (2002) (noting that Asian Americans are often stereotyped as the "perpetual foreigner"); *see also* Douglas Quan, *Kicking the Box: Asian Actors Take Stand Against Stereotypical Roles*, HOUSTON CHRON., Jun. 30, 2002, at 16, *available at* 2002 WL 23205692.

273. Kermit Pattison, *Video Producer Covers Indian's Tales in "Our Own Voices," Voids Stereotypes*, L.A. DAILY NEWS, June 24, 1996, at SV4.

274. Misha Berson, *Native American Images: Stage and Screen Reflect More Indians, But Has Picture Really Changed?*, SEATTLE TIMES, Apr. 10, 1994, at F1.

275. *Id.*

276. *Id.*

277. Pat Dowell, *The Mythology of the Western: Hollywood Perspectives on Race and Gender in the Nineties*, CINEASTE, Jan. 1, 1995, at P6.

278. *Id.*

279. *Id.*

showing how whites captured the Native American's "worshipful rustling," "land," and "woodland skills."[280]

The older portrayal of Native American as "fearsome warriors" and the more modern stereotype "spiritual shaman" are broadcast on television. The cable networks periodically broadcast the cowboy classics. TNT cable network has a $60 million initiative to produce over fourteen hours of Westerns films with Native American themes such as *Geronimo: An American Legend*, *Broken Chain*, and *Lakota Woman*.[281] These TNT features have the more modern Native American stereotypes of "spiritual shaman."[282] However, almost contemporaneously in 1997, TNT, with the largest library of cowboy classics, broadcast over twenty-six hours of classic Westerns.[283]

Broadcast television has had very few contemporary portrayals of Native Americans. One of the few was the television show *Northern Exposure*, which took place in Alaska and had Native American characters played by Native American actors.[284] The show was critically acclaimed[285] for its sensitive and non-stereotypical portrayal[286] and was broadcast for five years, but those portrayals have most often been of the one-dimensional positive stereotype.[287] *Northern Exposure*'s creators and producers, Joshua Brand and John Falsey, stated that they were "trying to break the [Native American] stereotypes that people have built up over all these years of

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280. *Id.*

281. Berson, *supra* note 274, at F1.

282. *See generally id.*

283. *See generally id.*

284. Berson, *supra* note 274, at F1; *see also* John Engstrom, *For Elaine Miles, Acting Is Easy—And So Is the Pay*, SEATTLE POST-INTELLIGENCER, July 25, 1991, at C1 (noting how Elaine Miles, a Native American, who played receptionist Marilyn Whirlwind on *Northern Exposure* was "discovered"); John Engstrom, *Indians Hold Negotiations with Northern Exposure*, SEATTLE POST-INTELLIGENCER, Mar. 9, 1993, at C5 (discussing the fact that some of the Native American actors on *Northern Exposure* complained about working conditions on the set).

285. Rick Du Brow, *NBC's Dramatic Surge in Quality TV*, L.A. TIMES, Nov. 26, 1991, at F16 (noting that the CBS show, *Northern Exposure*, was voted best show by Viewers for Quality Television).

286. *Is Northern Exposure Cooling*, AUSTIN AM-STATESMAN, Jun. 6, 1993, at 15, *available at* 1993 WL 9949138 (noting that "Native American characters get a rare chance to step outside stereotypes").

287. *See generally* Annette M. Taylor, *"Northern Exposure" Unfairly Minimizes Alaska Indians' Native Culture*, DAYTON DAILY NEWS, July 29, 1993, at 8A (Letter to the Editor asserting that the *Northern Exposure* Native American characters are "Hollywood's manufactured stereotypes" because Alaskan native populations consists of three distinct cultures—Tlingit, Haida, and Athabascan, yet the television show focused solely on the Tlingit culture and artistic style. In addition, *Northern Exposure* took place in the Alaskan interior where the Athabascan, not the Tlingit, live.).

The prevailing Native American stereotype is that of the proud and brave Indian—the "Noble Savage." Even though this may appear to be a positive stereotype, it is a still stereotype and limiting to those affected by it." *Cf.* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1244 (1993) (discussing the burdens that many Asian Americans face as the "model minority").

television and the movies."[288] *Dr. Quinn, Medicine Woman, Walker Texas Ranger,* and *Star Trek Voyager* also have had recurring Native American characters. Native American actor, D. Martin Pera agreed that "media images of [Native Americans] are maturing."[289] Currently, very few Native American characters or actors appear on prime time television shows.[290]

VI. THE SOCIAL CONSEQUENCES OF STEREOTYPICAL CHARACTER PORTRAYALS

Many more African-American characters appear on television series today than at any other time in television history. Some of today's portrayals of African-American characters seem fair and responsible. However, upon closer examination one realizes that certain stereotypes still exist. For instance, more black characters appear in sitcoms than family dramas.[291] In sitcoms, the black characters are more often than not portrayed as the buffoon. In sitcoms where the black character portrays the "friend," "colleague" or in rare instances the "boss," the character is often one dimensional; we do not see the black character's friends or family.

Some may say that the television shows that feature predominately white characters also portray the white characters as buffoons and in stereotypical ways. However, the consequences are different; because so few black characters appear in television, they are more likely to leave a lasting impression with the viewing audience. Because African Americans are a small minority in the United States, many non-blacks are likely to learn about African Americans from television. Therefore, those limited impressions, especially those that reinforce negative stereotypes, are indelibly etched in many viewers' minds.[292]

The networks have a lot of work to do with respect to the portrayal of Latinos(as) on television. Still too few depictions exist of America's fastest growing minority.[293] Ironically, Latino(a) characters are sometimes played by whites, as when

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288. Mark Schapiro, *Trademarks for Offbeat, Literary Backgrounds Mark Imaginations of Series Writers*, AUSTIN-AM. STATESMAN, Mar. 29, 1992, at 5 (noting how the producers disagreed with costume designers who wanted an Indian spirit to wear "moccasins, medicine-man kind of stuff," but the producers wanted him dressed like their grandfathers).

289. Berson, *supra* note 274, at F1.

290. Greg Braxton, *Networks Still Struggling with Diversity: Study Says*, L.A. TIMES, July 18, 200, calendar section, at F2; *see also* Noel Holston, *The Color of Prime Time: When It Comes to More and Better Roles for Minorities in Drama TV Executives Deliver Little More than Snow and Static*, SUN SENTINEL, Aug. 25, 2002, at 1D.

291. Paul Farhi, *Amos 'n' Standby: Television's Dramatic Deficit for African Americans*, WASH. POST, Jan. 8, 1995, at C1.

292. *See, e.g.*, ENTMAN & ROJECKI, *supra* note 14, at 94–106 (discussing how the broadcast networks do not broadcast news reports on poverty and how poverty and welfare are perceived to be black issues, even though most poor people, and most people on welfare, in the United States are white).

293. Latinos(as) are anticipated to be America's largest minority in the next few years. Spanish-language cable channels like TeleMundo, Univision and Gala exist, and some Latino(a)-themed shows on cable such as Showtime's *Resurrection Blvd.* exist. *See generally* Showtime, *Resurrection Blvd.*, *at* http://www.sho.com/resblvd/ (last visited Apr. 3, 2003).

Madonna was cast as Eva Peron in the film musical *Evita*.[294] Many of the depictions are still very negative.[295] In addition Spanish-language cable stations[296] are not a substitute for broadcast television shows that have wider viewership. Hardly any portrayals of Asian Pacific Americans or Native Americans are on television, and many of those have been stereotypical as discussed above.

These negative portrayals, stereotypes and invisibility can have a profound effect on children.[297] Research suggests that children devote the greatest proportion of their leisure time watching television.[298] Many children spend more time watching television than attending school.[299] Black children in the survey watched nearly twice as much television as whites.[300] Dr. Bradley Greenberg found that black children[301] identify with black television characters and rate them high in handsomeness, friendliness, and strength.[302] What is the impact on our children if they see blacks portrayed on television most often as criminals or any other negative stereotypes? Social scientists Paula Pointdexter and Carolyn Stroman have concluded that these stereotypes impact negatively on the self-concept of African-American children.[303] The television roles in which blacks are cast communicate to black children the negative value, which society places on them.[304]

For white children these minority portrayals also have negative implications.[305] Dr. Greenberg's study shows that white children are more likely to

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However, those cable channels and shows are not free like broadcast television. Moreover, to the extent that the Spanish-language cable channels market solely to Spanish-speaking Latinos(as), they preclude access to non-Spanish speaking Latinos(as).

294. EVITA (Disney Studios 1996).

295. *See supra* Section V.B.

296. *See infra* Section VII.

297. Young girls are also influenced by the stereotypes against them. A 1995 Lou Harris survey seems to confirm that girls are strongly influenced by the female characters that they see on television. This influence may confirm Professor Zerbinos's analysis. In the Lou Harris survey, fifty-one percent of girls in grades three through six acknowledged that they talk like a character they have seen on television, and forty-one percent of girls in grades seven through twelve do so. *See* Tom Walter, *Girls Remake TV in Their Own Image. Project Tunes Out Stereotype Messages*, COMMERCIAL APPEAL, Nov. 2, 1995, at C1. Among the younger girls, twenty-four percent wear clothes that they have seen television characters wear while thirty-four percent of the older girls do so. *Id.*

298. Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 533 (1996) (noting that children spend between 28.3 to 31.2 hours per week watching television).

299. *Id.* at 533.

300. Jane Tagney & Seymour Feschbach, *Children's Television-Viewing Frequency: Individual Differences and Demographic Correlates*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 145, 149 (1988).

301. Even those these statistics deal with black children, the concepts are probably basic enough to apply to other children of color. *Id.*

302. *Id.*

303. Paula M. Poindexter & Carolyn A. Stroman, *Blacks and Television: A Review of the Research Literature*, 25 J. OF BROADCASTING 103–22 (1981).

304. *Id.*

305. Worthy, *supra* note 298, at 535.

learn about other races through electronic rather than through personal interaction.[306] Forty percent of white children attributed to television their knowledge about how blacks look, talk, and dress.[307] Those white children who had the least opportunity to encounter blacks were most likely to believe that television portrayals were realistic.[308] Children are more vulnerable to media images because they lack real world experience and lack the necessary basis for comparison. Nancy Signarielli and Susan Kahlenberg have explained that while ideas, stereotypes, and roles depicted by the television industry do not reflect the real world, young children may not "distinguish" between symbolic and social reality.[309]

The negative media stereotypes of people of color impact how children perceive minority characters.[310] Indeed, it appears that children make generalizations about race based on television characters. Children more often associate positive qualities such as financial success and intelligence with white characters and negative qualities including lawbreaking and laziness with minority characters.[311] Seventy-one percent of children said that the role of boss is played by whites while fifty-nine percent said the criminal is typically played by blacks.[312]

These stereotypes play a role in shaping children's perceptions of people of color, and children may carry these stereotypes as adults. As seen earlier, a 1990 University of Chicago study found that 52.8 percent of Americans believe that violence is a characteristic to describe African Americans.[313] Approximately 42.8 percent believed the same thing about Latinos(as).[314] If children falsely learn from television that all criminals are African American or Latino(a) and that members of these groups are inherently prone to violence and other bad acts, then racism and discrimination is perpetuated in our society. These absences and stereotypes may "condition the viewers' expectation of what is ordinary and normal in the larger society" and create a "schism" between whites and people of color in this country.[315]

VII. CABLE TELEVISION DOES NOT PROVIDE SUFFICIENT ALTERNATIVES FOR PROGRAMMING FOR PEOPLE OF COLOR

Cable television fails as an alternative to broadcast television's absences and stereotypes of minority characters primarily because cable is a pay service while broadcast is free. In addition, broadcast licenses are part of a public grant given to the

306. Bradley S. Greenberg, *Children's Reaction to TV Blacks*, JOURNALISM Q., Spring 1972, at 11.

307. *Id.*

308. *Id.*

309. *Television's World of Work in the Nineties*, J. BROADCAST & ELECTRONIC MEDIA, Jan. 1, 2001, at 4.

310. *See also* CHILDREN NOW, *supra* note 33; John Carmody, *The TV Column: News Channel 8 Wins the Cable Ace Awards*, WASH. POST, May 7, 1998, at B09.

311. *See* CHILDREN NOW, *supra* note 33.

312. *See id.*

313. *See* ENTMAN ET AL., *supra* note 75, at ch. 1.

314. *Id.*

315. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 383 (New York Times ed., 1968) [hereinafter CIVIL DISORDERS].

licensees as trustees for the public.[316] Therefore, even though there may be some cable offerings that appeal to people of color, these offerings are insufficient and fail to provide those groups with the array of free choices that whites have on broadcast television. People of color should not have to pay to get entertainment programming suitable to their needs and devoid of stereotypes. The broadcasters are required to operate their stations in the public interest and provide programming for all.

Cable does offer a number of options for people of color. Black Entertainment Television (BET), which used to be a black-owned company, has primarily black-oriented programming and has been criticized for mostly playing music videos. In some markets, it is available as part of the basic package, in other markets it is offered as a premium channel, and in some markets it is not available at all. BET's founder Robert Johnson recently sold the company for $2 billion to Viacom.[317] BET reaches 62.4 million of the nation's 76 million pay television households.[318] BET viewership has actually increased by twenty percent since the purchase.[319] Nonetheless, BET is not the channel most viewed by African Americans.[320] Statistically, African Americans' order of preference is ABC, CBS, UPN, FOX, NBC, and WB.[321] Unfortunately, BET viewers have the lowest median incomes among adults eighteen to forty-nine of any network.[322] Having viewers with such low median incomes makes it harder for BET to attract the advertising dollars that other networks get. Having fewer advertising dollars makes it harder to produce quality programming. Even though BET has been black owned and has provided largely black entertainment programming, some in the African-American community have criticized its limited offerings, which consists mostly of music videos and recycled sitcoms.[323] Aaron MacGruder, the creator of the "hip" urban comic strip *Boondocks*, has made Robert Johnson and BET's lack of original minority

316. *See generally* FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (noting that those granted a license must serve "as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.'") (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969)).

317. Sallie Hofmeister, *Viacom Expands Cable Empire with BET Purchase*, L.A. TIMES, NOV. 4, 200, at C1.

318. *Id.*

319. R. Thomas Umstead, *Lifetime Leads Cable Ratings Rise*, MUTLICHANNEL NEWS, Apr. 9, 2001, at 3; R. Thomas Umstead, *BET Specials, Movies Prompt Record Ratings*, MULTICHANNEL NEWS, June 18, 2001, at 46.

320. Michael Schneider, *Blacks and Whites Share More TV Faves*, DAILY VARIETY, Feb. 12, 2001, at 5.

321. Schneider, *supra* note 320.

322. *See* Jon Lafayette, *NBC Most Upscale: Analysis Says Peacock Network Draws Richest Broadcast Viewers*, ELECTRONIC MEDIA, Feb. 7, 2000, at 10.

323. *See* Council of Presidents of African American Greek Letter Organizations, *Open Letter to Robert Johnson, CEO, Black Entertainment Television* (Nov. 2, 2001) (threatening a national boycott of BET for failure to operate interests of African-American community) (letter on file with author); *see also* Lisa de Moraes, *Who Wants "Millionaire"? Maybe Not ABC*, WASH. POST, Nov. 29, 2001, at C1 (discussing the writing and aftermath of the letter). *But see* Lisa de Moraes, *For Now, Group Calls Off Boycott Over BET Video Content*, WASH. POST , Dec. 4, 2001, at C7.

programming the brunt of recurring jokes in his strip.[324] In one strip, Huey, one of the characters, says that he used to believe in the "economic philosophy of black nationalism," but he does not any more because "BET shot a few holes in that theory."[325] In another strip, Huey calls the cable company and says that he is watching "Black Entertainment Television, but I don't see anyone black and it is not entertaining."[326] The cable company operator says that he gets "this complaint all the time."[327]

Latinos(as) have more cable options than African Americans, but many are foreign owned and produced and often broadcast only in Spanish. They fail to give the viewer a modern view of the North American Latino(a) experience. Latinos(as) have Univision, Telemundo, and Galavision. The recently launched Hispanic Television Network now reaches fifteen percent of the country and consists of twenty television stations.[328] In addition, some of the other cable networks have created Spanish language alternatives like Discovery *en Espanol*, CNN *en Espanol*, and FOX World Sports *en Espanol*.[329] Univision captures eighty percent of the market, and Telemundo twenty percent even though it has an audience reach of eighty-eight percent of Latino(a) households.[330] Univision has twenty-six stations and thirty-two affiliated stations.[331] In contrast, Telemundo has ten full power stations and forty affiliated stations.[332] Univision owns Galvision, which is available to 25 million cable subscribers.[333] In addition, it owns an Internet portal and music label and plans to launch a second television broadcast network.[334] Univision and Telemundo enter viewers' homes either as a local broadcast station carried by the cable providers pursuant to the FCC's must-carry rules either as a basic or an expanded basic offering.[335]

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324. *See* Paul Farhi, *For BET, Some Static in the Picture, Bob Johnson Wanted People to Turn on His Cable Network. He Got His Wish*, WASH. POST, Nov. 22, 1999, at B6; E.R. Shipp, *On "The Boondocks,"* WASH. POST, Apr. 9, 2000, at B6; Teresa Wiltz, *But Has the Network Sold a Bit of its Soul?*, WASH. POST, Nov. 4, 1999, at C1. *But see* Robert Johnson, *Free for All: Clear Picture at BET*, WASH. POST (Op-Ed), Dec. 11, 1999, at A29.

325. Farhi, *supra* note 324.

326. *Id.*

327. *Id.*

328. Ronald Grover, *Media Giants Are Glued to Latino TV*, BUS. WK, Sept. 24, 2001, at 105.

329. Allison Romano, *Checking the Census*, BROAD. & CABLE, Oct. 1, 2001, at 32, *available at* 2001 WL 29165489.

330. Harry Berkowitz, *Spanish-Language Telemundo Bought by NBC*, NEWSDAY, Oct. 12, 2001, at A62.

331. Meg James, *Suitors Stay Tuned for Univision's Next Media Move: Many Are Eyeing the Spanish Language Broadcast Leader. But Acquisition Would be Costly, Analysts Say*, L.A. TIMES, Nov. 4, 2001, at C1.

332. Berkowitz, *supra* note 330, at A62.

333. James, *supra* note 331.

334. *Id.*

335. Simon Appelbaum, *Spanish Flying*, CABLEVISION, Sept. 3, 2001, at 25.

Although Galavision sometimes has some English-language advertisements and broadcasts,[336] most of its broadcasts are only in Spanish not providing a benefit to those Latinos(as) whose primary language is English.[337] Thus it should come as no surprise that these Spanish language networks draw only thirty-five percent of United States Latino(a) viewers.[338] United States Latinos(as) spend more time watching programs in English rather than Spanish-language shows on Telemundo, Univision or Galavision.[339]

There have also been a few other Latino(a)-themed shows on other cable networks. For instance, Nickelodeon broadcast the Latino(a)-themed *The Brothers Garcia*.[340] In 2000, Showtime also debuted a Latino(a)-themed television show called *Resurrection Blvd.*[341] Even though Latinos(as) have more options on cable than African Americans, Native Americans, or Asian Americans, it is an illusory advantage. Cable penetration is much lower among Latino(a) households than other American households.[342] The lower penetration rate may also be due to lower average household income for Latinos(as) as compared to the national average.[343] Thus, even if Latinos(as) have more choices, they may not be able to access the choices. In addition, if the goal is diverse positive images throughout the spectrum, so that everyone, of all backgrounds, can see them, having these images on costly and specialized cable channels will not effectuate that goal.

VIII. IS THE ABSENCE AND STEREOTYPING OF PEOPLE OF COLOR IN ENTERTAINMENT PROGRAMMING ACTIONABLE UNDER THE COMMUNICATIONS ACT?

Kweise Mfume stated that the NAACP was considering a wide range of actions against the networks, including litigation, because the absence of minorities was a violation of the 1934 Communications Act.[344] The NAACP and the networks reached agreement on the under-representation issue.[345] As shown in the preceding Sections, the major networks have done a substandard job of including people of color in their entertainment programming. Whether the FCC can regulate to remedy this

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336. *See generally* Jennifer Gonzalez McPherson, *Targeting Teens*, HISPANIC, Sept. 1, 2001, at 3236.

337. *Id.*

338. Poniewozik, *supra* note 210, at 80.

339. James, *supra* note 331.

340. Dale Russakoff, *Keeping Up with the Garcias: Children's TV Leads Latino Emergence*, WASH. POST, Sept. 23, 2000, at A1.

341. Suzanne C. Ryan, *Latinos Finally Beginning to See Themselves on Television*, BOSTON GLOBE, Mar. 24, 2002, at L8.

342. Allison Romano, *supra* note 329, at 32.

343. *Id.*

344. Braxton, *supra* note 27, at A1 (Mr. Mfume also stated that he would call for Congressional and Federal Communications Commission hearings on network ownership, licensing and programming; he also indicated that a viewer boycott of the networks, and of advertisers was also under consideration.).

345. *See ABC Reaches Pact with NAACP*, *available at* http://abcnews.go.com/sections/us/DailyNews/abc_naacp0000107.html (Jan. 7, 2000) (last visited on Oct. 15, 2002).

issue is an interesting question for several reasons. First, we must consider whether the FCC has the grounds to litigate this matter. Second, as seen from the prior agreements between the networks and Latino(a) groups, the networks sometimes do not honor these types of agreements.[346] And we can see that the networks' efforts to diversify their programming have been slow and inefficient to date.[347] Consequently, this legal question is likely to recur. The FCC has broad authority to regulate the communications industry "as the public interest, convenience, or necessity requires."[348] This mandate even includes the right to suspend a license if the broadcaster has broken the law.[349] The meaning of "public interest" has always been subject to debate. For instance, Judge Henry Friendly stated that the term "public convenience, interest, or necessity" had more meaning when used in the context of constructing railroad routes, but "was almost drained of meaning under . . . the Communications Act, where the issue was almost never the need for broadcast service but rather who should render it."[350]

At first, some thought that this language gave the Commission only the power to regulate the engineering and technical aspects of broadcasting.[351] However, the Supreme Court has held that the Commission's powers are not limited to solely technical and engineering aspects of broadcasting.[352] Instead the Court stated that "comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience or necessity,'"[353] meaning that, in awarding a license, the FCC could consider who was going to provide the best service. The Court has held that because of scarcity of the spectrum, the FCC has wide latitude in regulating the broadcasters.[354] Similar restrictions imposed on print journalists might be considered a violation of the First Amendment guarantees of Freedom of Speech, but broadcasters' First Amendment rights are not as broad as those of print journalists. As such, the Court has upheld FCC-imposed regulations on chain broadcasting,[355] the fairness doctrine, the personal attack doctrine, and the

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346. Rick Bentley, *The Latin Touch Cable Drama Tackles Diversity in Front of and Behind Cameras*, FRESNO BEE, June 25, 2000, at H1 ("What about the promises made by network bosses? So far they have been empty words.").

347. *TV Minorities Rare: Group Says*, THE DESERET NEWS, Nov. 15, 2000, at A18.

348. 47 U.S.C. § 303 (2001).

349. *Id.* § 303(m)(1). The origin of the term "public interest, convenience, or necessity" used in the 1934 Communications Act is uncertain. Former Chairman of the FCC, Newton Minow said that Senator Clarence C. Dill told him that the drafters of the Communications Act failed to reach an agreement on the statutory language, and a young lawyer who had worked at the Interstate Commerce Commission proposed the words "public interest, convenience and necessity" be used because they were present in other Federal statutes. NEWTON N. MINOW, EQUAL TIME 8–9 (1964).

350. HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATION AGENCIES 54–55 (1962).

351. National Broad. Co. v United States, 319 U.S. 190, 209–10 (1943) (broadcaster alleged that the FCC exceeded its powers conferred by the Communications Act).

352. *Id.* at 215.

353. *Id.* at 217.

354. *See* FCC v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978) (citations omitted).

355. *National Broad. Co.*, 369 U.S. at 209–10. Chain broadcasting is defined as the permissible relationship between networks and stations in terms of affiliation, network programming of affiliates' time, and network ownership of stations.

political editorial rules.[356] In fact, in *National Broadcasting Co. v. United States*, the Supreme Court stated that this mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive."[357] The public interest standard is very broad and would provide the FCC with the authority to regulate discriminatory conduct by the broadcasters, including the absence and stereotyping of people of color on network programs.[358]

A. The Communications Act Bars Discrimination

There are several bases for the FCC to regulate and prohibit the absence and stereotyping of minorities by the broadcast networks. Section 151 of the Communications Act sets the policy that bars discrimination by the carriers.[359] In addition, in two decisions, broadcasters lacking minority programming were found to be in violation of their public interest mandate.[360]

B. Section 151 of the Communications Act

In 1996 Congress amended section 151 of the Communications Act by including a provision barring "discrimination on the basis of race, color, religion, national origin, or sex.[361] Section 151 now reads:

> For the purposes of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges for the purpose of national defense, for the purpose of promoting safety and life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio as the "Federal Communications

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356. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). The fairness doctrine required the broadcasters to broadcast important issues of controversy and allow for alternative views of those issues. In its fairness report, the FCC repealed the fairness doctrine. The personal attack and political editorial rules were related to the fairness doctrine. The personal attack doctrine allowed a person attacked during the discussion of an important issue to request an opportunity to respond, and the political editorial rules required a broadcaster to allow a response to its political editorials on an issue. The D.C. Circuit overturned the personal attack and political editorial rules because the FCC failed to establish within a reasonable time why the public interest would benefit from the retention of the rules. *See* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

357. *See National Broad. Co.*, 319 U.S. at 219.

358. *See infra* Section VIII.B.

359. *See* 47 U.S.C. § 151 (2001).

360. *See infra* Section VIII.B.

361. 47 U.S.C.§ 151.

> Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.[362]

This amendment attempted to address discriminatory redlining of communication services as alleged in the Video Dial Tone[363] proceedings,[364] but the plain language of section 151 is broad enough to include discrimination in the broadcast area.[365]

The current enactment is much broader than the other proposed legislation. The legislative history shows that Congress previously rejected alternative amendments that would have prohibited discrimination solely by common carriers, not necessarily by broadcasters. Other failed amendments would have limited the protected class solely to certain income levels, would not have covered race and ethnicity, and would have employed an "effects" test, as opposed to "intent" test, for ascertaining whether discrimination occurred. For example, then-Congressman Bill Richardson offered an amendment to the Communications Act, which provided that the FCC should adopt regulations to

> prohibit a common carrier from excluding areas from the platform service area on the basis of the ethnicity, race, or income of the residents of that area, and provide for public comments on the adequacy of the proposed service area on the basis of the standards set forth under this subparagraph.[366]

The previous rejected proposals for the nondiscrimination provision show that Congress failed to approve language guaranteeing an "effects test." However, Congress also failed to pass legislation that required a showing of intent for this statutory amendment.[367] Since Congress was ultimately silent on this issue, it has in

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362. 47 U.S.C. § 151 (emphasis added).

363. Video Dial Tone was a service akin to cable television offered by the telephone companies over telephone company-owned wires and equipment. James J. Halpert & Angela J. Campbell, *Electronic Redlining: Discrimination in the Information Superhighway, in* NEW CHALLENGES: THE CIVIL RIGHTS RECORD OF THE CLINTON ADMINISTRATION MID-TERM 278–79 (Corrine M. Yu & William L. Taylor eds., 1995). Video Dial Tone had several advantages over regular cable service offerings: video dial tone had greater capacity and could carry more information and programming; could carry voice, data, and audio services, in addition to video; and could offer interactive service. *Id.*

364. *See* Angela J. Campbell, *Universal Service Provisions: The "Ugly Duckling" of the 1996 Act*, 29 CONN. L. REV. 187, 196 (1996).

365. Several of the telephone company video dial tone applications filed with the FCC allegedly evidenced discriminatory deployment patterns that bypassed minority and low-income communities. Halpert & Campbell, *supra* note 363, at 279. Instead of enacting an additional statutory provision specifically prohibiting electronic redlining, Congress amended section 151 of the Communications Act. Congress has called the section 151 amendment an "anti-redlining" provision. *See* Unanimous Consent Agreement, 142 CONG. REC. S687-01, S688 (Feb. 1, 1996).

366. H.R. 3626, 103rd Cong. § 653(b)(1)(G) (1994).

367. *See* Leonard M. Baynes, Electronic Redlining: The Color of Urban Access to Telecommunications (unpublished manuscript) (on file with author).

essence deferred to the Commission to promulgate regulations to deal with this thorny issue.[368]

The plain language of section 151 declares that the FCC should regulate those providing broadcast service so as to "make available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex* . . . ."[369] The statute has no explicit requirement that intent is a necessary element to find a violation of this statute. In fact, an intent requirement would be contrary to prior FCC precedent, especially when it comes to absences of people of color by broadcasters.[370]

To the extent anyone believes that the statutory language of section 151 is unclear over its regulatory scope,[371] these outstanding issues can be resolved by appropriate regulation. For example, any regulation that the FCC promulgates could make sure that "intent" is not required for any finding of discrimination, but "adverse effect" alone would be sufficient ground for a finding of discrimination. A regulation of this type would go a long way to clarifying any possible vagueness of the statute. Most agency policy judgments are subject to a very lenient "arbitrary and capricious" standard under the Administrative Procedures Act.[372] Under this review, a court will

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368. Courts defer to federal agencies like the FCC if its interpretation is consistent with the plain meaning of the statute or is a reasonable construction of an ambiguous statute. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984). Courts will overturn an "agency interpretation that conflicts with the plain meaning of the statute, is an unreasonable construction of an ambiguous statute, or is arbitrary and capricious." Iowa Utilities Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000) (citations omitted). The reasonable decision is not a question of whether the FCC "made the best choice or even the choice that [the] court would have made, but rather 'whether the FCC made a reasonable selection from among the available alternatives.'" *Id.* (citing Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 559–60 (8th Cir. 1998) (quoting MCI Telecommms. Corp. v. FCC, 675 F.2d 408, 413 (D.C. Cir. 1982))).

Moreover, this proposed legislation probably is not relevant to the absence and stereotyping of minority images because the proposed legislation was geared exclusively at electronic redlining. It noted that "[c]ommon carriers should ensure that their facilities are built out in a manner that does not disadvantage [applicable] communities." S. Rep. No. 103-367, at 53 (1994), *available at* 1994 WL 509063. The Senate bill was a bit more cautious. It provided: "In considering any application under section 214, the Commission shall ensure that access to such applicant's telecommunications services is not denied to any group of potential subscribers because of their race, gender, national origin, income, age, or residence in a rural or high-cost area." S. 1822, 103rd Cong., §229(g) (1994). It also specified that residents of communities containing "substantial numbers" of such residents enjoy "the right to choose . . . advanced services on approximately the same timetable as other Americans." *Id.*

369. 47 U.S.C. § 151 (2001).

370. *In re* Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975).

371. One possible drawback to relying solely on section 151 for the purpose of regulating television images is that it is located in the general purposes section of the Communications Act, which basically states policy, but does not necessarily mandate action to be taken. It does not specifically prohibit discrimination by the carriers; it merely states that it is the policy "so far as possible" to make available "world-wide wire and communications service" without discrimination based on race and other impermissible factors.

372. 5 U.S.C. § 706(2)(a) (1996).

inquire whether the agency "based its decision on substantial evidence, considered arguments on both sides, and explained the basis for its decision."[373] Courts generally do not want to "substitute their judgments on the merits" for those of an expert agency.[374] It also reaffirms Congress's desire to outlaw discrimination in the communications field—allowing the FCC to promulgate regulations in the public interest, including regulating negative minority stereotypes.

C. FCC Precedent in Cases Where Broadcasters Did Not Broadcast Minority Programming and Violated the FCC's Public Interest Requirements

When a broadcaster seeks to renew its license, the FCC grants the renewal if the broadcaster served the "public interest," committed no "serious violations" of the Communications Act or the FCC's rules, and committed no other violations "which, taken together, would constitute a pattern of abuse."[375] Two precedents

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373. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 61–62 (2001).

374. *Id.*

375. Section 309(k) of the Communications Act specifically provides:

> (k) Broadcast Station Renewal Procedures.
>
> (1) Standards For Renewal. If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license—
>
> (A) the station has served the public interest, convenience and necessity;
>
> (B) there have been no serious violations by the licensees of this Act or the rules and regulations of the Commission; and
>
> (C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.
>
> (2) Consequence of Failure to Meet the Standard
>
> If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3) or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.
>
> (3) Standards for denial
>
> If the Commission determines, after notice and opportunity for a hearing as provided in Subsection (e) of this section, that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall—
>
> (A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and
>
> (B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.
>
> (4) Competitor Consideration Prohibited

address issues where broadcasters were found to violate their public interest mandate because they failed to broadcast people of color on television. *United Church of Christ v. FCC*[376] and in *In re Application of Alabama Educational Television Commission*[377] involved citizens who alleged that a broadcaster operated in a racially discriminatory manner by failing to broadcast images of people of color over their licensed airwaves. Both cases are very important precedent evidencing the FCC's belief that it could remedy the absence and portrayals of people of color on television.

1. United Church of Christ v. FCC

In *United Church of Christ v. FCC*,[378] viewers of a television station in Jackson, Mississippi protested the station's license renewal alleging that, in the midst of the Civil Rights struggle of the 1960s, the station presented programs concerning racial integration in which only one viewpoint was aired, and failed to present the opposing viewpoint in contravention of the fairness doctrine.[379] The FCC failed to hold a hearing but renewed the license for a one-year probationary period.[380] The FCC stated that serious issues were presented as to whether the licensee's operations have met the public interest standard[381] and that it was a close question whether to designate a hearing for these license renewal applications.[382]

The FCC conditioned the license renewal on the following factors: (a) that the licensee would strictly comply with the fairness doctrine; (b) that the licensee observe its representations to the commission in the fairness area; (c) that the licensee meet with community leaders to deliver programming fully meeting their needs and interests; (d) that the licensee immediately cease discriminatory programming patterns; and (e) that the licensee make detailed reports on its efforts to meet these requirements.[383]

The D.C. Circuit held that members of the listening public had standing to contest the renewal of a broadcast license, and that the FCC must hold a hearing to resolve the public interest issues[384] raised by claims of the broadcaster's

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> In making the determination specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

47 U.S.C. § 309(k) (1996).

376. 359 F.2d 994 (D.C. Cir. 1965).

377. 50 F.C.C.2d 461 (1975).

378. 359 F.2d 994 (D.C. Cir. 1965).

379. *Id.* at 998. The fairness doctrine required the broadcaster to give unlicensed individuals a right to express their views or to respond to personal attacks or contrary political editorials. *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

380. *United Church of Christ*, 359 F.2d at 997.

381. *See id.* at 1008 n.27.

382. *Id.* at 999.

383. *Id* at 999–1000.

384. *Id.* at 1006–07. The court noted that under section 309(e) of the Communications Act, the FCC "must set a renewal application for hearing where 'a substantial and material question of fact is presented or the Commission for any reason is unable to make

discrimination and violation of the fairness doctrine.[385] The court noted that participation of the listening public is especially important in a renewal proceeding since the public will have been exposed for at least three years to the licensee's performance.[386]

On remand, the FCC granted the licensee a three-year license, even though it had more specific documentation of the licensee's shortcomings than it had in 1965 when it granted only a one-year renewal.[387] The D.C. Circuit held that the FCC's conclusion was not supported by substantial evidence.[388] The court took the highly unusual step of vacating the license that was granted and ordered that the FCC invite other applications to be filed for the license.[389] The court stated that the FCC misread the court's opinion in the previous case involving the parties because the hearing examiner seems to have regarded the interveners "as 'plaintiffs' and the licensee as 'defendant' with burdens of proof allocated accordingly."[390] The court noted that the hearing examiner seemed to have a "curious neutrality" towards the licensee in his conduct of the evidentiary hearing.[391] The court noted that the practical effect of the FCC's action was to place on the public interveners the entire burden of showing that the licensee was not qualified to be granted a renewal.[392] The court stated, "The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Interveners and their efforts."[393]

As a consequence, the court found as follows:

> The record now before us leaves us with a profound concern over the entire handling of the case following the remand to the Commission. The impatience with the Public Interveners, the hostility towards their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.[394]

The tenor of then-Judge Burger's opinion seems to suggest that he believed that the FCC was actually biased against the interveners during the hearings. In as a polite manner as he could muster under the circumstances, Judge Burger took the very

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the finding' that the public interest, convenience, and necessity will be served by the license renewal." *Id.* at 1007.

385. *Id.* at 1006.

386. *See id.* at 1004.

387. *See In re* Lamar Life Broad. Co., 14 F.C.C.2d 431 (1968).

388. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969).

389. *Id.*

390. *Id.* at 546.

391. *Id.* at 547.

392. *Id.* at 549.

393. *Id.* at 549–50.

394. *Id.* at 550.

unusual step of vacating an FCC order and ordering that the FCC put the license up for acquisition.[395] The important legal theory that comes from *United Church of Christ* is that members of the audience have standing to raise issues about how the licensees have served the public interest during their license term.[396] Similarly, therefore, the NAACP and La Raza and other racial affinity groups, as representatives of African American and Latino(a) viewers, have standing before the FCC to raise the issue of under-representation and stereotyping of minorities by the major television networks.

2. In re Applications of Alabama Educational Television Commission *(AETC)*

In *In re Applications of Alabama Educational Television Commission,*[397] the FCC considered renewing the licenses of eight educational television stations and granting a new license to cover a construction permit for a ninth station. The Alabama State Legislature created the Alabama Educational Television Commission ("AETC") as "the licensee for all state-owned and operated noncommercial television stations."[398] Programming was simulcast over all AETC stations, but several autonomous, state-funded production centers were responsible for the production and acquisition of programming. "The ultimate control and responsibility for all program operations remain[ed] in the hands of AETC which [had] the power to revoke all such delegations of its authority."[399] As part of the AETC's renewal process, Reverend Father Eugene Farrell, S.S.J., Linda Edwards, and Steven Suitts made informal complaints to the FCC about AETC's racial discrimination in programming and employment practices during the preceding license term.[400] At this time, the FCC held comparative hearings for the renewal of the license in which it would consider whether the licensee's activities conformed to the "public interest, convenience and

395. The Communications Act gives the FCC the power to assess penalties against licensees for violations of the law and FCC rules. *See* 47 U.S.C.§ 307(d) (2001) (allowing for shorter license terms at renewal time); *see also* 47 U.S.C. § 503(b) (2001) (authorizing the FCC to assess a fine against a licensee for violating an FCC rule); 47 U.S.C. § 312(a) (2001) (indicating that the FCC can revoke a license for violation of FCC rules); 47 U.S.C. § 309(k)(1) (2001). Then-Judge Burger could have remanded the case to the FCC with very specific instructions to revoke the license and set it up for hearing; instead, he took the very unusual step to revoke the license on his own accord and set it up for hearing. It appears to an observer that he did not trust the FCC to follow his orders. *See United Church of Christ*, 359 F.2d at 1003.

396. *See United Church of Christ*, 359 F.2d at 1001 (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (stating that, pursuant to 47 U.S.C. § 404(b), "Congress gave the right of appeal to persons aggrieved or whose interests are adversely affected by the Federal Communications Commission action." But the court noted that these private litigants had standing only as representatives of the public interest)).

397. 50 F.C.C.2d 461 (1975).

398. *Id.*

399. *Id.*

400. *Id.*

necessity."[401] The Administrative Law Judge initially rejected the complaints and concluded that there was no substantial problem warranting further inquiry and renewed the licenses.[402]

The FCC denied the applications for renewal and the construction permit.[403] The FCC found that the Administrative Law Judge inappropriately placed the burden that renewal would not be in the public interest on the petitioners, not on the AETC renewal applicant.[404] The FCC also concluded that AETC had ultimate responsibility for the actions of those to whom it delegated programming responsibilities irrespective of whether AETC was aware of the delegatee's actions.[405] As a consequence, licensees are responsible for the selection and presentation of program material over their stations, and are responsible for the programs broadcast on its designated frequencies.[406]

The Administrative Law Judge found that the licensee broadcast a minimal amount of integrated programming at the beginning of the license period and that the absence of black-oriented programming was not the result of non-availability since National Educational Television offered a substantial amount of such programming. As a consequence, the Administrative Law Judge found that AETC elected to broadcast virtually no black-oriented programming[407] and the "dearth" of such programming "resulted from AETC's desire to provide programming of value to everyone which blinded it to the possibility that some of its viewers might have special needs rather than from a design to discriminate on the basis of race."[408]

The FCC found that the Administrative Law Judge failed to give sufficient weight to the fact that the population of the State of Alabama was approximately thirty percent black.[409] The FCC found that the Administrative Law Judge reached his erroneous conclusion because he misallocated the burden of proof, and he gave "undue weight . . . [to] the broadcast of some integrated programs, and his unwarranted emphasis on the lack of evidence of a 'formal' policy of racial discrimination or of instructions that racial discrimination should be practiced."[410]

The FCC held:

> While it is true that there is no evidence that direct orders were ever issued to discriminate on the basis of race, the absence of such evidence is hardly dispositive. A policy of discrimination may be

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401. 47 U.S.C. § 307(d) (2001). The FCC often relied on informal complaints made by citizens or citizen groups on petitions to deny renewal. *See United Church of Christ*, 359 F.2d at 1001.

402. *See United Church of Christ*, 359 F.2d 994.

403. *In re* Application of Alabama Educ. Television Comm'n, 50 F.C.C.2d 461, 477 (1975).

404. *Id.* at 463–64.

405. *Id.* at 464–65.

406. *Id.*

407. *Id.* at 465.

408. *Id.*

409. *Id.*

410. *Id.*

> inferred from conduct and practices which display a pattern of under-representation or exclusion of minorities from a broadcast licensee's overall programming. In light of the facts of record set forth below, we find a compelling inference that AETC followed a racially discriminatory policy in its overall programming practices during the license period.[411]

The FCC further noted that, although a licensee has a great deal of discretion, that discretion is, of course, limited, and a "[r]efusal to present members of . . . other groups, would constitute discrimination in programming"[412] under the public interest standard.

The *AETC* case provides support for the arguments of the NAACP and La Raza. In *AETC*, there was an absence of people of color on the state educational television system.[413] The FCC found that an absence of minorities created a strong inference that discrimination occurred.[414] Moreover, the FCC decided the case without regard to the intent of the broadcaster.[415] Based on *AETC*, the burden would be on the networks to show that their all-white new season was within the public interest.[416] Some might argue that *AETC* was decided in a different era, and that the FCC would not follow that precedent today because in light of all the media outlets, scarcity no longer exits and the market provides programming for everyone. Moreover, some would say that the FCC no longer regulates broadcaster format[417] and has left it to the market to regulate.[418] But the lack of people of color in network entertainment shows is not a question of format, i.e., what kinds of things a network will broadcast. Instead it is a question of programming discrimination. When people of color comprise almost thirty percent of the population, their absence from network prime-time programs is prima facie evidence of discrimination in violation of section 151 of the Communications Act and the broadcaster's public interest obligations under section 309(k).[419] Portraying people of color most often as criminals in network shows is not only stereotypical, it is discriminatory in violation of section 151 of the Communications Act and the broadcaster's public interest obligations under section 309(k).

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411. *Id.* (citations omitted).

412. *Id.* at 466.

413. *Id.* at 467.

414. *Id.* (stating that "[t]here were no black AET commissioners, no black AETC professional staff, and no blacks on the Program Board during the license period").

415. *See generally id.*

416. *Id.* at 463–64.

417. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

418. *See In re* Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976) *rev'd*, WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir 1979), *aff'd* 450 U.S. 582 (1981).

419. *See generally In re* Applications of Alabama Educ. Television Comm'n, 50 F.C.C.2d at 465 n.5 (citing Norris v. Alabama, 294 U.S. 587 (1935) (noting that under the so-called "rule of exclusion," a substantial under-representation of a class is sufficient to establish a prima facie case of discrimination)).

D. Historic Governmental Concerns About Media Images of People of Color

The government has repeatedly been concerned about the absence and stereotyping of people of color in the media. After the civil unrest in several African-American communities in the 1960s, President Johnson appointed Governor Otto Kerner of Illinois to chair the National Advisory Committee on Civil Disorders (the "Kerner Commission") to investigate "what happened," "why . . . it happen[ed]," and "what [could] be done to prevent it from happening again."[420] As part of its charge, the Kerner Commission examined the media's depiction of people of color and found that

> television and print media failed to] communicate[] to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They [had also failed to] communicate[] to whites a feeling for the difficulties and frustrations of being a[n] [African American] in the United States.[421]

Moreover the Kerner Commission found that "[the media had] not shown understanding or appreciation of—and thus [had] not communicated—a sense of [African American] culture, thought, or history."[422] The Report concluded, "Unless the media became more sensitive to its portrayal of minorities, and blacks in particular, these stereotypical images would persist." As if it were talking about current conditions with African Americans, Latinos(as), Asian Americans, and Native Americans, the Kerner Commission noted that "most television programming ignores the fact that an appreciable part of their audience is black."[423] Furthermore, the Kerner Commission stated that the media acts as if African Americans do not "watch television, give birth, marry, die, and go to PTA meetings."[424]

In 1977, the United States Civil Rights Commission conducted a study of the portrayal of people of color on network news and in dramatic programs.[425] The study concluded that people of color were underrepresented on television, but when they did appear they were frequently seen in token or stereotypical roles.[426] The study concluded that the portrayal of people of color is critically important to American society because "viewers' beliefs, attitudes, and behaviors may be affected by what they see on television."[427]

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420. *See* CIVIL DISORDERS, *supra* note 315, at 1.
421. *Id.* at 383.
422. *Id.*
423. *Id.*
424. *Id.*
425. U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 1 (1977) (citing CIVIL DISORDERS, *supra* note 315, at 1).
426. *Id.*
427. *Id.*; *see also* Worthy, *supra* note 298.

Two years later the U.S. Civil Rights Commission conducted another survey of this topic and found that stereotyping of people of color by the media continued and in some instances worsened.[428]

The U.S. government has had consistent and long-term concerns over media absences and stereotyping of people of color. It has also interpreted these absences and stereotypes as having a deleterious effect on these groups. Section 151 of the Communications Act makes race discrimination illegal and the FCC has interpreted the lack of minority representations as a violation of a broadcaster's public interest mandate under section 309(k). To help the FCC analyze future cases of oversight, I suggest that the FCC import Fair Housing Act notions to analyze these questions. These notions will provide a test that the FCC can use to analyze these issues in the future.

E. Fair Housing Act Analogue

When I think of the absence and stereotyping of minorities by the media, I turn to an analogous situation in the real estate context. section 804(c) of the Fair Housing Act provides that it shall be unlawful

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familiar status, or national origin, or an intention to make any such preference, limitation, or discrimination.[429]

Section 804(c)'s ban on discriminatory advertisements is similar in scope to Title VII of the Civil Rights Act provisions prohibiting discriminatory employment advertising,[430] but different and more expansive than the other portions of the Fair Housing Act, which exempts small owner-occupied residences from its coverage.[431] Although the legislative history behind section 804(c) is silent, some commentators are of the opinion that Congress enacted this provision not only to prohibit discrimination, but to promote integration.[432] For example, the Fourth Circuit in *U.S. v. Hunter* stated that the reason for section 804(c)'s special coverage might be to promote the aims of the Act and that by "seeing large numbers of 'white only' advertisements in one part of the city may deter nonwhites from venturing to seek

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428. The FCC has considered this under-representation, as evidenced by these reports, in developing its minority ownership policy in 1978. *See* State of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978).

429. 42 U.S.C. § 3604(c) (1988).

430. Ronald L. Phillips, Note, *Challenging Discrimination in Real Estate Advertising: Do "Mere" Readers Have Standing?*, 3 TEX. F. ON C.L.& C.R. 113, 125 (1997) (noting that the reader should compare 42 U.SC. § 3604(c) (1995) with 42 U.S.C. § 2000(e)(b) (1994)).

431. Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORD. URB. L. J. 187, 194 (2001).

432. *Id.* at 211–13.

homes there, even if other dwellings in the same area must be sold or rented on a non-discriminatory basis."[433] The court also stated that the appearance of such advertisements in the mass media would magnify its effect.[434]

In these human models cases, the courts have generally found that repeated regular advertisements for apartments that use only white models violates section 804(c) of the Fair Housing Act. The courts' interpretation of the Fair Housing Act as covering human models is most akin to the situation dealing with broadcast exclusion of television programs starring people of color. The Department of Housing and Urban Development had implemented regulations, which help to clarify this matter, stating that "an advertising campaign using human models primarily in media that cater to one racial or national origin segment population without a complementary advertising that is directed at other groups" may be a violation.[435] These regulations also had provided that the models "should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race."[436] However, these regulations rejected the notion that the "models used should reflect, in numbers, the exact percentage of various groups in the population."[437]

The Second Circuit has held that the Fair Housing Act makes it illegal for a newspaper to publish advertisers' discriminatory housing advertisements.[438] If such conduct is illegal under the Fair Housing Act,[439] analogous conduct by broadcasters should be illegal under either section 151 of the Communications Act as it stands, under an amendment to the Act proposed herein,[440] or under the public interest standard used in license renewals. This Article advocates that we should import the Fair Housing Act test for discrimination—the ordinary reader test—into application of the Communications Act. To understand how this would work, this Section analyzes how the Fair Housing Act addresses the absence or stereotyping of images of people of color in the context of housing advertising. It is a strict liability statute requiring merely that there be a discriminatory advertisement made "with respect to the sale or rental of a dwelling."[441] No evidence of intent is required.[442]

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433. *U.S. v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972).

434. *Id.* at 215.

435. 24 C.F.R. pt. 109.30(b)(1995) (Part 109 was removed on Feb. 22, 1996. 61 Fed. Reg. 14378-01 (Apr. 1, 1996), *available at* 1996 WL 142700.).

436. *Id.*

437. Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 647 (6th Cir. 1991) (quoting Rules and Regulations, Department of Housing and Urban Development, 45 Fed. Reg. 57,105 (Aug. 26,1980) (codified at 24 C.F.R. pt. 109)).

438. *See* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993); Ragin v. N.Y. Times Co., 923 F.2d 995 (2d Cir. 1991).

439. *Id.*

440. *See supra* Section VIII.B.

441. H.U.D. v. Roberts, Fair Hous.-Fair Lending Rptr. ¶ 25,151, 26,217 (H.U.D. A.L.J. 2001), *available at* 2001 WL 56376; H.U.D. v. Dellipaoli, Fair Hous.-Fair Lending Rptr. ¶ 25,127, 26,077 (H.U.D. A.L.J. 1997), *available at* 1997 WL 8260.

442. *See, e.g.*, *Harry Maclowe Real Estate Co.*, 6 F.3d at 906; *Ragin*, 923 F.2d at 1000; Hous. Opportunities Made Equal, Inc., 943 F.2d at 646; Spann v. Colonial Vill., Inc., 899 F.2d 24 (D.C. Cir. 1990).

In *Ragin v. New York Times* (*Ragin*), plaintiffs brought an action against the *New York Times* for printing housing advertisements over a period of twenty years with only white models.[443] The complaint further alleged that when African Americans appeared in the advertisements, they were usually depicted in stereotypical ways such as "building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters."[444] Most of these advertisements were for buildings, developments, communities, or neighborhoods with predominately white populations.[445] The complaint further alleged that, when the *New York Times* had published advertisements that pictured all black models, these advertisements were for buildings, developments, or communities located in predominately black neighborhoods.[446]

The Second Circuit developed the "ordinary reader test" to help analyze this complicated case.[447] The court specifically stated that section 804(c) of the Fair Housing Act was "violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred [sic] for the housing in question."[448] The Second Circuit stated that the "ordinary reader is neither the most suspicious nor the most insensitive of our citizenry."[449] According to the court, an "ordinary reader" does not apply a "mechanical test" in reading every advertisement to discern the demographics of every model seen.[450] An advertisement depicting a single model of one race that is run only two or three times would seem, absent some other direct message, outside section 804(c)'s prohibitions as a matter of law.[451] In contrast, a housing complex that regularly and continuously runs advertisements depicting white models as tenants and black ones as doormen or custodial employees would be facially evidencing a racial preference in violation of section 804(c).[452]

At oral argument, the *New York Times* argued that an advertisement had to be "facially suggesting to an ordinary reader" that there was a preference.[453] The *New York Times* gave examples of "burning crosses or swastikas."[454] The court found that "[o]rdinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross."[455] The court also read the "word 'preference' to describe any ad that would discourage an ordinary

443. *Ragin*, 923 F.2d at 998.
444. *Id.*
445. *Id.*
446. *Id.*
447. Judge Haight observed at the district court that "[t]he ordinary reader is nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries." Ragin v. N.Y. Times, 726 F. Supp. 953, 964 (S.D.N.Y. 1989).
448. *Ragin*, 923 F.2d at 999.
449. *Id.* at 1002.
450. *Id.*
451. *Id.*
452. *Id.* at 1001.
453. *Id.* at 999.
454. *Id.*
455. *Id.*

reader of a particular race from answering it."[456] Moreover, the court noted that the statute prohibits all advertisements that indicate a racial preference to an ordinary reader regardless of the advertiser's intent.[457]

Applying this standard to advertising, the court held that the use of models as a medium of expression was within the purview of section 804(c) and that a reader plausibly might conclude that "ads with models of a particular race and not others will be read by the ordinary reader as indicating a racial preference."[458]

The *New York Times* also argued this interpretation of section 804(c) violated the First Amendment.[459] The Second Circuit disagreed.[460] It held that commercial speech has lesser protection than other constitutionally guaranteed expression,[461] and "commercial messages that do not accurately inform the public about lawful activity are unprotected."[462] The court held that the "*Times*' publication of real estate advertisements that indicate a racial preference is therefore not protected commercial speech."[463]

The Second Circuit affirmed the denial of the *New York Times*'s motion to dismiss because section 804(c) validly prohibits the publication of real estate advertisements that "[i]ndicate[] any preference based on race, and the complaint can fairly be read to allege that the *Times* has published such ads."[464]

In *Ragin v. Harry Macklowe Real Estate Co.* (*Harry Macklowe Real Estate Co.*), an African-American couple and the Open Housing Center brought suit under section 804(c) of the Fair Housing Act.[465] They alleged that the "defendant's

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456. *Id.* at 999–1000.

457. *Id.* at 1000.

458. *Id.* The *New York Times* failed to deny that advertisers target certain groups, but instead argued that section 804(c) would lead to racial quotas and race conscious decisions. *Id.* The Second Circuit found the *Times*'s concern overblown. *Id.* at 1001. It noted that in the debate over affirmative action, the question of quotas principally concerns selection of persons for competitive opportunities, over which opinions differ whether individual skills or purely academic qualifications should govern. In contrast, the Second Circuit noted that the use of models in advertising involves wholly different considerations. In advertising, the court noted that a "conscious racial decision" about models seems almost inevitable. *Id.* The court stated that the "deliberate inclusion of a black model where necessary to avoid a message seems a far cry from the alleged practices that are at the core of the debate over quotas." *Id.*

459. *Id.* at 1002.

460. *Id.*

461. *Id.* (quoting Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 563–64 (1980)).

462. *Id.*

463. *Id.* at 1003. The Second Court cited to *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973). In *Pittsburgh Press Co.*, the Supreme Court held that separate, gender-designated columns, which were illegal under a City of Pittsburgh ordinance, were related to illegal activity and were therefore unprotected commercial speech. *Id.* at 376. Moreover, the Supreme Court found the ordinance imposed no special burden on the newspaper because it did not interfere with the traditional "protection afforded to editorial judgment and to the free expression of views . . . however controversial." *Id.* at 391.

464. *Ragin*, 923 F.2d at 998.

465. Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993).

placement of display advertising for residential apartments in the *New York Times* violated the Act's prohibition against racial discrimination in residential housing advertising because all the models portrayed in the advertisements were white."[466] Defendant was the leasing agent and the managing agent for two luxury residential apartment complexes in Manhattan.[467] The advertisements for the buildings featured exclusively white models.[468] For one complex, the agent attempted to find a target group of individuals in the thirty-five to fifty-five year-old age group with annual household incomes over $75,000.[469] For the other complex, the agents targeted individuals in the twenty-five to forty-five year-old age group with annual household incomes over $50,000.[470] Models were chosen from a collection of stock photographs

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466. *Id.* at 900.

467. *Id.* at 901–02.

> In addition to placing ads in the print media, [the agent] also advertised the two buildings by using direct mail, press releases, classified advertising, on-site brochures and signs, and radio advertisements and by placing advertisements on the sides of buses, which ran throughout Manhattan, including Harlem. None of the advertisements contained any language that either explicitly or implicitly conveyed a discriminatory message.

Id. at 902.

468. *Id.* at 903.

> Between May 1986 and April 1987, the agent placed six half-page or full-page display advertisements for the River Terrace Building in the *New York Times*. One of the advertisements featured a photograph of three single white models engaging in sports or recreational activities and a photograph of a white couple embracing. A second advertisement portrayed four white models gathered around a piano on New Year's Eve. A third advertisement included three photographs: the scene depicted in the New Year's Eve advertisement, two white models at a swimming pool and a white couple on a terrace. The last three advertisements also featured three photographs: the New Year's Eve scene, a white couple swimming in a pool, and a white model at a health club.
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> Between April of 1987 and December of 1988, the agent placed twenty-eight half-page or full-page display advertisements for Riverbank West in the *New York Times*. Three of the advertisements featured a recreation of a famous *Life* magazine photograph depicting a movie audience of seventy-five white men and women wearing 3-D eyeglasses. Three of the advertisements depicted a young, white woman lying in the sun next to an advertisement for Riverbank West. Four advertisements showed a young white woman walking on a beach while swinging her handbag as an image of Riverbank West rose from the surf. Nine of the advertisements depicted a white woman's lips and fingers applying lipstick shaped in the image of Riverbank West. Two advertisements featured a white man skiing against a background of mountains including Riverbank West. Two of the advertisements depicted a white woman wearing a bathing suit lying in the ocean in front of an image of Riverbank West. The remaining five advertisements showed a white woman leaning toward a miniature image of Riverbank West.

Id. at 902.

469. *Id.*

470. *Id.*

that included both black and white models.[471] The defendant did not expressly specify the color of the models used in, or excluded from, the advertisements for the two buildings.[472]

The District Court found that "an ordinary reader would naturally interpret the advertisements [in question as] indicating a racial preference."[473] The District Court based its findings solely on the fact that no black models appeared in any of the advertisements, including the advertisement portraying seventy-five movie viewers, and the fourteen-to-twenty-five times between 1986 and 1988 when plaintiffs viewed the advertisements.[474] On review, the Second Circuit analogized the "ordinary reader test" to the "reasonable person test" in negligence law, stating that the question is one that the fact finder can answer by viewing the advertisements.[475] The Second Circuit upheld the District Court decision and found the defendants liable. The court held that a plaintiff could bring an action against a defendant for violating section 804(c) of the Fair Housing Act if the defendant's housing advertisements "suggested to the ordinary reader that a particular race [was] preferred or dispreferred [sic] for the housing in question"[476] regardless of the defendant's intent.[477] The court reiterated that the ordinary reader is "neither the most suspicious nor the most insensitive of our citizenry."[478] Although the court stated that the intent of the defendant "'may be relevant to a factual determination of the message conveyed,' the message conveyed to the ordinary reader was the 'touchstone' of [the court's] inquiry."[479] The Second Circuit rejected the defendant's argument that plaintiffs were required to submit expert testimony to prove whether the ordinary reader would find an advertisement to express a racial preference; instead the court found defendant's conduct could be scrutinized by applying "common sense."[480] The Second Circuit reaffirmed its analysis in *Ragin*

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471. *Id.*

472. *Id.*

473. Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1231, 1231 (S.D.N.Y. 1992).

474. *Id.* at 1223. The District Court declined to rely on the expert testimony presented by the parties, finding such testimony inconclusive, and gave limited weight to the individual plaintiffs' testimony because of their "commitment to their cause and heightened sensitivity attributable to an awareness of historical patterns of housing discrimination and personal experiences with segregation." *Id.* at 1231. The District Court also declined to credit the testimony of the two black residents living in the defendants' building because "they did not view the same variety or number of advertisements over the same duration as plaintiffs," and because their testimony was affected by their experiences after having lived in the buildings. *Id.* at 1232. Finally, the District Court declined to consider the racial composition of the apartments because that evidence was "not probative of the ordinary reader's interpretation of the advertisements." *Id.*

475. *Harry Macklowe Real Estate Co.*, 6 F.3d at 906.

476. *Id.* at 906–07.

477. *Id.*

478. *Id.* at 905 (quoting Ragin v. New York Times, 923 F.2d 995, 1002 (2d Cir. 1991)).

479. *Id.* at 906 (quoting *Ragin*, 923 F.2d at 1000).

480. *Id.* at 906.

that a prima facie violation of section 804(c) does not require a showing of discriminatory intent or effect.[481]

The other circuits have generally recognized a cause of action under the Fair Housing Act for advertisements featuring human models, which exclude people of color. For instance, in *Spann v. Colonial Village, Inc.*, the D.C. Circuit found that nonprofit agencies dedicated to ensure equal housing opportunities had standing to bring a claim under section 804(c) of the Fair Housing Act based on the repeated exclusion of black models from their advertising.[482] Then-Judge Ruth Bader Ginsburg writing for the court indicated that plaintiffs would have to show to a reasonable reader that the advertisements showed a racial preference.[483] In *Tyus v. Urban Search Mgmt.*, plaintiffs brought suit because an apartment complex allegedly used all-white models in its advertisements.[484] Although reversing and remanding the case, the Seventh Circuit held that the standard used by the District Court was permissible.[485] The District Court's jury instruction provided the Fair Housing Act was violated if an advertisement "suggests to an ordinary reader that a particular [protected group] is preferred or dispreferred [sic] from housing in question [or the ad] would discourage an ordinary reader of a particular [protected group] from answering it."[486] In *Housing Opportunities Made Equal v. The Cincinnati Enquirer*, the Sixth Circuit, although recognizing a claim for using all-white models in real estate advertisements, dismissed plaintiff's complaint because it failed to allege repeated all-white advertisements by the same advertiser.[487] In *Saunders v. General Services Corp.*, the District Court of Eastern Virginia found that plaintiffs had standing to bring a claim under the Fair Housing Act based on the fact that advertisements for the housing complex used all-white models.[488]

Only the Tenth Circuit has attempted to limit the application of the Fair Housing Act in a similar case. In *Wilson v. Glenwood Intermountain Properties, Inc.*, plaintiffs brought an action because an apartment complex's advertisement expressed a preference for gender as a result of a contract with Brigham Young University to provide unmarried students sex-segregated housing.[489] The Tenth Circuit held that the receipt or reading of discriminatory advertisements alone fails to establish standing under section 804(c) and that the other circuits had gone "too far."[490] The court held that, to establish standing, the plaintiff must demonstrate that he or she was deterred

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481. *Ragin*, 923 F.2d 995.

482. 899 F.2d 24 (D.C. Cir. 1990).

483. *Id.* at 29.

484. 102 F.3d 256, 258 (7th Cir. 1996).

485. *Id.* at 266.

486. *Id.* at 258 (Plaintiffs wanted to use the standard of the "ordinary African-American reader.").

487. 943 F.2d 644, 649 (6th Cir. 1991); *accord* Ragin v. N.Y. Times, 923 F.2d at 1002. *But see* Robinson, *supra* note 67, at 117–19 (advocating that that "just one all-white advertisement featuring human models" should be a violation of the Fair Housing Act.)

488. 659 F. Supp. 1042 (E.D. Va. 1986).

489. 98 F.3d 590, 592 (10th Cir. 1996).

490. *Id.* at 595.

from seeking housing in the advertised residence.[491] The court was concerned that allowing standing under the ordinary reader test would lead to "abstract stigmatic injuries"[492] and would lead to potentially nationwide, ideological litigation by "concerned bystanders who are not personally subjected to discrimination."[493]

Wilson is distinguishable from other cases highlighted above. First, *Wilson* did not involve advertisements with all-white models. Since *Wilson* dealt with gender preference rather than race, it is analytically understandable that the outcome might differ because courts usually treat issues of race discrimination differently with race seen as more of an immutable characteristic more importantly needing to be remedied.[494] Second, the *Wilson* case is directed at limiting suits by nonprofit agencies bringing cases under the Fair Housing Act, not by plaintiffs who have suffered actual injury from seeing advertisements with all-white models. Even in the Tenth Circuit, actual readers of all-white advertisements who are seeking out new residences will still be able to bring suit. Third, the Tenth Circuit is plain wrong because it fails to interpret section 804(c) in accordance with its plain reading making it unlawful to indicate a racial or gender preference in the advertisement with respect to sale or rental. Despite the Tenth Circuit's more narrow reading of section 804(c), I think that the bedrock principals behind the ordinary reader test, once reconceptualized as the "ordinary viewer test" can be used to help analyze the absences and stereotypes broadcast on television.

IX. THE ORDINARY VIEWER TEST

This Article proposes that the FCC adopt an "ordinary viewer test" to evaluate whether the networks are broadcasting television shows with no people of color or are broadcasting shows with too many stereotypical characterizations; and argues that failing this test would violate either section 151 (as is or as may be amended) or the public interest standard for license renewals under section 309(k). In 1999, Congressman Eliot Engel introduced the Ethnic and Minority Bias Clearinghouse Act requiring the FCC to establish an Office on Victims of Media Bias. This office would function as a clearinghouse for complaints, grievances and opinions relating to television depictions of race and ethnicity.[495] This office would collect and analyze data on media portrayals and conduct an annual conference designed to focus attention on the images of media bias.[496] This proposed legislation is a good first step because having access to information often provides evidence of disparity. However, my proposal advocating an "ordinary viewer test" augments the proposed Act. The FCC would collect and analyze grievances, but the "ordinary viewer test" identifies

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491. *Id.* at 596–97.

492. *Id.* at 596 (quoting Allen v. Wright, 468 U.S. 737 (1984) (an equal protection case holding that stigmatic injuries only establish standing when a direct result of being personally denied equal treatment)).

493. *Id.*

494. *See generally* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301 (1986); Michael M. v. Super. Ct. of Sonoma Co., 450 U.S. 464, 477 (1981).

495. Ethnic and Minority Bias Clearinghouse Act, H.R. 125, 106th Cong. § 2(f) (1999).

496. *Id.* § 2(f)(1)(A)–(D).

two criteria the FCC could use to find broadcast content to be discriminatory in violation of section 151 or the public interest standard. First, a network's failure to cast people of color would be prima facie discriminatory. Second, a disproportionate number of stereotypical representations of people of color would also violate section 151 and the public interest standard.

A. Discrimination by Absence

Under the first prong, a network's failure to cast any people of color in a given television season would be a prima facie violation of section 151 of the Communications Act. Under this standard, the broadcaster would have the burden of proof to refute the violation. The regulation is loosely modeled after the Civil Rights Act of 1991, which codified the disparate impact theory of liability.[497] Under this theory, an employer can refute the finding of discrimination by demonstrating that the challenged practice is job related for the position in question and consistent with business necessity.[498] The employer has the burdens of production and persuasion of establishing business necessity.[499]

This regulation might have included a minimum percentage of minority representations as a safe harbor, similar to the Children's Television Act[500] regulations. Under the Children's Television Act, a broadcaster must broadcast a regularly scheduled weekly program of "core programming" of at least thirty minutes between 7 A.M. and 10 P.M.[501] These guidelines defined "core programming" as programming that is "specifically designed" to educate and inform children.[502] To provide some certainty to the broadcasters, the FCC adopted a processing guideline that would give the broadcasters some guarantee of staff-level approval of the Children's Television Act portion of their renewal application when they air at least three hours of core programming per week or its equivalent.[503] If a broadcaster fails to broadcast the minimum amount of children's programming, its renewal application is set for hearing to determine whether its actions during the previous license term meet the public interest, convenience and necessity.[504] While the "ordinary viewer test" proposed here could have advocated such mandatory minimums of minority programming, it does not do so out of concern that some would see mandatory minimums as an affirmative action program, thus triggering strict scrutiny judicial

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497. Pub. L. No. 102-166, 105 Stat. 1071.

498. *Id.*; *see also* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995).

499. *Id.*

500. The Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-98, 1000 (codified at 47 U.S.C. §§ 303(a), 303(b), 393(a), 394, 397, 609 (2001)).

501. *Id.* (When it airs the program, the broadcaster must identify the program as educational and informational. The program must be listed in the children's report placed in the broadcaster's public inspection files.).

502. *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C.R. 10660 (1996) (To qualify as core programming, the FCC held that "the show must have serving the educational and informational needs of children as a significant purpose.").

503. *Id.*

504. *Id.*

review.[505] To avoid such a high standard in evidencing past discrimination, this author instead decided to anchor the proposed rule in current race-based discrimination jurisprudence. By not triggering the strict scrutiny analysis, the proposed regulation should survive Fourteenth Amendment Equal Protection challenges.

B. Discrimination by Stereotyping

The second determination the FCC may make under the proposed regime is whether a network has presented a disproportionate number of stereotypical portrayals of characters of color as compared to the white characters. Evidence of lack of any portrayals or of stereotypical disparities in any given television season would establish a prima facie case of discrimination under the Communications Act. Such a disparity could be shown by statistical studies. The FCC would have administrative oversight and would conduct proceedings to evaluate whether, on average, the network is discriminating by the absence or by the disproportionate portrayals of negative stereotypes of people of color. If the FCC found that there is an absence or disparity, it could revoke a station license, impose a monetary forfeiture, or issue a warning to the broadcaster.[506]

The "ordinary viewer test" may initially seem onerous because it appears as though the FCC is scrutinizing broadcast content, but it is no more onerous or burdensome than what the FCC does in evaluating indecent programming. With indecency, section 1464 prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication."[507] The FCC has the administrative responsibility of enforcing the statutory provisions, which prohibit indecency. To be indecent, the material must describe or depict sexual or excretory organs or activities.[508] The broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium. Elaborating on the notion of community standards, the FCC has said that "the determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."[509] In determining whether the material is patently offensive, the full context in which the material appeared is critically important. Contextual determinations are highly fact specific, which would make it highly difficult to categorize the patent offensiveness of the

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505. *See generally*, Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?* 33 U. MICH. J.L. REFORM 87 (2000) (To establish a race-based affirmative action program, you generally need to show that there is a compelling government interest for the government action and that it is narrowly tailored. Most courts find past discrimination to be a compelling government interest.).

506. *See* 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D) (2001) (providing that whenever a broadcaster violates the law, an FCC regulation, or the public interest, the FCC may impose sanctions).

507. 18 U.S.C. § 1464 (2000).

508. *See* WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1840–41 (2000).

509. *Id.*

material. No specific criteria exist to specifically categorize whether a broadcast is indecent, yet the courts have upheld the indecency statute and the related FCC rules. The courts usually justify the restrictions on indecency because of the pervasiveness of media and the difficulty of tuning out indecent speech.[510]

Similar to the FCC indecency rules, the determination of whether programming violated the "ordinary viewer test" would be a highly fact sensitive analysis. The analysis would take into account both historical and current stereotypes, for example, that African Americans are lazy. The decision maker would then consider whether a disproportionate number of African-American characters in any given season meet that stereotype. The alleged stereotype would be analyzed in the context of the story to determine whether in fact the depiction was a stereotype. If a disparity exists, the FCC has the power to impose any sanction provided for in its enabling statute.[511] The larger the size and the more often the frequency of the disparity, the more likely that the FCC will impose a more severe penalty, such as license termination or heavy fines.

The "ordinary viewer test" proposal is fairly modest; it does not require that there be a percentage quota of programming with minority characters. Rather it requires that stark absences and disproportionate stereotypical portrayals be considered a prima facie violation of the Communications Act. The proposal allows for an administrative proceeding in which the broadcaster could challenge the evidence of the disparity. The "ordinary viewer test" does not require that all stereotypical programming be eliminated. It only prohibits that such programming not be disproportionate in comparison to the representation of people of color on any individual network. But again, the broadcasters are not automatically penalized for a disparity. They have an opportunity to do their own statistical analysis and to show that some of the stereotypes are not really stereotypes because of the context. Both branches of the test should withstand judicial scrutiny. It does not require that the ordinary viewer be the ordinary African-American or Latino(a) viewer.[512] It basically would use the standard of the average viewer who is not necessarily the most scrutinizing. It also does not make any single episode of a television show that contains all-white characters or negative minority stereotypes a violation of the test.[513] Instead, the ordinary viewer test analyzes the whole network season in determining whether there is a violation.

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510. *See infra* Section X.B.

511. *See supra* Section VIII.

512. *Cf.* Robinson, *supra* note 67, at 127 (suggesting that the Fair Housing Act ordinary reader test should be reconceptualized as an "ordinary black reader test."); *accord* Peter Engel, *The Reading Room: Fairer Housing: Proposals for Improving the Fair Housing Act*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 114, 115–17 (1996).

513. *Cf.* Robinson, *supra* note 67, at 119 (suggesting that "just one all-white advertisement featuring human models" would violate the Fair Housing Act).

X. FIRST AMENDMENT CHALLENGE TO THE ORDINARY VIEWER TEST

The ordinary viewer test may raise First Amendment freedom of speech issues. The First Amendment provides, "Congress shall make no laws abridging the freedom of speech, or of the press."[514] The Amendment is designed to ensure that the government does not attempt to censor content that it does not want the public to hear. However, not all speech is entitled to the same protections. The government can regulate or censor speech that is obscene,[515] libelous,[516] or fight provoking.[517] The Supreme Court considers these forms of speech as having little social value and has concluded that their value can be exceeded by their harm, thus rendering them subject to government regulation. Stereotypical depictions also have very little social value and can cause great deal of harm to society, as discussed above.

For First Amendment purposes, the Supreme Court has historically treated broadcast media differently than the print media.[518] In this hierarchy, the print media enjoys more First Amendment protection than the broadcast media.[519] There are two legal rationales supporting this lower degree of First Amendment protection for broadcast media, which are called the scarcity of media rationale and the pervasiveness of media rationale.

A. Scarcity Rationale

The first theory derives from the fact that there is a scarcity of broadcast frequencies available for the government to distribute to private individuals.[520] An insufficient number of broadcast licenses exist to satisfy demand.[521] This theory also implicitly takes into account the fact that the government owns the frequencies and

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514. U.S. CONST. amend. I.

515. Miller v. California, 413 U.S. 15, 15 (1973).

516. Beauharnais v. Illinois, 343 U.S. 250, 266 (1973); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *But see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Under the First Amendment, the plaintiff cannot recover for libel unless she proves that the defendant acted with knowledge that the challenged statement was false or made with reckless disregard for the statement's truth.).

517. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

518. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 779 (1978) (upholding FCC ban on cross-ownership of broadcast stations by newspapers in the same market because there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (finding the fairness doctrine, which required the broadcaster to cover both sides of a controversial issue, constitutional). *But cf.* Miami Publ'g Herald Co. v. Tornillo, 418 U.S. 241 (1974) (finding Florida "right to reply" statute unconstitutional as to newspapers).

519. FCC v. Pacifica Found., 438 U.S. 726 (1976); *Red Lion*, 395 U.S. 367.

520. *Red Lion*, 395 U.S. 367; *see also* Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 637 (1994).

521. *Red Lion*, 395 U.S. 367; *see also Turner Broad. System, Inc.*, 512 U.S. at 637–38.

distributes this valuable government resource to private individuals to use.[522] As part of this grant, licensees have certain obligations in their use of this government resource.[523] Because of the nature of the license, the grant, and the dearth of frequencies, the Supreme Court has held that a broadcast licensee does not have a constitutional right to hold a license or to monopolize a radio frequency to the exclusion of fellow citizens.[524] As a fiduciary holding the license in public trust, a licensee may be required to share its frequency with others.[525] The Supreme Court has stated that both broadcasters and the public have First Amendment rights that must be balanced when the government seeks to regulate access to the radio spectrum.[526] In fact, the Supreme Court has held that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here."[527] An essential goal of the First Amendment is to achieve "the widest possible dissemination of information from diverse and antagonistic sources."[528]

In *Red Lion*, the Court specifically relied on the scarcity of broadcast frequencies to uphold the fairness doctrine allowing the government to give unlicensed individuals a right to respond to one-sided media stories on controversial issues, personal attacks or contrary political editorials.[529] In *Red Lion*, the Supreme Court premised its analysis on the excess demand for broadcast licenses in comparison to the number of available licenses for allocation by the FCC.[530] *Red Lion* involved two consolidated cases that turned on this issue. In the first case, *Red Lion Broadcasting Co.*, a radio station, WGCB, broadcast Reverend Billy James Hargis as part of its "Christian Crusade" series.[531] During the broadcast, Reverend Hargis attacked Fred J. Cook, author of a book entitled *Goldwater—Extremist on the Right*,[532] stating:

> Now, this paperback book by Fred J. Cook is entitled, *Goldwater—Extremist on the Right*. Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and *Newsweek* magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation*, one of

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522. *Id.*
523. *Id.*
524. *Pacifica Found.*, 438 U.S. at 726.
525. *See id.*
526. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102–03 (1973).
527. *Red Lion*, 395 U.S. at 390; *accord Democratic Nat'l Comm.*, 412 U.S. at 102.
528. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 779 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
529. *Red Lion*, 395 U.S. at 367.
530. *Id.* at 390–91.
531. *Id.* at 371.
532. *Id.*

> the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies . . . . Now, among other things Fred Cook wrote for *The Nation*, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist Of The Right*![533]

After hearing of the attack, Cook demanded free reply time, but the station refused.[534] The FCC found that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed its obligations under the fairness doctrine because it did not send a tape, transcript, or summary of the broadcast to Cook and failed to offer him an opportunity to respond.[535] The FCC found the radio station must offer time to Cook to respond regardless of whether he would pay for it.[536]

The second consolidated case involved a challenge to rules adopted by the FCC making the personal attack and political editorial rules more specific.[537] The Radio-Television News Directors Association ("RTNDA") challenged the

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533. *Id.* at 371 n.2.
534. *Id.* at 371–72.
535. *Id.* at 372 (discussing FCC decision).
536. *Id.*
537. *Id* at 373. The amended FCC regulations read as follows:

Personal attacks; political editorials.

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, no later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
> (b)The provisions of paragraph (a) . . . shall not be applicable (1) to attacks on foreign groups or foreign public figures; to personal attacks which are made by legally qualified candidates . . . on other such candidates . . . and (3) bona fide newscasts. . . . .
> (c) Where a licensee, in a editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

Personal Attack Rule; Political Editorial Rules, 47 C.F.R. pt. 73.1920 (repealed 2000).

constitutionality of these amended rules.[538] The Supreme Court found the fairness doctrine and the related amended personal attack rules constitutional on their face and as applied.[539] The *Red Lion* Case demonstrates that the FCC has historically been allowed to regulate content by making sure that diverse viewpoints have access to fora.

In 1985, the FCC released a "Fairness Report" which declared the doctrine obsolete and "no longer in the public interest."[540] The Report concluded that the media technologies and outlets ensured dissemination of diverse viewpoints without need for federal regulation, that the fairness doctrine chilled speech on controversial issues, and that the doctrine interfered with journalistic freedom.[541] In its analysis, the FCC relied on the growth of other communications technologies, like cable, and the forty-eight percent increase in the number of radio stations[542] and the forty-four percent increase in television stations.[543] This analysis of scarcity was contrary to the *Red Lion* analysis which was premised on the excess demand for broadcast licenses in comparison to the number of available licenses for allocation by the FCC.[544]

Despite its conclusion that broadcast scarcity was a thing of the past, the FCC declined to immediately eliminate the doctrine because it was concerned that the 1959 amendments to the Communications Act mandated the fairness doctrine, making it subject to repeal only by Congress.[545] Thus, the FCC waited for courts to resolve the question of whether the FCC or Congress had the power to eliminate the fairness doctrine. In *Telecomm. Research v. FCC*, in which the D.C. Circuit found that the fairness doctrine derived from the FCC's mandate to serve the public interest, subject to changing agency interpretation, and was not required by statute.[546]

In 1987, the FCC finally announced that it would no longer enforce the fairness doctrine, but after taking a rather circuitous route.[547] In *Syracuse Peace Council v. FCC*, a decision with a highly unusual procedural posture, the D.C. Circuit affirmed the conclusion that the fairness doctrine no longer served the public interest, but failed to address whether the fairness doctrine violated the First Amendment.[548]

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538. *Id.*

539. *Id.* at 391–92.

540. *In re* Inquiry into section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licenses, 102 F.C.C.2d 142, 246 (1985) *vacated*, Radio-Television News Dirs. Ass'n v. FCC, 831 F.2d 1148 (D.C. Cir. 1987) [hereinafter *Fairness Report*]. The FCC refused to make a constitutional ruling in its Fairness Report; the FCC stated that the First Amendment issues were "the province of the federal judiciary—and not this Commission . . . ." *Id.* at 155.

541. *See id.* at 147.

542. *Id.* at 202.

543. *Id.* at 204.

544. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–91 (1969).

545. *See Fairness Report*, 102 F.C.C.2d at 227–246.

546. *See* Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 517–18 (D.C. Cir. 1986).

547. *In re* Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987) [hereinafter *In re Syracuse Peace Council*] *rev'd*, Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

548. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989).

In *Syracuse Peace Council*, a broadcast licensee ran advertisements that asserted that a nuclear power plant was a "sound investment for New York."[549] Syracuse Peace Council filed a complaint to the FCC that the licensee failed to present both sides of the issue in contravention of the fairness doctrine.[550] Initially, the FCC held that the licensee violated the fairness doctrine for failing to "give viewers conflicting perspectives on the [nuclear power] plant."[551] The licensee filed for reconsideration, but before ruling on licensee's petition, the FCC issued its Fairness Report.[552] In considering the licensee's motion for reconsideration, the FCC refused to address the constitutionality "not on the ground that the [licensee] raised the defense belatedly but solely on the theory that [the validity of the fairness doctrine] should be left to Congress and the courts."[553]

On appeal the D.C. Circuit reversed and remanded to the FCC, acknowledging the "principle that regulatory agencies are not free to declare an act of Congress unconstitutional,"[554] but stating that a regulatory agency cannot "blind itself to a constitutional defense to a 'self-generated policy.'"[555] The court further observed that it was "patently obvious" that the FCC was reluctant to eliminate the fairness doctrine because it was concerned about "non-legislative expressions of congressional concern."[556] The court noted that, in *Telecomm. Research v. FCC*, it had decided "that the fairness doctrine [was] not mandated by statute."[557] Consequently, the D.C. Circuit remanded *Syracuse Peace Council* and instructed the FCC to resolve the licensee's constitutional issues, unless it determined that the fairness doctrine was "contrary to the public interest."[558]

On remand, the FCC solicited comments from the general public on the question of whether "in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest."[559] The FCC ruled in favor of the licensee, relied on the 1985 Fairness Report and found that the fairness doctrine "disserved the public interest" by contravening the First Amendment.[560] This action was unprecedented since the FCC usually decides policy questions by Notices of Proposed Rulemaking or Notices of Inquiry, not by adjudication.[561] Relying on a

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549. *Id.*

550. *Id.*

551. *Id.* (quoting *In re Syracuse Peace Council*, 99 F.C.C.2d 1389 (1984)).

552. *Id.* at 656.

553. *Id.* (citations omitted).

554. Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987) (citing Johnson v. Robison, 415 U.S. 361, 368 (1974)).

555. Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989).

556. *Meredith Corp.*, 809 F.2d. at 873.

557. *Id.* at 873 n.11 (citing Telcomm. Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986)).

558. *See Syracuse Peace Council*, 867 F.2d at 657.

559. Fairness Doctrine Complaint Filed by Syracuse Peace Council Against Television Station WTVH, 52 Fed. Reg. 2805 (Jan. 27, 1987).

560. *See Fairness Report*, 102 F.C.C.2d at 142.

561. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE, REGULATION OF ELECTRONIC MASS MEDIA 36 (1996) (noting that the FCC acts as a "quasi-legislature" when adopting rules and regulations through NPRMs and NOIs). However, with

Brandeis concurring opinion in *Ashwander v. TVA*,[562] the D.C. Circuit held that it need not decide the First Amendment issues involving the fairness doctrine even though they were integral part of the FCC's decision. Instead, in rather tortured logic, the D.C. Circuit held that the FCC's decision that the fairness doctrine did not conform to the "public interest" was neither arbitrary, capricious, nor an abuse of discretion.[563] The court noted that when the FCC "is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy."[564] However, in relying exclusively on the public interest, the court reached a decision "urged by no one in the case."[565] Even though the D.C. Circuit invalidated the fairness doctrine, it ultimately failed to decide whether the fairness doctrine violated the First Amendment and the viability of the scarcity rationale.[566] Therefore, the *Red Lion* precedent still stands. Given what the D.C Circuit said when it later invalidated the personal attack and political editorial rules, it might be disposed to finding certain FCC rules constitutional once it was presented with the right evidentiary record.[567]

In its 1985 Fairness Report, the FCC did not directly resolve whether the fairness doctrine and its related rules, such as the political editorial and personal attack rules,[568] were no longer justified. In fact the FCC stated that, in the Fairness Report, it would address the personal attack and political editorial rules in a "separate, pending proceeding."[569] Despite the fact that few observers paid attention to the personal attack and political editorial rules,[570] on August 14, 1980, the National Association of Broadcasters (NAB) filed a rulemaking petition challenging the constitutionality of the personal attack and political editorial rules.[571] In 1983, the FCC issued a Notice of Proposed Rulemaking, which proposed the repeal or modification of the political editorial and personal attack rules.[572] The FCC decided that these "rules do not serve the public interest"[573] because they "impose individual rights of access contrary to a

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comparative hearings, the FCC noted "membership on the Commission is not static" and the views of individual commissioners may change. FCC Policy Statement on Comparative Hearings, 1 F.C.C.2d 393 (1965). The Commission found that it "is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable. *Id.* It noted that "changes in viewpoint" are "inescapable and proper." *Id.*

562. 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

563. *See Syracuse Peace Council*, 867 F.2d at 669.

564. *Id.* at 658.

565. *See* Ian Heath Gershengorn, *The Fall of the FCC's Personal Attack and Political Editorial Rules*, 19 COMM. L. 7, 9 (2001) (quoting *Syracuse Peace Council*, 867 F.2d at 657).

566. *See* Arthur Martin, Comment, *Which Public, Whose Interest? The FCC, The Public Interest, and Low-Power Radio*, 38 SAN DIEGO L. REV. 1159 (2001).

567. *See infra* notes 605, 606 and accompanying text.

568. *In re Syracuse Peace Council*, 2 F.C.C.R. at 5063 n.75.

569. *See Fairness Report*, 102 F.C.C.R. at n.313; *see also In re Syracuse Peace Council*, 2 F.C.C.R. at n.75.

570. *See* STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 92 n.1 (1978).

571. *In re* Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28,295 (1983).

572. *See id.* ¶ 53.

573. *Id.* ¶ 52.

regulatory scheme that discourages such obligations"[574] and "deprive licensees of the large measure of editorial discretion that Congress intended."[575] The FCC singled out the personal attack rule as not being in the "public interest" because it served "largely as a means to vindicate attacks on personal reputations."[576] Moreover the FCC found that these rules failed to conform to First Amendment values because they had an "impermissible chilling effect" on "journalistic independence."[577] However, primarily because of a change of administrations, the FCC never issued a final decision to eliminate these two rules. The NAB filed renewed rulemaking proceedings in 1987 and 1990, but the FCC took no action.

In 1996, the Radio-Television News Directors Association (RTNDA) filed a petition for mandamus with the D.C. Circuit seeking to force action on the personal attack and political editorial rules' Notice of Proposed Rulemaking. The D.C Circuit denied the request for mandamus "without prejudice to its renewal" depending on whether the FCC made "significant progress within six months, towards the possible repeal or modification of the personal attack and political editorial rules."[578] Since the FCC had one vacant seat at this time, the F.C.C deadlocked, by voting two-two on the elimination of the personal attack and political editorial rules, stating "a majority of the Commission is unable at this time to agree upon resolution to the issues presented in this docket."[579] In 1997, the RTNDA re-filed its petition for mandamus, and, on May 8, 1998, the FCC, even with a full slate of commissioners, again announced that it was deadlocked, voting two-two, with then-Chairman Kennard recusing himself.[580]

The D.C. Circuit ordered the individual commissioners to issue statements in support of their positions. Commissioners Ness and Tristani voted in favor of the rules finding that they were "grounded" in the "public interest" and constitutional.[581] They found that a continued scarcity of the spectrum existed,[582] that the increase in media outlets was "irrelevant to the rules at issue,"[583] that the broadcasters' allegation that the rules would have a "chilling effect" were "obsolete and untrustworthy,"[584] and that cable and satellite stations did little to cover local news.[585] Commissioners Powell and Furchtgott-Roth favored the elimination of the rules. Relying on *Syracuse Peace Council*, they concluded that because of the "continually advancing state of

574. *Id.*
575. *Id.*
576. *Id.*
577. *See id.* ¶¶ 14, 52, 17 (respectively).
578. *In re* Radio-Television News Dirs. Ass'n, *at* 1997 WL 150084, *1 (D.C. Cir. 1997).
579. Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 12 F.C.C.R. 11,956 (Aug. 8, 1997).
580. *Id.*; Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 13 F.C.C.R. 11,809 (May 8, 1998).
581. Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules, 13 F.C.C.R. 21, 901 (Jun. 22, 1998) (Joint Statement of Commissioners Ness and Tristani).
582. *Id.*
583. *Id.* ¶ 59.
584. *Id.* ¶ 33.
585. *Id.* ¶ 59.

communications technology" and increased communication outlets, the rules "disserve the public interest."[586] They relied on the fact that the rules provided an affirmative right of access to the licensee's facilities limiting the licensee's editorial discretion. Commissioners Powell and Furchtgott-Roth concluded that "[t]here can be no dispute that the regulations at issue—the personal attack and political editorial rules—were expressly and solely designed to implement the fairness doctrine."[587]

On appeal of this deadlocked decision, the D.C. Circuit remanded the matter back to the FCC stating that the repeal of the fairness doctrine failed to eliminate the personal attack and political editorial rules.[588] However, the court found that the joint statements of Commissioners Ness and Tristani were insufficient in providing "affirmative justification of the two rules as being in the public interest, or explanation of why the rules should survive in light of the FCC precedent rejecting the fairness doctrine."[589] The court refused to decide the rules' constitutionality because the lack of a well-thought out FCC decision with sufficient evidence presented in the record "render[ed] meaningful judicial review impossible."[590] The court advised the FCC on remand to distinguish the personal attack and political editorial rules from the repealed fairness doctrine.[591] The court decided not to vacate the rules "because they [had] been in force for more than thirty years."[592] Instead, the court ordered the FCC to act expeditiously and "provide a more detailed defense."[593] The court believed that there was "at least a serious possibility" that the F.C.C would be able to justify the rules on remand.[594] However, the FCC did not act on remand. In June 2000, the RTNDA again filed a petition for mandamus. Reconsidering his previous recusal, then-Chairman Kennard participated in the new FCC proceedings addressing the elimination of the personal attack and political editorial rules citing "the public interest in finality but no change in circumstance."[595] With all five commissioners voting, a majority of the FCC decided to suspend the personal attack and political editorial rules for sixty days during which time the FCC hoped to gather information about the legality and desirability of retaining the rules[596] and maybe even expanding their scope.[597] FCC

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586. *Id.* ¶¶ 4, 54, 65 (Joint Statement of Commissioners Powell and Furchtgott-Roth).

587. *Id.*

588. *See* Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999).

589. *Id.* at 875.

590. *Id.* at 887.

591. *Id.* at 885.

592. *Id.* at 888.

593. *Id.*

594. *Id.* (quoting Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993)).

595. *See* Former FCC Chairman William E. Kennard, Statement Concerning His Participation in the Personal Attack and Political Editorial Rule Proceeding (Sept. 18, 2000) (noting that his prior recusal was "out of an abundance of caution"), *available at* http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek075.html.

596. *In re* Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C.R. 19973 (Oct. 4, 2000), *available at* 2000 WL 1468707; *see also id.* (separate statement of Michael Powell dissenting and describing the FCC's order as "a day late and a dollar short").

Commissioners Powell and Furchtgott-Roth dissented asserting that the attempt to "refresh" the record was a tactic to afford the FCC another opportunity to justify the rules especially given that this action came within one month of the 2000 presidential election.[598] Commissioner Powell specifically said:

> [T]he [FCC's] conception will impermissibly coerce a government-favored form of speech by the broadcasters. The [FCC] seems to believe that an ideal time to experiment with broadcast editorial judgment is in the midst of a presidential election . . . . I believe this clever device presents the danger of government coercing political speech in the final innings of a major national election.[599]

The D.C. Circuit concluded that because of the more than two-decade delay, "its remand order for expeditious action was ignored."[600] Deciding that "extraordinary action" was warranted, the court ordered the FCC to "immediately . . . repeal the personal attack and political editorial rules."[601] The D.C. Circuit indicated that it might have upheld the rules had the FCC provided good grounds for the rules' retention, other than scarcity[602] "consistent with constitutional constraints" and the "public interest."[603] As a consequence of this tortured procedural history, the D.C. Circuit failed to resolve whether the broadcast scarcity rationale still exists or whether the fairness doctrine or its related personal attack and political editorial rules are constitutional.[604] The failure to resolve this matter as to the personal attack and political editorial rules is particularly sad since it now appears that they were infrequently enforced after 1983.[605] The D.C. Circuit's reliance on the public interest in affirming the FCC's repeal of the fairness doctrine and its repeal on mandamus of the personal attack and political editorial bypassed "an essential conversation" between the courts and the political branches over the scope of the First Amendment[606] leaving some uncertainty as to the viability of *Red Lion.*

The D.C. Circuit, however, has recently looked approvingly at the rationale for the fairness doctrine in the case of direct broadcast satellite service ("DBS").[607] In

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597. *In re* Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record, 15 F.C.C.R. 19973 (Oct. 3, 2000), *available at* 2000 FCC Lexis 5190, *9.

598. *Id.* at *31, *59.

599. *Id.* at *59–60 (Commissioner Powell, dissenting).

600. Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 271 (D.C. Cir. 2000).

601. *Id.* at 272.

602. *Id.*

603. *Id.*

604. Gershengorn, *supra* note 565.

605. Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557 (2001) (The author notes that there were only twenty-one personal attack complaints and three political editorial complaints since 1983. Each of the personal attack complaints was dismissed, but all three political editorial complaints went against the licensee.).

606. *Id.*

607. Direct Broadcast Satellite service ("DBS") is defined as:

Time Warner Entertainment Co. v. FCC,[608] cable television system owners, operators, and programmers brought an action challenging the constitutionality of certain provisions of the Cable Television Consumer Protection and Competition Act of 1992 and the Cable Communications Policy Act of 1984.[609] Section 25, one of the challenged provisions, provided:

> The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than four percent nor more than seven percent, exclusively for noncommercial programming of an educational or informational nature.[610]

DBS service providers "have no editorial control over the . . . programming they are required to carry under this provision."[611] The D.C. Circuit stated that "because the United States has a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited."[612] Like broadcast, the FCC found that "the demand for channel/orbit allocations far exceeds the available supply."[613] Quoting from *Red Lion*, the court elaborated on the consequences of scarcity:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[614]

The court also quoted from the *Turner Broadcasting* decision in which the court stated that the Supreme Court applies a "less rigorous standard of the First Amendment scrutiny," based on the recognition that

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> High-powered satellite transmission or retransmission of signals intended for direct reception by the public. The signal is transmitted to a small earth station or dish (usually the size of a large pizza) mounted on homes or other buildings. The term DBS refers most often to satellite-based multichannel video services to which consumers can subscribe.

BENJAMIN ET AL., *supra* note 373, at 1048 (Conceptual Index and Telecommunications Glossary). DBS operates on a specified band of the radio frequency spectrum. *See* 47 C.F.R. pt. 101.47 (2003). The FCC prescribes the manner in which parts of that spectrum are made available for DBS systems. *Id.* The nations of the Western Hemisphere entered into an agreement to assign orbital satellite positions and channels. *See In re* Processing Procedures Regarding the Direct Broadcast Satellite Serv., 95 F.C.C.2d 250, 251 (1983). The United States was assigned thirty-two channels at each of the eight orbital positions. *Id.* at 252 n.4. Through compression technology, one satellite channel can deliver up to four channels of video service. DBS providers are allotted a number of channels of a specified spectrum width.

608. 93 F.3d 957 (D.C. Cir. 1996).

609. *Id.* at 963–64.

610. 47 U.S.C. § 335(b)(1) (2001).

611. *Time Warner*, 93 F.3d at 973.

612. *Id.* at 975.

613. *In re* Applications of Cont'l Satellite Corp., 4 F.C.C.R. 6292, 6293 (1989).

614. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

> the inherent physical limitation on the number of speakers who may use the medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.[615]

The D.C. Circuit held that "because the new DBS technology is subject to similar limitations, we conclude that section 25 should be analyzed under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media."[616]

The government asserted that requiring DBS operators to reserve four to seven percent of their channel capacity for noncommercial educational and informational programming was justified by its "interest[s] in assuring public access to diverse sources of information."[617] The D.C. Circuit found that section 25

> represents nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming. The section achieves this purpose by requiring DBS providers to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity. The set-aside requirement of from four-to seven percent of a provider's channel capacity is hardly onerous . . . .[618]

The court further stated that the DBS provider may "utilize for any purpose any unused channel capacity for noncommercial programming of an educational or informational nature."[619] The court noted that this regulation failed to dictate "the specific content of the programming that DBS operators are required to carry."[620] The DBS operators are "free to carry whatever programming they wish on all channels not subject to [the set-aside] requirements."[621] The court further stated that section 25's "purpose and effect is to promote speech, not to restrict it."[622] The D.C. Circuit held that "[b]ecause section 25 is 'a reasonable means of promoting the public interest in diversified mass communications,' it does not violate the First Amendment rights of DBS providers."[623]

Ultimately the FCC decides whether scarcity exists or some technological reason requires the broadcasters to allow access. As a result of the prevalence of different wireless technologies, it now appears that spectrum scarcity may again

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615. Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 638 (1994).

616. *Time Warner*, 93 F.3d at 975.

617. *Id.* at 976.

618. *Id.* at 976. The court noted that the reservation of four to seven percent was not onerous in light of the Senate Committee Report that instructed the FCC to "consider the total channel capacity of DBS systems operators" so that it may "subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with a relatively less total capacity." *Id.* (citation omitted).

619. *Id.* at 976 (quoting 47 U.S.C. § 335(b)(2) (2001)).

620. *Id.* at 976.

621. *Id.* at 977 (citation omitted).

622. *Id.* (citation omitted).

623. *Id.* (citation omitted).

exist.[624] The Supreme Court has made it clear that it is the FCC that determines whether spectrum scarcity exists. In the *FCC v. League of Women Voters of Calif.*,[625] the Court stated that it was not prepared to reconsider its "long-standing approach [to the fairness doctrine] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[626]

Although the FCC has overturned its fairness doctrine and the D.C. Circuit has vacated the personal attack and political editorial rules (without, however, deciding their constitutionality), the basic premise of these rules that involved the right of access of non-license holders to broadcaster facilities is still valid and reasonable. The broadcasters hold their licenses in trust for the public.[627] As a consequence, if a particular view is not being presented, then the FCC has a right to make sure that it is presented in certain cases. Such presentations will benefit the public interest by providing the public with a greater diversity of viewpoints.

Currently, members of minority groups own approximately 2.9 percent of broadcast stations in the United States.[628] Many minority-owned stations are radio stations, and they tend to broadcast minority-focused news and entertainment. As shown in this Article, non-minority owned television stations have a limited amount of minority-themed programming. The proposed ordinary viewer test is designed to allow the public to raise questions when any broadcaster's programming fails to reflect the diversity of society and the minority community. Like the fairness doctrine, the ordinary viewer test should promote more and diverse speech on broadcast television. It may promote more and different speech because broadcasters who are found to violate the ordinary viewer test will presumably take corrective action to broadcast more diverse programming. Like the fairness doctrine, the ordinary viewer test does not require any specific type of programming, just that it be diverse and balanced.

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624. Federal Communications Commission, *Press Release, Chairman Kennard Tells Private Wireless Industry Group Spectrum Scarcity Will Be Greatest Challenge: Chairman Receives Groups' Award for Outstanding Contribution to Industry* (Oct. 5, 2000), *available at* http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc0043.html; Michael Calabrese, *Battle Over the Airwaves: Principles for Spectrum Policy Reform*, NEW AM. FOUND., Oct. 2001, at 2–3 (noting that the airwaves are overcrowded in the largest cities of the U.S.); *see also* Michael Calabrese, *Unclog the Wireless Pipelines*, WASH. POST., Aug. 17, 2001, at A23; Jared Sandberg, *Raft of New Wireless Technologies Could Lead to Airwave Gridlock*, WALL. ST. J., Jan. 8, 2001, at B1.

625. 468 U.S. 364 (1984).

626. *Id.* at 376.

627. *See* 47 U.S.C. §§ 307(a), 309(a) (2001); *see also* Harrington, *supra* note 43, at 506.

628. Baynes, *supra* note 505, at 88. Three-hundred thirty-seven minority-owned businesses own broadcast properties. *See* Minority Telecommunications Development Program, the National Telecommunications and Information Administration, the U.S. Department of Commerce, *Minority Commercial Broadcast Ownership in the United States, available at* http://ntia.doc/gov/reports/97/minority/ (Aug. 1998). Only thirty-two minority-owned businesses own television stations, constituting 2.6 percent of all television station owners. *Id.* One-hundred eight-nine minority-owned businesses own AM radio stations. *Id.*

Therefore, the ordinary viewer test is promulgated on bedrock FCC regulatory principles that are very similar to those behind the fairness doctrine.

B. Pervasiveness of Media Rationale

The second rationale for regulating broadcast speech has revolved around the pervasiveness of the media. Ninety-eight percent of homes have at least one television.[629] It is difficult to issue warnings regarding unexpected program content "because the broadcast audience is constantly tuning in and out."[630] Thus, it is difficult to enable audiences to avoid being confronted with something that they do want to see or hear. Moreover, broadcasting is easily accessible to children.[631] In *Pacifica Foundation*, the Supreme Court found that the FCC did not violate the First Amendment in issuing a warning to a radio station[632] that had broadcast indecent materials.[633] The Supreme Court stated that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's rights to be left alone plainly outweigh the First Amendment rights of an intruder."[634] In essence, the Court found that the words were protected but were broadcast at the wrong time of day.[635] All-white television images and negative minority stereotypes are equally intrusive. The viewer is exposed to them before he or she may realize what is being shown. These stereotypes are intrusive just like indecent materials.

The D.C. Circuit in *Action for Children's Television v. FCC*,[636] used strict scrutiny to analyze section 16(a) of the Public Telecommunications Act of 1992, which provided for indecent broadcast materials to be relegated to the wee-hours of the morning. However, the court noted that even though it was applying strict scrutiny, it "must necessarily take into account the unique context of the broadcast medium."[637] The D.C. Circuit found the time-shifting provisions regulating commercial broadcasters constitutional because they satisfied a compelling governmental interest in protecting minors.[638] The court found that concerns for the morals of children and the ability of parents to supervise their children were sufficient grounds to establish

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629. Alder & Pittle, *supra* note 45, at 162 n.13.

630. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

631. *Id.* at 749.

632. *Id.* at 730. The FCC refused to impose a penalty on the station, but instead issued a warning that sanctions might result against the station if future indecent broadcasts occurred. *Id.* at 729–30.

633. *Id.* At two o'clock in the afternoon, a radio station broadcasted the prerecorded George Carlin satirical monologue in which he says and discusses the so-called "seven dirty words." *Id.* A parent driving with his fifteen year old son heard the routine and complained to the FCC. *Id.*

634. *Id.* at 748 (citing Rowan v. Post Office Dep't., 397 U.S. 728 (1970)).

635. *Id.*; *accord* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

636. *Action for Children's Television*, 58 F.3d at 654.

637. *Id.* at 660.

638. *Id.* at 660–64.

a compelling governmental interest.[639] With indecent materials on broadcast television, the court allowed the mandatory time shifting of indecent material to late night and early morning in an effort to protect children.[640]

The ordinary viewer test will not do time shifting; it in fact allows programming evidencing negative stereotypes to be broadcast any hour of the day. The ordinary viewer test attempts only to limit the amount of programming with negative stereotypes to a reasonable amount and to counterbalance these with positive representations. This proposal is far less invasive of the network's programming discretion than is the time shifting allowed for indecent programming. At the same time, especially for people of color, the negative stereotypes are indecent, and they may not want to have their children view them.

1. The Ordinary Viewer Test Does Not Violate the First Amendment

The ordinary viewer test does not violate the First Amendment when applied either to the absence of people of color on broadcast television, or to the excessive stereotyping of people of color by the broadcast networks.

a. The Absence of People of Color

The ordinary viewer test does not violate the First Amendment's protection for several reasons. First, the ordinary viewer test applies to entertainment speech, not political speech so it is lower value speech that has less First Amendment protection. This principle has been widely recognized. Second, the absence of minority depictions is discriminatory, and the FCC has a public interest obligation to prohibit and sanction discrimination by the broadcasters. Thus, under the First Amendment standard of review for broadcasters, the ordinary viewer test is within the public interest. Even if we were to analyze this under the heightened "compelling government interest" First Amendment standard, the eradication of discrimination would be a sufficient government interest, and the ordinary viewer test is narrowly tailored because it requires some minimum, but certainly not proportional, representation of people of color. Thus the "ordinary viewer test" is minimally burdensome on the broadcaster.

b. Stereotypical Depictions of People of Color

This prong of the test may appear to regulate content, and it does to some extent. However, it is similar to other FCC regulations of broadcasters in that it requires differing views. It does not attempt to eliminate all negative stereotypical depictions. Its goal is to ensure that the negative depictions of people of color is not disproportionate to those of whites. It is akin to the fairness doctrine in that it ensures

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639. The court also found the legislation met the least restrictive means requirement of strict scrutiny because Congress was justified in extending the legislation to minors of all ages because other legislation bars dissemination of sexually explicit material to minors seventeen years of age and under. In addition, the court found that adults who are interested in viewing indecent material have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors. *Id.* at 663–67.

640. *Id.*

that various perspectives of people of color are presented and that no one representation would monopolize the airways. In addition, because television is so pervasive, it is very difficult for viewers to prevent negative stereotypes from entering their homes. As such, the government has an interest in making sure that the negative stereotypes are not the sole view of people of color that are broadcast.

In our democracy, we ensure that the media has freedom of speech so it can freely and openly engage in discourse on any issue so the public can be fully informed. This is the strength of our democratic system. Former President Clinton, citing the work of John Locke, has attempted to explain the Lockean notion of "freedom and responsibility" in this digital age.[641] The President was cautioning the media that they needed to exercise some self-regulation in broadcasting certain violent or sexually graphic content to children.[642] Even though the President was discussing a different legal issue, his Lockean reference is a very suitable analogue when discussing the absence or stereotypical media portrayals of people of color.

The electronic media has the freedom to portray fictional characters as they choose and to engage in free and open dialogue and discussion on any issue. Such media freedom, if exercised without due care, can cause the powerless, the disadvantaged, and members of minority groups to be ignored or devalued, or both. That freedom must be exercised responsibly so that "tired old" stereotypes will be obliterated and diverse perspectives will be heard.

XI. CONCLUSION

The depiction of people of color by the media is a very important issue. People of color—African Americans, Asian Pacific Americans, Latinos(as), and Native Americans—currently comprise almost thirty percent of the U.S. population.[643] Many people learn about other groups from television. We need to make sure that people learn about each other in ways that provide a full-bodied depiction—not a stereotypical one. The absence and stereotyping of people of color by the media is a serious problem. This situation is akin to that in *Brown v. Board of Education* where the Court was made aware that segregation led young black children to have low self esteem.[644] Studies have also shown how young children identify with television characters of their race. In addition, white children often have very little exposure to people of color except through what they see on television. What is portrayed on television is critically important to our society and the concept of group identity. This matter lies squarely within the public interest. By failing to portray a more integrated world the broadcasters are implying that certain individuals and groups do not exist. The FCC has a mandate to regulate the communications field in a manner that comports with the public interest. The public interest should be broad enough to include everyone in media depictions.

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641. Jon Katz, *The Trouble with Giving Kids a Safety Net*, WASH. POST, July 6, 1997, at C1.

642. *Id.*

643. *See generally* Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002).

644. Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

By statute, the FCC is supposed to ensure that the carriers provide service in a nondiscriminatory manner.[645] Failing to have any new minority programs or having a disproportionate percentage of negative minority stereotypes during a new season raises a prima facie case of discrimination.[646] The *United Church of Christ* case established that viewer groups have standing to challenge a license at license renewal time.[647] The challenge can be based on factors such as how well the broadcaster serves the community, including the minority community. Thus La Raza and the NAACP are more than able to bring a complaint before the FCC, which may allow a hearing to go forward provided these groups prove that they have presented a substantial material question. Whether such claims will prevail is a question of fact. In *In re Applications of Alabama Educational Television*, the FCC found that the absence of people of color on a broadcaster's programs, when people of color comprised a sizeable part of the viewing audience, was prima facie evidence of discrimination.[648] Moreover, the FCC held that the disparity alone was enough to find wrongdoing; an intent to discriminate need not be shown.[649]

The issues today are much more complicated. Many networks have some people of color on their shows—although very few Latinos(as), Asian Americans or Native Americans. In addition, quality portrayals of underserved groups is often non-existent. Many shows use cheap stereotypes of people of color. It seems that the FCC should move to a deeper level of analysis to help it decide these more troubling cases. This Article suggests that the FCC analyze all such cases of under-representation or stereotype under an "ordinary viewer test" standard. Each case would be analyzed separately. The ordinary viewer would be the reasonable person. If it is clear that there is no representation of a particular racial and ethnic group, then clearly that would be a violation of the Communications Act. In addition, if evidence was presented that members of a certain racial or ethnic group were always being portrayed as criminals or villains, then that would also be a violation.

Some may argue that this proposed rule would require the FCC to censor content of network programming. But it is not so much censoring as it is prohibiting discrimination. Further, the FCC has a long history of defining within broad areas the type of content that is broadcast. The network shows are not in the category of commercial print advertising, which is lower down on the First Amendment hierarchy, but a parallel exists because broadcasting has less First Amendment protection than print media.[650] This situation involves making sure that the broadcasters use the spectrum as trustees for all the American people, and they use it in a way that is

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645. *See* 47 U.S.C. § 151 (2001).

646. *In re* Applications of Alabama Educ. Television Comm'n, 50 F.C.C.2d 461, 465 n.5.

647. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1965).

648. *In re Applications of Alabama Educ. Television Comm'n*, 50 F.C.C.2d at 465 n.5.

649. *Id.* at 472.

650. *See generally* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children Television v. FCC, 58 F.3d 654 (D.C. Cir 1995) (en banc).

nondiscriminatory. As such the implementation of the proposed ordinary viewer test would make sure that the public interest is met by avoiding the broadcast of either all-white images or negative stereotypes of people of color.

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