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Fiordaliza Batista, The Ramifications of the Federal Communications Commission's Failure to Minimize Negative Media Portrayals of Latinas and Black Women, 11 Cardozo Women's L.J. 331 (2005)

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Thu Feb 7 21:24:34 2019

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THE RAMIFICATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION'S FAILURE TO MINIMIZE NEGATIVE MEDIA PORTRAYALS OF LATINAS AND BLACK WOMEN

FIORDALIZA BATISTA*

INTRODUCTION

The Federal Communications Commission (FCC) contributes to the subjugation of minorities by failing to implement policies that encourage accurate portrayals of minorities.* A correlation exists between negative media portrayals, or stereotypical portrayals of minorities, and the manner in which society perceives and reacts to them. Stereotypes are a dangerous and powerful weapon for those who wish to subjugate and degrade other human beings for their own personal benefit.¹ Stereotypes distort ideas about human differences and group behavior.²

* J.D. Candidate, Benjamin N. Cardozo School of Law. This Note is dedicated to the memory of my father, Jose Batista, Jr. Additionally, I would like to thank my family and friends for their love and support, specifically my mother Maria Batista for inspiring me to persevere. Also, I would like to thank the members of the Cardozo Black Law Student Association and the Cardozo Latin American Law Student Association for their love and support. Lastly, I would like to thank the editorial board of the *Cardozo Women's Law Journal*.

* In this note, I refer specifically to minorities such as Latino/a Americans and African Americans, however, I realize that the word minority encompasses other people such as Asian Americans, Southeast-Asian Americans, Native Americans, Arab Americans, etc who are also the subject of stereotyping and discrimination in the broadcast industry. These topics are beyond the scope of this note.

¹ See Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 167 (1998) (explaining that stereotypes are a "very partial and inadequate way of viewing the world"); see also Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 29 (1990). Cava defines and explains the origins of stereotype:

Credit for first using the term 'stereotype' to describe generalizations about individuals who share a common characteristic is generally given to journalist and commentator Walter Lippmann. According to Lippmann, human beings seek to order their complex world by generalizing; they refer to stereotypes before they refer to reason. Stereotypes 'are a form of perception, impos[ing] a certain character on the data of our sense before the data reach our intelligence.' Stereotyped pictures of racial and national groups can arise only so long as individuals accept consciously or unconsciously the group fallacy attitude toward a place of birth or skin color.

Cava, *supra*. (citations omitted). The author also discusses several sociological and psychological studies demonstrating that stereotypes are bad generalizations or concepts because they are over-generalized, factually incorrect, or rigid. *Id.* Furthermore, stereotyping is "hard-wired" into society. *Id.* at 33.

² See Cava, *supra* note 1.

Unfortunately, stereotypes continue to permeate every aspect of American society, primarily through the electronic and print media.

The FCC has failed and continues to fail to alleviate or prevent the regular stereotyping of minorities.³ Because the media has become the primary source of information for many Americans, telecommunications regulations should serve as a vital instrument in the reduction or eradication of the negative portrayal of minorities. Regrettably, the Telecommunications Act of 1996 (the "Act") permits programming that will further cement the racial prejudices that pervade the minds of many Americans.⁴ This failure transforms the broadcasting industry into a vehicle of misinformation. The FCC's inaction assists in cementing these negative images on the minds of the majority. The media portrayal of minorities and the impact of these portrayals are matters of critical importance to the American people.⁵ An analysis of current telecommunications regulations is necessary to understand why it has failed to address the problem of negative minority portrayals. This Note will provide an overview of past and present FCC regulations and their effects on minority participation in the media. This Note will also examine the consequences of the lack of minority representation and participation in the broadcast industry, primarily violence against women of color, specifically Latinas and African-American/Black women. Finally, this Note argues that a correlation exists between negative or stereotypical portrayals of minority women in the media and the high incidences of violence directed towards them.

I. THE FCC'S FAILURE TO ENCOURAGE MINORITY PARTICIPATION IN THE MEDIA

A. *In The Beginning . . .*

The Communications Act of 1934⁶ produced a system of permits and licenses regulating commercial broadcasting.⁷ The 1934 Act maintained the notion that the

³ See discussion *infra* Part I.A.

⁴ See discussion *infra* Part I.A.

⁵ See discussion *infra* Part I.A.

⁶ Communications Act of 1934, 47 U.S.C. § 151 (1934):

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of 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 communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

⁷ Jeng Fao Mao, Note, Comment: *Racial Implications of the Telecommunications Act of 1996: The Congressional Mandate of Neighborhood Purity*, 41 HOW. L.J. 501, 513 (1998) (explaining that technological advances in television led to the creation of the FCC and the Telecommunications Act of 1934 and the replacement of the Radio Act of 1927 and the Federal Radio Commission). The Note

“public owned the airwaves,”⁸ and the grant of licenses was restricted to broadcasters devoted to operating in the “public convenience, interest or necessity.”⁹ This recognition of the “public convenience, interest or necessity”¹⁰ motivated the FCC to create policies that promoted diversity of ownership in an attempt to ensure diversity of broadcast programming.¹¹ The policy of diversity had two main objectives: To provide the “best practicable service” through the “widest possible dissemination of information from diverse and antagonistic sources” and to prevent “undue concentration of ownership” in broadcasting.¹²

The FCC believed that “diverse programming [was] a constitutionally guaranteed right of the television viewing audience.”¹³ This triggered the execution of various rules designed to reduce media “concentration” and promote the diversity of information.¹⁴ In an attempt to prevent monopolization of the broadcast industry in the early 1940s, the Commission created policies that prohibited any person from operating more than one television and radio station in the same area.¹⁵ Throughout the 1960s, the FCC prohibited common ownership of

explains that a broadcast license was obtained by “a direct grant from the FCC” or by purchasing “a license from an existing broadcaster.” *Id.* at 515. A television license expired after five years and a radio license expired after seven years. *Id.* “[W]hen several applicants applied for the same license, the FCC initiated a comparison of . . . ‘comparative criteria,’ which included: (1) diversification of control of mass media; (2) full-time participation, by owners, in station operation; (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; (6) applicant’s character; and (7) other factors.” *Id.*

⁸ Patricia M. Worthy, Comment: *Diversity and Minority Stereotyping in the Television Media: Unsettled First Amendment Issue*, 18 HASTINGS COMM. & ENT. L.J. 509, 520 (1996).

⁹ *NBC v. United States*, 319 U.S. 190, 216 (1943) (holding that the Federal Radio Commission was endowed with wide licensing and regulatory powers). The Court also explains that “[t]he ‘public interest’ to be served under the Communications Act is thus the interest of the listening public . . . [t]he facilities or radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest.” *Id.*

¹⁰ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Justice Frankfurter found the public interest touchstone to be:

[A]s concrete as the complicated factors for judgment in such a field of delegated authority permit[.]; it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission’s licensing authority is invoked . . . were explicitly and by implication left to the Commission’s own devising.

Id. at 138. See also Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard*, 42 CATH. U. L. REV. 51, 70 (1992) (explaining that “the significance of the *Pottsville* decision is that the FCC, a presidentially-appointed independent agency, has been given the difficult charge of defining the public interest as it relates to broadcasting.”).

¹¹ Andrea L. Johnson, *Redefining Diversity in Telecommunications: Uniform Regulatory Framework For Mass Communications*, 26 U.C. DAVIS L. REV. 87, 90 (1992) (explaining that “diversity in mass communications means facilitating diverse and antagonistic viewpoints and prohibiting undue concentration of control by any one licensee”); see also Ellen L. Triebold, *Constitutional Law—The Court Meets Halfway on Affirmative Action: Metro Broadcasting Inc. v. F.C.C.*, 16 J. CORP. L. 653, 655 (1991).

¹² Johnson, *supra* note 11, at 90.

¹³ Worthy, *supra* note 8, at 521.

¹⁴ *Id.*

¹⁵ See generally *Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16,065 (1943).

two AM or FM stations in the same broadcast service area.¹⁶ Initially, the FCC's primary means of ensuring the dissemination of diverse viewpoints focused on race-neutral regulations that minimized concentrated broadcast media ownership.¹⁷ This notion of diversity of viewpoint meant "that a large, diverse number of voices speaking over the air taken collectively [would] insure that the diverse and often un-predictable needs of the multifaceted, multiethnic, multilingual audience will eventually be addressed."¹⁸

However, these race-neutral policies largely ignored under-represented minorities.¹⁹ The FCC's attempts to promulgate policies failed to address the problems of minority under-representation and stereotyping in the media because they were not actively implemented to include minorities. Although the FCC established guidelines, they were not designed to provide accurate portrayals of minorities, and they did not address the problems inherent within the media industry.²⁰ Furthermore, the FCC continuously refused to recognize minority status as a relevant factor in reviewing and granting licenses, and permitted discriminatory employment practices (that persist today) among broadcasting companies.²¹

The racial instability of the 1960s and the results of a study conducted by the Kerner Commission²² led the FCC to devise and implement regulatory policies that attempted to guarantee the incorporation of minority viewpoints in the broadcast industry. The policies were essentially intended to promote the employment of minorities in broadcast media and prohibit discrimination in broadcast employment.²³ The policies were based on the notion that an increase in minority

¹⁶ See Multiple Ownership of Standard, FM and Television Broadcast Stations, Notice of Proposed Rule Making, 45 F.C.C. 1476 (1964).

¹⁷ See TV 9, Inc. v. F.C.C., 495 F.2d 929, 938 (D.C. Cir. 1973) (explaining that the FCC concluded that minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming).

¹⁸ David Honig, Comment, *The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities*, 27 HOW. L.J. 859, 862 (1984).

¹⁹ When I use the term under-represented minorities, I am referring to minorities who have been historically under-represented and discriminated against in this country, specifically focusing on Black Americans, which includes Caribbean Americans, African Americans, and Latino Americans.

²⁰ See generally Mary Tabor, *Encouraging "Those Who Would Speak Out with Fresh Voice" Through The FCC's Minority Ownership Policies*, 76 IOWA L. REV. 609 (1991).

²¹ *Id.*

²² See KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (March 1968). President Lyndon B. Johnson appointed Illinois Governor Otto Kerner to head a Commission to investigate the way in which the white media depicted minorities in its coverage of the civil disturbances during the 1960s. *Id.* The Commission concluded that the media failed to depict the frustrations of minorities that engaged in the disturbances. *Id.* See also Multiple Ownership of Standard, FM and Television Broad. Stations, 45 F.C.C. 1476 (1964).

²³ MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 16 (D.C. Cir. 2001) (noting that the FCC first began implementing Equal Employment Opportunity (EEO) regulations regarding its broadcast licenses in 1969, when it promulgated rules that prohibited licensees from discrimination on the basis of race in employment and required licensees to "establish, maintain and carry out a positive continuing program of specific practices designed to ensure equal employment opportunity and nondiscrimination in every aspect of station employment policy and practice") (quoting F.C.C. Broadcast Services, 47 C.F.R. § 73.2080(b) (2004)).

ownership would diversify broadcast programming and reduce the negative portrayals of minorities.²⁴ The FCC implemented affirmative action requirements and supported these constraints with quantitative Equal Employment Opportunity (EEO) guidelines.²⁵ It subjected stations to a heightened level of scrutiny at license renewal time if they failed to allocate minimal amounts of airtime to programs on community issues,²⁶ and it required licensees to use an objective process to determine which issues to address.²⁷

Unfortunately, the FCC's early legislative attempts failed to address or improve minority representation and the stereotypical portrayal of minorities. In 1977, the United States' Civil Rights Commission publicized a study that linked the "importance of stereotypical portrayals of minorities on television to the beliefs, attitudes and behavior of the viewing public."²⁸ The Civil Rights Commission concluded that racism and stereotypes were a result of a pervasive misconception that whites were the only real Americans.²⁹ As a result, the FCC established the Minority Ownership Task Force (MOTF) as an advisory group to tackle minority under-representation. The MOTF released a report that determined that "unless minorities are encouraged to enter the mainstream . . . commercial broadcasting business, a substantial proportion of our citizenry will remain underserved, and the larger non-minority audience will be deprived of the views of minorities."³⁰ After the release of the MOTF Report, the FCC proposed two new policies: "minority preferences in tax certificates" and a "distress sales program."³¹ The FCC justified

²⁴ Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515 (1972) (providing guidelines for granting renewal applications established to allow FCC to identify stations with under-representation of women and minorities in their staff in relation to the local workforce).

²⁵ *Id.*

²⁶ See S.J.R. Communications, 67 F.C.C.2d 1103 (1978) (explaining that the renewal application of a Cleveland FM station was set aside and scheduled for a hearing because the station failed to demonstrate that its non-entertainment programming requirement would allow the station to adequately address community needs).

²⁷ Honig, *supra* note 18, at 862 (explaining that ascertainment required "broadcasters to determine which community needs to address . . . by familiarizing themselves with community demographics and surveying community leaders and the general public, including minorities.").

²⁸ U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 1 (1977) (citing KERNER COMM'N REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 43 (1968)).

²⁹ See 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, 64 (2000) (quoting U.S. COMM'N ON CIVIL RIGHTS, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION 1 (1977)). The article explained the Civil Rights Commission's findings regarding the role the media played in perpetuating racism. *Id.*

³⁰ MINORITY OWNERSHIP TASK FORCE, FEDERAL COMMUNICATION COMMISSION, MINORITY OWNERSHIP REPORT (1978).

³¹ Mao, *supra* note 7, at 516 (explaining that the "tax certificate program gave the seller a deferment of any capital gain tax on the sale . . . [and] provided the seller with a significant incentive to seek out minority purchasers."). Congress eliminated this program in 1995 "without sound justification." *Id.* "The distress sale program allowed the FCC to approve the transfer of licenses designated for revocation hearing or for renewal hearing on basic qualification issues . . . [t]he transfers were designated to minority buyers, where the buyers purchased the station before the start of the hearing and paid no more than seventy-five percent of the fair market value . . . [the program] gave an incentive to licensees, in danger of losing their licenses, to seek out minority buyers." *Id.*

the new regulatory approach by resorting to its time-honored policy of acting in the "public interest."³² The FCC argued that "the views of racial minorities continue[d] to be inadequately represented in the broadcast media," and that the failure of the media to represent the views of racial minorities was detrimental to the viewing and listening public.³³ The FCC determined that the "legitimate public interest objective" of program diversity could be furthered through minority ownership of broadcast facilities.³⁴ As a result, in the 1970s, the FCC restricted "media concentration in specific markets, regional concentration, and cross-ownership of competitive media."³⁵

In *TV 9, Inc. v. FCC*, the D.C. Circuit Court introduced the notion that a "nexus" exists between minority ownership and minority programming.³⁶ The Court explained that there is a connection between diversity of ownership and diversity of ideas because new interest groups and silent minorities must be allowed to broadcast on American radio and television frequencies.³⁷ The FCC embraced the nexus theory and implemented minority preference programs. These programs were supported by Congress and the courts.³⁸ The rationale in *TV 9* emphasized the importance of some kind of voice for minorities: "Our developing national life . . . accords merit to Black participation among principals of applicants for television rights."³⁹ However, legitimacy of the FCC minority ownership policies was not widely accepted.⁴⁰ The arguments and presumptions of both the supporters and opponents of the FCC's programs became the focus of a debate between the majority and dissenting opinions in the contentious Supreme Court decision in *Metro Broadcasting v. FCC*.⁴¹

³² Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 (1978).

³³ *Id.* at 980-81 (stating that "adequate representation of minority viewpoints in programming serves not only the needs and interest of the minority community but also enriches and educates the non-minority audience.").

³⁴ *Id.* at 980.

³⁵ Worthy, *supra* note 8, at 521.

³⁶ *TV 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973). This case involved the determination of who was the best applicant entitled to a construction permit to operate a commercial television station on Channel 9 in Orlando, Florida; *see also* Garrett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975).

³⁷ *TV 9*, 495 F.2d at 937.

³⁸ *See* H.R. REP. NO. 765, 97th Cong., at 40 (1973), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2284. Congress also noted that "the nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." *Id.* at 40; *see also* NAACP v. FCC, 425 US 662, 670 (1976) (explaining that the FCC's obligation under the Communications Act is "to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."); *see also* Steele v. FCC, 770 F.2d 1192, 1195 (D.C. Cir. 1985) (explaining that the encouragement of diverse resources of information through diversification of ownership is a well-established public interest directive).

³⁹ *TV 9*, 495 F.2d at 936.

⁴⁰ *See generally* Steele, 770 F.2d at 1198-1199 (holding that the FCC exceeded its statutory authority in adopting a policy granting preferential treatment to female applicants for FM radio stations in comparative evaluation proceedings). The FCC failed to offer a factual basis for its contention that increase of female-owned broadcast facilities would advance the FCC's public interest in fostering "diversity of viewpoint" in mass media. *Id.*

⁴¹ *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

In *Metro Broadcasting*, the Court held that minority preference programs of the FCC withstood intermediate scrutiny under the Fifth Amendment equal protection clause.⁴² Writing for the majority in *Metro Broadcasting*, Justice Brennan contended that increasing broadcast diversity constitutes an important governmental purpose.⁴³ In sanctioning the assumption that expanding “minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity,”⁴⁴ the majority deferred to the fact-finding of Congress and the FCC’s expertise.⁴⁵ Although the Court failed to find a direct connection between minority ownership and a diversified point of view, the Court determined that it is reasonable to imagine that the “broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.”⁴⁶ Justice O’Connor, writing for the dissent, criticized the majority for failing to determine “how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints.”⁴⁷ However, the empirical data presented by the majority conclusively established that there is some relationship between minority ownership, participation in the media and diverse viewpoints.⁴⁸

The holding in *Metro Broadcasting* that congressionally mandated minority preference programs require an intermediate level of scrutiny was overruled in *Adarand v. Peña*.⁴⁹ In *Adarand*, the Supreme Court held congressional programs,

⁴² *Id.* at 579. The Court explained that (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority “distress sale” program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms do not violate equal protection principles.

⁴³ *Id.* (the Court deferred to the FCC’s determination that a “nexus” existed between minority ownership and the incorporation of minority view points in media programming).

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *Id.* The Court also explains that empirical data “suggests that an owner’s minority status influences the selection of topics for news coverage and the presentation of editorial view point, especially on matters of particular concern to minorities.” *Id.* at 581 (citing M. Fife, *The Impact of Minority Ownership on Minority Images in Local TV News*, in *Communications: A Key to Economic and Political Change, Selected Proceedings from the 15th Annual Howard University Communications Conference 113* (1986)) (explaining that “minority ownership does appear to have specific impact on the presentation of minority images in local news”); *see also* M. Fife, *The Impact of Minority Ownership On Broadcast Program Content: A Case Study of WGPR-TV’s Local News Content*, Report to the Nat’l Ass’n of Broadcasters, Office of Research and Planning, 45 (Sept. 1979). This study compared an African-American-owned television station and a European-American-owned station in Detroit and revealed that “the overall mix of topic and location coverage between the two stations is statistically different and with its higher use of blacks in newsmaker roles and its higher coverage of issues of racial significance, [the Afro-American-owned station’s] content does represent a different perspective on news than that of the [white-owned station].”) *Id.*

⁴⁷ *Metro Broadcasting*, 497 U.S. at 614 (O’Connor J., dissenting).

⁴⁸ *See Metro Broadcasting*, 497 U.S. at 579-84.

⁴⁹ *See Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). The petitioner in this case was a low bidder on a federal contract that was denied the contract because a presumptive preference was given to minority-owned businesses. The petitioner sued, claiming violation of its equal protection rights under the Fifth Amendment of the United States Constitution. The Court held that federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.

like state and local programs, that "impose racial classifications"⁵⁰ shall be subject to strict scrutiny.⁵¹ Therefore, Congress and the FCC must now show statistical evidence of past discrimination that demonstrates a compelling governmental interest and that the program was narrowly tailored to meet such interest.⁵² The Court in *Adarand* determined that *Metro Broadcasting* "was . . . a significant departure from much of what had come before it"⁵³ and as such, thought that "well-settled legal principles pointed toward a conclusion different from the one reached in *Metro Broadcasting*."⁵⁴

However, instead of reinforcing the objective of their initial public interest policy, the FCC began to gradually eliminate the policies it had created to encourage minority representation in the broadcast industry.⁵⁵ In the early 1980s, the FCC decided not to extend its minority ownership policies to "telephone companies."⁵⁶ In 1988, the FCC ended enforcement of the Fairness Doctrine, which allowed minorities to gain access to the broadcast media by requiring licensees to devote a reasonable amount of air-time to the presentation of public issues, and provide a reasonable opportunity for presentation of divergent views on controversial issues of public importance.⁵⁷ The FCC ruled that "enforcement [of the 38 year-old doctrine] contravene[d] the First Amendment and thereby disserves the public interest."⁵⁸ The FCC also took the teeth out of the ascertainment policy, which "required licensees to ascertain community needs, to incorporate guidelines for licensees to use to determine the needs of the community and to address these recognized needs in programming."⁵⁹ This policy allowed minority groups to exercise some control over broadcast programming.⁶⁰

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* ("such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

⁵³ *Id.*

⁵⁴ *Id.* at 234.

⁵⁵ See discussion accompanying notes 56, 57, 58, & 59.

⁵⁶ See Mao, *supra* note 7, at 519-24. The FCC also eliminated the programming logs requiring the licensees to maintain a log of the programs that were aired and available to the public. *Id.* at 520. The "log allowed the public to ascertain empirically whether the broadcasters were serving the needs of the minority community." *Id.* at 520. "[T]he long-form renewal process . . . was eliminated and eventually replaced with the postcard-size renewal form consisting of only five questions The elimination was yet another step towards the de-emphasizing of public participation; because without specific evidence of broadcaster's neglect of the minority community's needs, the public participation process is rendered ineffective." *Id.* at 521.

⁵⁷ *Id.*

⁵⁸ Mao *supra* note 7, at 519-22.

⁵⁹ *Id.*

⁶⁰ *Id.*

In *Lutheran Church-Missouri Synod v. FCC*,⁶¹ the court held that the Commission's Equal Employment Opportunity rule⁶² was an unconstitutional race-based classification. The court held that the rule was subject to strict constitutional scrutiny because it was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional [racial] representation" and "oblige[d] stations to grant some degree of preference to minorities in hiring."⁶³ The court also held the Commission's rationale for the diversity of programming was not a sufficient compelling governmental interest to justify the rule.⁶⁴ The Commission therefore revised the rule to stipulate "that a licensee must make a good faith effort to disseminate widely any information about job openings and, in order to 'afford broadcasters flexibility in designing their EEO programs,' the rule allows them to select either of two options entailing 'supplemental measures' for accomplishing that goal."⁶⁵ In *Maryland Broadcasters Ass'n v. F.C.C.* [hereinafter *MD/DC/DE Broadcasters Ass'n*],⁶⁶ which involved fifty broadcasters' associations that challenged an EEO rule promulgated by the FCC to promote minority hiring, the court held that the rule was unconstitutional, and overruled it. The court explained the rule was not "narrowly tailored" to promote its interest in preventing discrimination.⁶⁷

With a conservative majority on the Supreme Court, and the revised "equal protection"⁶⁸ standards derived from *Adarand* and *MD/DC/DE Broadcasters*

⁶¹ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). The Lutheran Church, which owned the licenses for two radio stations, appealed an order of the Federal Communications Commission (FCC) finding that the church violated the FCC's Equal Employment Opportunity (EEO) regulations by using religious hiring preferences and inadequate minority recruiting. *Id.*

⁶² 47 C.F.R. § 73.2080(b) (2004) (requiring all broadcast licensees to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice."). See also *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 16 (explaining that the regulation required the licensees to search for sources that would refer female and minority applicants for employment, to track the source of each referral and to record the race and sex of each applicant and of each person hired). If the data revealed that the "station employed a lower percentage of women and minorities than were employed in the local workforce, then the Commission would take that into account in determining whether to renew the station's license." *Id.*

⁶³ *Lutheran Church-Missouri Synod*, 141 F.3d at 351-52.

⁶⁴ See *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 16. Fifty D.C. broadcasters associations petitioned for review of an Equal Employment Opportunity (EEO) rule promulgated by the Federal Communications Commission. *Id.* The Court of Appeals held that the effect of the rule was to pressure licensees to recruit minorities and women, and that a recruitment program targeting minorities is considered a racial classification and is subject to strict scrutiny. *Id.* The court also held that the regulation was not narrowly tailored to further the interest in preventing discrimination, and therefore violated equal protection. *Id.* Lastly, the court held that the invalid portion of the regulation was not severable. *Id.*

⁶⁵ *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 17. "Under Option A the licensee . . . must undertake four approved recruitment initiatives in each two-year period; qualifying initiatives are specified by the Commission in some detail, A licensee that selects Option A need not report the race and sex of job applicants. Under Option B the licensee may design its own out-reach program but must report the race and sex of each job applicant and the source by which the applicant was referred to the station." *Id.*

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Adarand Constructors*, 515 U.S. at 231.

Ass'n,⁶⁹ the FCC must revise its minority ownership policies in order to achieve its goal of ensuring diversity within broadcasting.⁷⁰ More importantly, the FCC must also acknowledge the continued practice of racial stereotyping in television broadcasting, and adopt a regulatory regime that more specifically addresses the problems associated with these media distortions.⁷¹ A 1993 study conducted by the Minnesota Advisory Committee to the United States Commission on Civil Rights concluded:

The news media has tremendous influence on the attitudes of viewers and readers regarding race relations in this country. The unfair portrayal of minorities in the electronic and print media has produced negative self-images of people of color, and it has bestowed upon white people an undeserved and destructive image of superiority.⁷²

The study explains that the media's consistent use of "negative self-images" significantly delays the reduction or eradication of racial tensions and promotes the subjugation of minorities.⁷³

The FCC attempted to correct minority under-representation and stereotypical portrayals by diminishing the control that white males have over media programming.⁷⁴ However, the FCC's strategy to promote minority hiring and to increase minority ownership of broadcast properties failed because the FCC is not a politically accountable entity, and because the judiciary refuses to use preferences to alleviate under-representation in the media.⁷⁵ The FCC is not required to provide a comprehensive definition of the "public interest"⁷⁶ because it is a body that is appointed by the President and does not answer to a constituency. Since members of the majority are rarely confronted with minority issues, they are less likely to be influenced by them.⁷⁷ Furthermore, the gradual eradication of most of the minority preference policies increasingly diminishes the strength of the diversity of viewpoint notions initially proposed by the FCC.⁷⁸ Without legislation

⁶⁹ *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 21. Ginsberg, writing for the majority, states "it is far from clear that future employment in the broadcast industry is a public benefit for which the Government is constitutionally responsible." *Id.*

⁷⁰ See generally *Adarand Constructors*, 515 U.S. at 225.

⁷¹ See discussion *infra* Part II.A.

⁷² MINNESOTA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, STEREOTYPING OF MINORITIES BY THE NEWS MEDIA IN MINNESOTA 35 (1993). See *id.* at 1 (quoting testimony of Robert Entman, a professor of journalism: "While the roots of racism are varied and deep, there is a surprising source of messages that daily stimulate racial tensions: local television news.")

⁷³ *Id.* at 35. The study concluded that stereotyping negatively impacts both minority and majority populations by "reinforcing negative stereotypes that impede equal opportunities for minorities, implying that minorities make more negative contributions to the community than positive ones and therefore alienates and polarizes the minority community from the majority community, impacting the potential role models for minority youth, and polarizes ethnic minority."

⁷⁴ See discussion *supra* Part I.A.

⁷⁵ See Mao, *supra* note 7, at 522.

⁷⁶ *Pottsville Broadcasting*, 309 U.S. at 138.

⁷⁷ Rogovin, *supra* note 10, at 71.

⁷⁸ BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* xviii (6th ed. 2000) (explaining that in the present time, "the Federal Communications Commission, the Federal Trade Commission, the Anti-Trust

mandating minority participation in the broadcast industry and without the means necessary for public participation, the destructive effects of racial stereotyping in television media persist today.⁷⁹

The Telecommunications Act of 1996 further widens the racial gap and enables the spread of racism and prejudice by failing to encourage minority participation in the broadcast industry. Although the Act requires operation in the public interest, "broadcasters have successfully narrowed the meaning of that phrase almost to the point of disappearance."⁸⁰ The 1996 Act allows licensees to own more than one station within a single market and permits unrestricted ownership of stations in the national market.⁸¹ The Act basically allows a small number of licensees to monopolize the broadcast industry, and it severely restricts the presentation of diverse viewpoints the FCC considered vital when granting licenses.⁸² The Act eliminates the restrictions placed on the number of AM and FM radio stations licenses given to one owner and grants a single owner the authority to control the national market.⁸³ Furthermore, the Act "protects agreements that broadcasters have already negotiated with Congress."⁸⁴ For instance, in the television broadcasting arena, the Act has eradicated "the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide."⁸⁵ The 1996 Act also operates to deregulate the telecommunications industry and hinder competition.⁸⁶ Consequently, big networks are allowed to

Division of the Department of Justice, the Congress, and a newly conservative federal court system favor a free market philosophy . . . [t]hey have all but retired from protecting the public from excessive private power.").

⁷⁹ See Rogovin, *supra* note 10, at 71. "The FCC . . . which presents policies implementing that directive, nor the judicial opinions scrutinizing those policies, reflects an understanding of the importance to the majority of this country of hearing minority voices." *Id.* at 53.

⁸⁰ BAGDIKIAN, *supra* note 78, at xviii. The author further argues that "[s]ince the 1980s the federal government has largely ignored the legal 'public interest' requirement and has increasingly adopted for broadcasting the dogma of free market, endorsing whatever pays the most profit." *Id.* at 248. Furthermore, "[t]he refusal of the major media to properly address central public concerns has created a crisis." *Id.*

⁸¹ See Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J., 1, 10 (1996).

⁸² *See id.*

⁸³ *See* Telecommunications Act of 1996, U.S.C. § 202(b)(1):

(A) In a market of 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, in which not more than 5 are to be in the same AM or FM service; (B) in a market of 30 to 44 commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations of which not more than 4 can be in the same AM or FM service; (C) in a market with between 15 and 29 commercial radio stations, of which not more than 4 cannot be in the same AM or FM service; and (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same AM or FM service, except that a party may not own, operate, or control more than 50 percent of the stations in such a market.

Id.

⁸⁴ Mao, *supra* note 7, at 523.

⁸⁵ Telecommunications Act of 1996, U.S.C. § 202 (c)(1)(A).

⁸⁶ Mao, *supra* note 7, at 502-03. The author explains:

monopolize the industry, resulting in the same misguided minority images dominating the airwaves.⁸⁷

The Act should assist in alleviating minority misrepresentation by encouraging minority participation within the broadcast industry. The Act exacerbates the misguided conceptions of minorities prevailing in American society.⁸⁸ Television programs that misrepresent minorities' physical appearance, speech and behavior adversely affect the viewers' perception and opinion of those minorities.⁸⁹ Television has been identified as the primary contributor to negative stereotypes.⁹⁰ Furthermore, social science studies suggest that "destructive images create or maintain negative intergroup attitudes such as racism and prejudice."⁹¹ Media regulation has failed to serve all of the members of North American society, and this failure has a direct connection to the rise in violence towards minorities by members of the majority.

II. CONSEQUENCES OF FCC'S INEFFECTIVE REGULATION OF MINORITY MEDIA PORTRAYAL

A. Stereotypes Portrayed Through the Media

In the United States, the media "substantially shapes society, society's perception of itself, and society's definitions of culture."⁹² Many commentators believe that the electronic media has the authority to influence and shape the

[T]he [1996] Act also contains many provisions which counter the pro-competitive provisions and create monopolies The Act, in effect, provides incentives for mass media mergers. Among the present powerhouse television networks and radio station owners as under the Act, the role of disciplining shifts from the Federal Communications Commission . . . to consumer-driven market forces. It is my belief that as a result of this shift, the diversity of viewpoints being expressed through the mass media venues will suffer. More specifically, this shift will result in a violation of the audience's First Amendment right to have "access to social, political, esthetic, moral, and other ideas and experiences," as recognized by the Supreme Court as "a condition of a free society."

⁸⁷ *Id.* at 526. "[U]nder 202 (b)(1) of the Act, ABC, NBC, CBS, FOX, UPN, and WB may acquire unlimited radio stations nationwide with minimal restrictions on the number of stations they can own in any one local market The possible consequences are that all programs from ABC, NBC, CBS, FOX, UPN, and WB will look the same, feel the same, and sound the same." *Id.*

⁸⁸ *See id.* at 506.

⁸⁹ Worthy, *supra* note 8, at 534 (explaining that "many commentators believe that [television] serves as the source and re-enforcer of negative beliefs that minorities hold about themselves, and that others hold about minorities.").

⁹⁰ *See* Rogovin, *supra* note 10, at 57-58.

⁹¹ Worthy, *supra* note 8, at 537.

⁹² *See also* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 79 (1986).

[T]elevision has achieved the status of myth . . . [it is] a way of understanding the world that is not problematic, that we are not fully conscious of, that seems, in a word, natural. A myth is a way of thinking so deeply embedded in our consciousness that it is invisible. This is now the way of television We do not doubt the reality of what we see on television, are largely unaware of the special angle of vision it affords [T]elevision has gradually *become* our culture.

cultural, political and social customs of American society.⁹³ Unfortunately, few broadcast television stations and media corporations are minority-owned.⁹⁴ Consequently, minorities are usually portrayed in a negative manner.⁹⁵ Often, programming depicts minorities through the lens of the majority.⁹⁶ The media shapes the majority culture's notions of minorities, and the majority's notions of minorities dominate the media.⁹⁷

The widespread use of "sex as a marketing tool, and as a critical component in much of media," is believed "to have profound negative effects on society."⁹⁸ Women of color are stereotyped as "over-sexed and wanton"⁹⁹ and easily accessible for sexual use.¹⁰⁰ Societal stereotypes¹⁰¹ about minority women's sexuality make them more vulnerable to sexual harassment.¹⁰² European-American or white men see women of color "as the center of raw sexuality."¹⁰³ Black women are viewed as "animalistic wantons" and Latinas are viewed as hot-blooded and willing sex partners.¹⁰⁴

Considering the omnipresence of women's naked flesh in the media, it is not a coincidence that violence against women of color has been steadily rising.¹⁰⁵ An example of how women of color are depicted is illustrated by a 1999 edition of *George* magazine devoted to the "Latin Explosion." Several Latina artists were portrayed in provocative poses.¹⁰⁶ Daisy Fuentes, a Cuban-American actress was featured wearing a half-opened shirt exposing portions of her breasts in a segment titled "If I Were President." Selma Hayek, a Mexican actress, was featured on the cover with her legs spread over a giant fire-cracker in stiletto heels, a tube top, and tight pants.¹⁰⁷ The issue was entitled "Latin Power" but the photograph indicated

⁹³ See Worthy, *supra* note 8, at 531-32.

⁹⁴ See *Metro Broadcasting*, 497 U.S. at 554.

⁹⁵ *Id.* at 553-54.

⁹⁶ See Rogovin, *supra* note 10, at 53.

⁹⁷ *Id.* (explaining that "majority culture" means the dominant culture in the United States).

⁹⁸ Allen S. Hammond, IV, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 267 (1996).

⁹⁹ Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 195 (2001).

¹⁰⁰ See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 53 (Yale University 1979) (explaining that Black women are most vulnerable to sexual harassment because of the notion that Black women are "sexually accessible" and because they are economically underprivileged).

¹⁰¹ See Cava, *supra* note 1, at 27 (explaining that "stereotypes undermine the individual by promoting unreasonable or untrue generalizations"). The article provides several definitions of stereotype including "a relatively rigid and oversimplified or biased perception or conception of an aspect of reality, especially of persons or social groups . . . [and as] a form of perception, imposing a certain character on the data of our sense before the data reach our intelligence . . . operat[ing] as pictures in our heads, transmitted generationally as part of cultural folklore." *Id.* at 28-29.

¹⁰² See MACKINNON, *supra* note 100, at 53.

¹⁰³ Hernandez, *supra* note 99, at 210.

¹⁰⁴ *Id.*

¹⁰⁵ *Big Booty Hoes (and Other Whack Rap Video Images)*, ABOUT.COM, at <http://rap.about.com/library/weekly/aa011201a.htm> (last visited Oct. 14, 2003).

¹⁰⁶ See *If I Were President*, GEORGE, July 1999, at 100.

¹⁰⁷ See Bob Morris, *Mexican Firecracker*, GEORGE, July 1999, at 60.

that Latino power came from sexual aptitude and not intelligence, determination, dedication or hard work.¹⁰⁸

Furthermore, the visual media continues to portray stereotypical images of African-American women. For instance, Queen Latifah in *Bringing Down the House*,¹⁰⁹ played a convicted bank robber who utters lines like "Who dat?"¹¹⁰ Halle Berry's Oscar-winning performance in *Monster's Ball*¹¹¹ was based on the portrayal of a "pathologically dependent dysfunctional mother who is sexually excessive."¹¹² There is also the phenomenon of what one journalist calls the "Evil Sista with Attitude" (SWA) portrayed in reality television shows.¹¹³ The SWA is "all sharp edges and raw nerves, an angry, aggressive, know-it-all, presenting a one-sided view of black womanhood." The most recent examples include: Alicia Calaway on *Survivor: All-Stars*,¹¹⁴ described as "she of the Finger and the forked tongue;"¹¹⁵ Camille McDonald, a Howard University student who appeared on *America's Next Top Model*¹¹⁶ who was denigrated on Internet message boards for having a "stank attitude;"¹¹⁷ and last, but not least, the gracefully frosty Omarosa "I'm not here to make friends" Manigault-Stallworth, who became the star of Donald Trump's *The Apprentice*¹¹⁸ and was arguably the most hated woman on television.¹¹⁹ A Washington Post article discussing the negative images of

¹⁰⁸ *Id.*

¹⁰⁹ BRINGING DOWN DA' HOUSE (Touchstone Pictures 2003).

¹¹⁰ See Felicia R. Lee, *Class with the 'Ph.D. Diva'*, N.Y. TIMES, Oct. 18, 2003, at B7.

¹¹¹ MONSTER'S BALL (Lions Gate 2001).

¹¹² See Lee, *supra* note 110, at B7.

¹¹³ Teresa Wiltz, *The Evil Sista Of Reality Television: Shows Trot Out Old Stereotypes To Spice Up Stagnant Story Lines*, WASH. POST, Feb. 25, 2004, at C01. Wiltz writes about the:

[P]refab nature of Reality TV, where the participants, grasping for those Warholian nanoseconds of fame, manufacture an Image, the better to garner maximum airtime. And so we have stock characters: The small-town naif struggling to hold onto those down-home values—not to mention his/her virginity. The bumbling bigot who doesn't realize that he's an Archie Bunker in the making. The Troubled Soul who's one step away from rehab. The Vamp/Party Girl who likes to toss back the shots, especially if that means slurping tequila out of someone's navel. And then there's the SWA's male counterpart: The Brother With an Attitude, a.k.a. The Angry Black Man. (Though "The Apprentice's" Kwame Jackson, a Harvard MBA, is an easygoing sort whom everybody wants on their team).

Wiltz also quotes Todd Boyd, a critical studies professor at the University of Southern California's School of Cinema: "We know all these shows are edited and manipulated to create images that look real and sort of exist in real time. But really what we have is a construction The whole enterprise of reality television relies on stereotypes. It relies on common stock, easily identifiable images." *Id.*

¹¹⁴ *Survivor: All Stars* (CBS television broadcast, Feb. 1, 2003).

¹¹⁵ See Wiltz, *supra* note 113 at C01.

¹¹⁶ *America's Next Top Model* (UPN television broadcast, 2004).

¹¹⁷ See Wiltz, *supra* note 113 at C01.

¹¹⁸ *The Apprentice* (NBC television broadcast, 2004).

¹¹⁹ *Id.* In an e-mail interview with the Washington Post, Manigault-Stallworth explains:

What you see on the show is a gross misrepresentation of who I am. For instance they never show me smiling, it's just not consistent with the negative portrayal of me that they want to present. Last week they portrayed me as lazy and pretending to be hurt to get out of working, when in fact I had a concussion due to my serious injury on the set and spent nearly . . . 10 hours in the emergency room. It's all in the editing! Minorities have

minority women quotes Andy Dehnart, creator of *RealityBlurred.com*, a daily compendium of TV's top reality shows:

The categories exist because, well, that's entertainment. If you have footage of Alicia [*Survivor*] sitting around chatting about her favorite foods and if you have footage of her wagging her finger, screaming, it's much more interesting. These shows aren't documentaries. Reality TV relies on the visual shorthand of recognizable stereotypes. This becomes problematic when there are only a handful of people of color on these shows. An obnoxious white guy can just be the obnoxious guy and not a stand-in for his entire race.¹²⁰

Mr. Dehnart's comments suggest that the entertainment industry does not understand the significant role it plays in American society—further supporting the notion that the FCC must play a more active role in implementing policies that promote minority participation in the media. Dehnart's comments also allow us to acquire a glimpse into the mentality pervading the entertainment industry regarding the stereotypical portrayals of minorities.

Negative images of minorities are solidified in the minds of television audiences and are interpreted by the audience as truth.¹²¹ Stereotyping presents discrediting attributes as reality.¹²² Critical-race scholars have observed that Americans maintain a deep uncertainty as to who and what they are, and further, that Americans attempt to resolve this unease by employing stereotypes to define minorities and label them as outsiders.¹²³ Consequently, after years of absorbing these stereotypes, members of America's mainstream society can only see their preconceived notions of how minorities should behave and live.¹²⁴

A study conducted by Professor Sheila T. Murphy suggests that exposure to "counterstereotypical"¹²⁵ images of minorities influences the manner in which members of the majority culture view minorities and women.¹²⁶ The results of

historically been portrayed negatively on reality TV. These types of shows thrive off of portrayals that tap into preconceived stereotypes about minorities (i.e. that we are lazy, dishonest and hostile).

¹²⁰ See Wiltz, *supra* note 113 at C0.

¹²¹ See Murphy, *supra* note 1, at 167.

¹²² See Stevina U. Evuleocha & Steve D. Ugbah, *Stereotypes, Counter-stereotypes, and Black Television Images in the 1990s*, 13 W.J. OF BLACK STUD. 197, 199-200 (1989). The author explains that when stereotypes "are used to serve the function of purveying bourgeois and racist ideology to the mass public . . . especially casting Blacks . . . in [a] demeaning and less than dignified light . . . there is a grave cause for concern." *Id.* See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199 (1995) ("[S]tereotypes are viewed as social schemas or person prototypes. They operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.").

¹²³ See Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999).

¹²⁴ *Id.*

¹²⁵ Murphy, *supra* note 1, at 167 (explaining that "counterstereotypic" refers to "disconfirming information" that directly contradicts the prevailing stereotype" both negative and positive).

¹²⁶ *Id.* The study incorporated the common cultural stereotypes of African-Americans as "lazy,"

Professor Murphy's study suggest that exposure to "stereotypic and counterstereotypic portrayals did cue consistent interpretations of unrelated media events."¹²⁷

Individuals who read a stereotypic portrayal of an African American . . . were much more likely to make internal or personal attributions of blame with regard to Rodney King and Magic Johnson, suggesting that they somehow "brought it on themselves." Conversely, being exposed to a counterstereotypic portrayal led to more external or situational attributions of blame

. . . .
Being exposed to a stereotypical portrayal of a female led individuals to doubt the credibility of Anita Hill (the woman who accused then Supreme Court nominee Clarence Thomas of sexual harassment) and Patricia Bowman (the woman who accused William Kennedy Smith of rape), whereas exposure to a counterstereotypic portrayal increased the perceived credibility of these women.¹²⁸

Therefore, the FCC must encourage the perpetuation of accurate counterstereotypic portrayals of minorities.

B. Violence Against Women of Color

The depictions in film and other media of minority women as hot-blooded lovers or sultry, curvy vixens help shape how society perceives minority woman and justifies treating them differently.¹²⁹ Women of color are either perceived as weak and thus "unlikely to fight back if harassed" or as "very sexual and thus desiring sexual attention."¹³⁰

"unintelligent," "aggressive" and "criminal" into an autobiographical letter by a college freshman. *Id.* A second version of the letter incorporated counterstereotypical concepts of African-Americans, mainly "hardworking," "intelligent," "gentle" and "law-abiding." *Id.* A third version did not portray the freshman in a stereotypic or counterstereotypic manner. *Id.* Four hundred undergraduates at a large west coast university were then asked to complete two seemingly unrelated surveys. *Id.* The first survey asked the students to evaluate a campus newsletter that incorporated one of the three versions of the letter. Murphy, *supra* note 1, at 167. After reading the newsletter the students were asked to answer several questions regarding "how effective and attractive they found the format and how interesting they considered the articles." *Id.* Then another experimenter asked the students to complete a second survey involving the "opinions and attributions of responsibility with regard to various media events," including Magic Johnson's HIV status and the police beating of Rodney King. *Id.*

¹²⁷ *Id.* at 169.

¹²⁸ *Id.*

¹²⁹ Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U.L. REV. 695, 709 (1994).

¹³⁰ Darlene C. DeFour, *The Interface of Racism and Sexism on College Campuses*, in *IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* 48 (Michele A. Paludi ed., 1990) (1970).

The images and perceptions of women of color increase their vulnerability to harassment. An untenured Hispanic faculty member [had] an appointment with her department chair in his office to request travel funds. When she [entered] the room the lights [were] dim. There [was] soft music playing in the background. The chair which she [was] asked to sit in reclines. He indicate[d] that there [was] an excellent chance she [would] receive the travel funds . . . she [wanted]. He [went] on to discuss how bright and attractive she [was]. He state[d] that although minorities in the past haven't done well in the

Furthermore, racism and sexism unite in the harasser's mind.¹³¹ For instance, "the harassment of African-American women integrates images of slavery, squalor, sexual accessibility and natural lasciviousness."¹³² In *Brooms v. Regal Tube Co.*, the defendant showed the victim numerous photocopies of racist pornography involving bestiality.¹³³ He showed her pornographic pictures depicting an interracial act of sodomy and told her that she was hired for the purposes indicated in the photograph because it demonstrated black women's "talent."¹³⁴ In *Continental Can Co. v. Minnesota*,¹³⁵ the harasser communicated to his African-American victim that "he wished slavery days would return so that he could sexually train her and she would be his bitch."¹³⁶

Similarly, the media does not regard women of color as highly as white women.¹³⁷ For instance, in the 1980s, when news reports about the rape of a white female in New York's Central Park¹³⁸ pervaded the media, equally horrifying rapes involving women of color were ignored by the media.¹³⁹ Professor Crenshaw, a feminist and law professor at the University of California, points out that:

department she [would]. He [would] see to it.

Id.

¹³¹ See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U.L. REV. 817 (1993).

¹³² *Id.* at 819.

¹³³ *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

¹³⁴ *Id.* at 417.

¹³⁵ *Continental Can Co. v. Minnesota*, 297 N.W.2d 241 (1980).

¹³⁶ *Id.* at 246; see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271-72 (1991) (explaining the origins and significance of sexualized images of African-American women):

Sexualized images of African Americans go all the way back to Europeans' first engagement with Africans. Blacks have long been portrayed as more sexual, earthier, more gratification-oriented. These sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, the Madonna's from the whores. Thus black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. The discrediting of Black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of Black women. If these sexual images form even part of the cultural imagery of Black women, then the very representation of a Black female body at least suggest certain narratives that may make Black women's rape either less believable or less important.

¹³⁷ See Crenshaw, *supra* note 136, at 1268-69.

¹³⁸ See Craig Wolff, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1. On April 18, 1989, a young white woman, jogging through New York's Central Park, was sexually assaulted, brutally beaten and left for dead in an attack by what was believed at the time to be perpetrated by several Black men. *Id.*

¹³⁹ Crenshaw, *supra* note 136, at 1265 (citing Don Terry, *In Week of an Infamous Rape, 28 Other Victims Suffer*, N.Y. TIMES, May 29, 1989, at B25). Don Terry stated that "[n]early all the rapes reported during that April week were of black or Hispanic women" but all were unnoticed by the public. See also John Ellement, *8 Teenagers Charged in Rape, Killing of Dorchester Woman*, BOSTON GLOBE, Nov. 20, 1990, at 1. Kimberly Rae Harbour was raped and stabbed more than 100 times by eight members of a local gang. *Id.* The victim was a poor black woman and the Central Park Jogger was an upper-class white woman. *Id.*

[A] sexual hierarchy [exists] that holds certain female bodies in higher regard than others. Statistics from prosecution of rape cases suggest that this hierarchy is at least one significant . . . factor in evaluating attitudes toward [violence against women of color]. A study of rape dispositions in Dallas . . . showed that the average prison term for a man convicted of raping a Black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of an Anglo woman. (citations omitted)¹⁴⁰

The media serves as the primary vehicle in the presentation of racialized gender stereotypes to the world and contributes to the high rate of violence against minority women.¹⁴¹

A statistical analysis of sexual harassment indictments in the United States reveals that there is an "overrepresentation of women of color and [an] 'underrepresentation' of White women in the charging parties when compared with their demographic presence in the female labor force":¹⁴²

White women accounted for only 61.9 per cent of the sexual harassment charges in 1992, even though they made up 84.8 per cent of all women employed in the civilian labor force in that same year. Furthermore, the data indicates an overrepresentation of women of color as complainants in comparison to their representation in the female labor force. Black women, at the time the studied statistics were gathered, made up only 11.5 per cent of all women employed in the civilian labor force and yet they accounted for 14.4 per cent of the sexual harassment charges. Other women of color only made up 3.7 per cent of women employed in the civilian labor force but accounted for 14.7 per cent of the sexual harassment charges.¹⁴³

"In the United States, the amount of variation between the observed numbers of sexual harassment charges by race and the expected number of sexual harassment charges based on racial demographic percentages of the population is considerable for each year of data."¹⁴⁴ The Supreme Court has stated that, for sample sizes larger than thirty, "if the difference between the expected value and

¹⁴⁰ See Crenshaw, *supra* note 136, at 1269 (citing *Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1). A study of 1998 cases in Dallas County's criminal justice system concluded that rapists whose victims were white were punished more severely than those whose victims were Black or Hispanic. *Id.*

¹⁴¹ Hernandez, *supra* note 99, at 184 (explaining that while a "number of factors may be connected to the disproportionate patterns in female sexual harassment filing statistics by race, [the most significant] factor is the powerful influence of racialized gender stereotypes.").

¹⁴² *Id.*

¹⁴³ *Id.* at 186; see also Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the United States: 1993, at 409 (listing total female employment in 1992 at 45,381,000 and white female employment at 38,481,000). See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 114 (1989) (explaining that "sexual harassment is a clear social manifestation of male privilege incarnated in the male sex role that supports coercive sexuality reinforced by male power over the job.").

¹⁴⁴ See Azy Barak, *Cross-Cultural Perspectives on Sexual Harassment*, in SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT 263, 276 (William O'Donohue ed., 1997) (enumerating studies in Zimbabwe, Netherlands, Australia and South Africa that suggest a higher incidence of sexual harassment among women of color).

the observed value is greater than two or three standard deviations," then a social scientist would view the data as not being the result of pure chance.¹⁴⁵ "The average sample size for each year of EEOC data analyzed under this study was 13,051.5, and the average sample size for each circuit of federal cases analyzed was 97."¹⁴⁶ "[T]he standard deviation for white women ranged from 71.5 to 84.4 and from 31.5 to 66.7 for women of color."¹⁴⁷ The statistical likelihood of such a substantial "standard deviation occurring in a normal distribution is zero."¹⁴⁸ Therefore, the link between "rates of sexual harassment and race-based decision-making by harassers" is indisputable.¹⁴⁹ The statistics suggest "that sexual harassers target white women as victims at disproportionately lower rates than women of color."¹⁵⁰

The Supreme Court of Canada has considered and accepted the theory that negative media portrayals of women lead to discrimination and violence against women. In *Regina v. Butler*, the court evaluated the effects of portraying women in degrading or dehumanizing sexual acts.¹⁵¹ The court stated that its "understanding of the harms caused by these materials ha[d] developed considerably" in preceding years.¹⁵² The court concluded that "[i]f true equality between male and female persons is to be achieved we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material."¹⁵³ The court indicated that "materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individuals' sense of self-worth and acceptance"¹⁵⁴ and therefore result in "harm, particularly to women, and therefore society as a whole."¹⁵⁵

III. SOLUTIONS

Minority stories should be told by those who have lived the Latino/Latina or Afro-Latino/Latina experience and the African-American/Black American experience.¹⁵⁶ People of color "need [to] be heard and allowed to influence the

¹⁴⁵ *Castaneda v. Partida*, 430 U.S. 482, 496 (1977).

¹⁴⁶ *Hernandez*, *supra* note 99, at 187.

¹⁴⁷ *See id.*

¹⁴⁸ *See* JAY DEVORE & ROXY PECK, *STATISTICS: THE EXPLORATION AND ANALYSIS OF DATA* 209, 211 (3d ed. 1997) (explaining how the probability that any standard deviation which exceeds 3.89 can practically be considered zero because 99% of the time the variance between an expected value and an observed value is three standard deviations or less, and thus any standard deviation which exceeds that range is an extreme probability); *see also* R.A. FISHER, *STATISTICAL METHODS FOR RESEARCH WORKERS* 43 (1946) (observing that the frequency of standard deviations beyond three are exceedingly small).

¹⁴⁹ *Hernandez*, *supra* note 99, at 187.

¹⁵⁰ *Id.*

¹⁵¹ *Regina v. Butler*, 89 D.L.R. 4th 449 (1992).

¹⁵² *Id.* at 478.

¹⁵³ *Id.* at 479.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 467.

¹⁵⁶ *See* Mathew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293 (1991).

majority culture.”¹⁵⁷ The FCC must devise a regulatory system that incorporates minority perspectives by actively implementing policies that encourage minority participation. The FCC must re-institute its EEO policies and challenge the court's assertion in *MD/DC/DE Broadcasters Ass'n, et al* that it would apply its EEO rules in an unconstitutional manner. The FCC should therefore encourage studios, networks and newspapers to include more representations that challenge the cultural stereotype.¹⁵⁸ An isolated counterexample may be dismissed as an aberration or considered an exception to the rule. Several counterstereotypic examples spread over time are necessary to slowly eradicate cultural and racial stereotypes. Diversity is an important governmental interest, and the FCC must assist in the implementation of this interest.¹⁵⁹

Furthermore, Congress should reinstitute the tax-certificate program, the ascertainment policy, logging requirements, and minority preferences in comparative hearings for initial granting of licenses and renewals.¹⁶⁰ The FCC should also subject licensees to rigid scrutiny to determine whether the licensees have sufficiently conformed to the rules and regulations, meriting license renewal. The FCC should only grant renewals upon a showing of evidence that: (1) the licensees made a “good faith effort” in broadcasting high-quality programs during times when children are most likely to watch television; (2) the licensees properly informed advertising-time purchasers of the quality of those programs; and (3) the licensees adhere to their responsibility as trustees of the public interest. This approach should revive public participation as a factor when granting licenses.¹⁶¹

The reestablishment of the tax certificate and distress sale program is necessary to permit minorities to take part in licensing practices.¹⁶² The purpose of

Spitzer explains the claim that nonwhites and women speak with a different “voice.” *Id.* Voice is interpreted as meaning that women and minorities experience life in different ways than do white men and that these different experiences manifest themselves in a different set of perceptions and perhaps normative descriptions of reality. *Id.* See also Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (suggesting that liberal white law professors should stop writing about civil rights so that minorities could express themselves instead); see also Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) (showing how minority status might make a difference in how people view the world around them).

¹⁵⁷ Rogovin, *supra* note 10, at 53.

¹⁵⁸ Worthy, *supra* note 8, at 523.

¹⁵⁹ See *Metro Broadcasting*, 497 U.S. at 583. The results of a Content/Ownership Study conducted by the FCC proved that minority-owned radio stations were far more likely to choose a program format that appeals particularly to a minority audience, to provide news and public affairs programming on events or issues of particular concern to minorities, to report greater diversity of on-air talent, and to tailor the stories to minority community concerns.

¹⁶⁰ See Press Release, Federal Communications Commission, *Studies Indicate Need to Promote Wireless & Broadcast License Ownership by Small, Women and Minority-Owned Businesses* (December 12, 2000). FCC Chairman William E. Kennard explained that the tax-certificate program is recognized as having had the greatest impact in lowering barriers for minority broadcasters. *Id.* Also, a study conducted by the FCC shows that the repeal of the program, which from 1978 until its repeal in 1995 provided tax incentives to encourage firms to sell broadcast licenses to minority owned firms, has had a severe negative impact on minorities' ability to obtain new stations. *Id.*

¹⁶¹ Mao, *supra* note 7, at 540.

¹⁶² *Id.* at 538.

the tax certificate program is to increase the number of broadcasting stations owned by minorities, while giving the seller a benefit: if the seller does not retain a benefit then he will not be incentivized to sell to a minority purchaser.¹⁶³ Minorities will benefit from the reinstatement of the comparative hearing procedures and the reestablished programs will hold up under *Adarand's* strict scrutiny requirement.¹⁶⁴ Furthermore, “[the] existence of the tax certificate and distress sale programs, giving a minority preference, is a ‘compelling government interest in furthering diverse programming in the public interest’”¹⁶⁵ and these programs “are narrowly tailored to further the compelling government interest, because these programs are neither overinclusive nor underinclusive.”¹⁶⁶

Finally, the reinstatement of the ascertainment policy, logging requirement, and long-form renewals is necessary to increase minority participation in media broadcasting. The current ascertainment policy needs to be reformulated to require broadcasters to address the issues the community or public considers important.¹⁶⁷ The logging requirement will facilitate the participation of the viewing public.¹⁶⁸ “Without the logging requirements, petitions to deny or complaints are useless due to lack of evidence of the broadcaster’s past performance.”¹⁶⁹ The logging requirements are necessary to ensure that broadcasters respond effectively to the public’s needs.¹⁷⁰ The same analysis applies to the long-form renewals: “The present postcard size, five question, renewal is ineffective in allowing practical public participation.”¹⁷¹

The FCC needs additional financial resources to reinstate these proposals.¹⁷² Therefore, the FCC should bill broadcasters an annual fee for their licenses.¹⁷³ The broadcast industry is a prosperous industry, and they can afford to pay additional fees. Many public goods are paid for and the broadcasting industry should not be exempted. Furthermore, broadcasters who can sufficiently

¹⁶³ See generally Spitzer, *supra* note 156.

¹⁶⁴ See *Adarand Constructors, Inc.*, 515 U.S. at 227.

¹⁶⁵ Mao, *supra* note 7, at 538.

¹⁶⁶ See *id.* at 539 (explaining that “[t]he public is the true owner of the air waves and the interest of the public is paramount to the interest of the broadcasters.”).

¹⁶⁷ See Mao, *supra* note 7, at 540.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Press Release, Federal Communications Commission, Studies Indicate Need to Promote Wireless & Broadcast License Ownership by Small, Women and Minority-Owned Businesses (Dec. 12, 2000) (explaining that Congress should also substantially increase funding for the Telecommunications Development Fund to address the lack of capital owned by small, minority-owned businesses. Minorities repeatedly report encountering discrimination in their efforts to obtain capital to finance their broadcast and wireless businesses, discrimination in securing advertising on their stations, and discrimination by members of their communities along with members of the communications industry. Furthermore, minority-owned businesses report that the market consolidation permitted by the relaxation of the FCC’s ownership rules has created nearly insurmountable obstacles to those seeking to enter or even survive as a small player in the broadcast industry.).

¹⁷³ See Mao, *supra* note 7, at 540.

demonstrate that they have programmed and performed their duties to the community could pay a reduced annual fee as well.¹⁷⁴ This proposal can be instituted if the ascertainment policy, logging requirement, and long-form renewals are re-instituted. Broadcasters in general must recognize that they have responsibilities to the communities in which they hold broadcast licenses. Furthermore, they must take an active role in catering their services to the community in which they are located by incorporating a more diverse range of viewpoints. Providing minorities with the opportunity to present realistic accounts of themselves will begin the slow process toward the elimination or reduction of negative stereotypes.

CONCLUSION

Despite the FCC's emphasis on diverse control of the media, their policies over the past thirty years have failed to include minority voices which must be heard in order to influence the majority culture.¹⁷⁵ The FCC must devise a regulatory system that incorporates minority perspectives by actively implementing policies that encourage minority participation in the broadcast industry. The majority culture presents images of minorities that perpetuate preconceived notions of minorities. Many white Americans, due to a lack of exposure to accurate portrayals of minorities, carry beliefs about minorities that have no basis in reality. The FCC must reinstate its EEO policies and challenge the court's assertion in *MD/DC/DE Broadcasters Ass'n, et al* that it would apply its EEO rules in an unconstitutional manner. Diversity is an important governmental interest and the FCC must assist in the implementation of this interest.

¹⁷⁴ *See id.*

¹⁷⁵ Rogovin, *supra* note 10, at 53.