

3-2003

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Recommended Citation

Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. Rich. L. Rev. 819 (2002).

Available at: <https://scholarship.richmond.edu/lawreview/vol37/iss3/8>

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RACIAL STEREOTYPES, BROADCAST CORPORATIONS, AND THE BUSINESS JUDGMENT RULE

Leonard M. Baynes *

I. INTRODUCTION

The major networks have received a great deal of criticism for the absence of, and stereotyping of, people of color who appear on their prime-time television shows.¹ Many more African American characters appear on television series today than at any other time in television's previous history.² African Americans comprise

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The author acknowledges all the helpful comments that he received when he delivered a prior draft of this manuscript at the June 2002 Sloan Institute Retreat in Chantilly, Virginia.

More specifically, this author would like to thank the following for all their helpful comments: John Armour, Larry Cata Backer, William W. Bratton, Simon Deakin, Michael Diamond, Claire Moore Dickerson, Gregory K. Dow, Ernie Englander, Lisa Fairfax, Kim Ford Mezrui, Eric Gouvin, Kent Greenfield, Daniel J.H. Greenwood, Sharon Livesey, Allen Kaufman, Michael S. Knoll, Peter Kostant, Sue Kozelmann, Larry Mitchell, Marleen O'Connor, Alfreda Robinson, Hillary Sale, Robert Sitkoff, Susan Stabile, Cheryl L. Wade, Cynthia Williams, and Adam Winkler. I also want to thank my research assistants, Kristina Runje and Casey Laffey, for their help with this project.

1. See, e.g., DONALD BOGLE, *PRIME TIME BLUES: AFRICAN AMERICANS ON NETWORK TELEVISION* (2001) (chronicling five decades of portrayals of African Americans in prime time network programming).

2. African Americans also have access to Black Entertainment Television ("BET"), which provides African American entertainment programming, and was until recently a majority black-owned company. Sallie Hofmeister, *Viacom Expands Cable Empire with BET Purchase*, L.A. TIMES, Nov. 4, 2000, at C1. The founder, Robert Johnson, recently sold BET for \$2.34 billion to Viacom. *Id.* 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. See, e.g., Letter from Council of Presidents of the African American Greek Letter Organizations, to Robert Johnson, CEO, Black Entertainment Television 1 (Nov. 2, 2001) (copy on file with author) (threatening a national boycott of BET for failure to operate in the best interests of the African American community); 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, *BET Spared Boycott: Two Sides Meet*, WASH. POST, Dec. 4, 2001, at F6. In addi-

an ever larger and growing segment of the viewing audience.³ Black households watch an average of seventy hours of television per week as compared to fifty hours for viewers overall.⁴

Although today's portrayals of African American characters, at first glance, seem fair and responsible, upon closer examination, one realizes that certain stereotypes still exist.⁵ For instance, in sitcoms the African American characters are more often than not portrayed as the buffoon.⁶ Dr. Camille Cosby conducted a study for the American Psychological Association and found that ethnic minorities were still "negatively stereotyped as criminals, dan-

tion, Aaron MacGruder, the creator of the "hip" comic strip *Boondocks*, has made Robert Johnson and BET's lack of original minority programming the brunt of recurring jokes in his strip. See Paul Farhi, *For BET, Some Static in the Picture*, WASH. POST, Nov. 22, 1999, at C1; 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, 2000, at C1. But see Robert Johnson, *Clear Picture at BET*, WASH. POST, Dec. 11, 1999, at A29. In one strip, Huey, one of the characters, says that he "used to be a firm believer in the economic philosophy of black nationalism," but he is not any more because "BET shot holes in that theory." Farhi, *supra*. In another strip, Huey calls the cable company and says, "I'm watching Black Entertainment Television, but I don't see anyone black and it's not entertaining." *Id.* The cable company operator says that he gets "this complaint all the time." *Id.*

In addition, BET is a cable channel; it does not use the public airwaves to broadcast its signal. Hofmeister, *supra*. Unlike television programming received via broadcast signals, cable subscribers have to pay a fee to receive the service.

3. 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, RACE & JUST. 99, 132 (2000) (citing Mary A. Mitchell, *Disregard for Minorities Is No Network News Flash*, CHI. SUN-TIMES, Sept. 19, 1999, at 22).

4. *Id.* (citing Brian Lowry et al., *Networks Decide Diversity Doesn't Pay*, L.A. TIMES, July 20, 1999, at A1); see also 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 (providing similar statistics of sixty-nine hours per week for black households and forty-seven hours per week for viewers overall).

5. For instance, more African American characters appear in sitcoms than family dramas. See generally ROBIN R. MEANS COLEMAN, *AFRICAN AMERICAN VIEWERS AND THE BLACK SITUATION COMEDY: SITUATING RACIAL HUMOR* 7 (1998) (discussing African Americans and the situation comedy). In sitcoms where the African American 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.

6. *Id.* at 4. Some may say that the television shows that feature predominantly white characters also portray the white characters as buffoons and in stereotypical ways. The Kramer character in *Seinfeld* acts in a buffoonish manner, but after watching the show, the audience will not necessarily come to the conclusion that all whites act like that. An important difference exists in the impact of the portrayal of white and non-white characters. Since so few non-white characters appear on television, they are more likely to leave a lasting impression with the viewing audience. As a consequence, the whole race may be defined by a few bad images. See *id.* at 7–8.

gerous characters, or victims of violence.”⁷ Dr. Cosby found that “negative television imageries of African-Americans instruct African-Americans to hate themselves. . . . [and] instruct other ethnic people to dislike African-Americans.”⁸

The situation is even worse for the other major minority groups in the United States.⁹ For example, the networks have a lot of work to do with respect to the portrayal of Latinos on television.¹⁰ Too few depictions of America’s fastest growing minority exist on television today.¹¹ Many of these depictions are still very negative.¹² There are hardly any portrayals of Asian Pacific Americans or Native Americans on television, and many of those have also been stereotypical.¹³

Because people of color are a small minority in the United States, many individuals are likely to learn about minority groups from television.¹⁴ Therefore, those limited impressions (especially those that reinforce negative stereotypes) are indelibly etched in many viewers’ minds.¹⁵

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

8. *Id.* Dr. Camille 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, Unhappy non-White, Natural-born cook, Perfect entertainer, Superstitious churchgoer, Chicken and watermelon eater, Razor and knife ‘toter,’ Uninhibited expressionist, Mentally inferior, and Natural-born musician.” *Id.* at 36–37 (citing Nagueyatti Warren, *From Uncle Tom to Cliff Huxtable, Aunt Jemina 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 (J.C. Smith ed., 1988)).

9. See discussion *infra* Part II.E.

10. See discussion *infra* Part II.E.3.

11. See Valerie Block, *Advertising Darlings: Amid Slump, Ethnic Media Continues to Climb*, CRAIN’S N.Y. BUS., Sept. 3, 2001, at 3, available at 2001 WL 7065096. Latinos are anticipated to be America’s largest minority in the next few years. *Id.* Spanish language channels like TeleMundo, Univision, and Gala are available on cable, and some Latino-themed shows are also available on cable, such as Showtime’s *Resurrection Blvd.* See *Resurrection Blvd.* Web site, at <http://www.sho.com/resblvd/> (last visited Jan. 24, 2003). However, those cable channels and shows are not free like broadcast television. Moreover, to the extent that the Spanish-language cable channels are directed solely at Spanish-speaking Latinos, they preclude access to Latinos who only speak English.

12. Another issue is the portrayal of Latino characters by white actors. For instance, Madonna recently played Evita Peron in the movie, *Evita*. *EVITA* (Disney Studios, 1996).

13. See discussion *infra* Parts II.E.4 and II.E.5.

14. See discussion *infra* Part IV.D.2.

15. 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

This article analyzes whether the broadcast executives who have made decisions as to minority representation on television have violated their duty of care or are protected by the business judgment rule.¹⁶ Executives of major broadcast corporations operate in somewhat unique and complicated environments.¹⁷ These executives have to be concerned not only with profit maximization, but also with the regulatory environment, and their related public interest mandate.¹⁸ These executives also have to monitor their activities closely to ensure that they do not run afoul of any current or future regulatory constraint or liability.¹⁹ Like other executives, they have to worry about maximizing profits.²⁰ For broadcast executives, the road to profit maximization is rather circuitous. These broadcast corporations earn their income based on the number of (and the prices of) commercials they sell for their broadcast programming. Advertisers spend approximately \$31 billion each year on network, local, syndicated, and cable television commercials.²¹ The price and demand for advertising on broadcast programming are a function of the audience share that the particular programming commands.²² The prices and demand are also influenced by the demographics of the audience that a particular programming reaches.

Advertisers are interested in programming that appeals to a young and affluent audience.²³ The “right demographics” usually

J. GENDER RACE & JUST. 37, 41 (2000) (discussing the effects of stereotyping on targeted groups).

16. In the article *WHITEOUT: The Absence and Stereotyping of People of Color by the Modern Media*, this author suggests a possible FCC regulatory response to this problem. See Leonard M. Baynes, *WHITEOUT: The Absence and Stereotyping of People of Color by the Modern Media*, 45 ARIZ. L. REV. (forthcoming 2003) (manuscript on file with author).

17. See discussion *infra* Part IV.

18. See ROBERT C. CLARK, CORPORATE LAW 139, 668–94 (1986) (discussing interest group accommodation and furthering the public interest as residual goals of the business corporation). See generally Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (1999).

19. CLARK, *supra* note 18, at 690–91.

20. *Id.* at 688–90.

21. Deborah M. Wilkinson, *Power Beyond the Remote Control*, BLACK ENTERPRISE, Dec. 1996, at 76.

22. See *id.* at 78.

23. 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, available at 2002 WL 2732446.

are “hip teenagers” and eighteen to thirty-four-year-old viewers with years of buying power ahead of them.²⁴ Advertisers are willing to pay a premium for programs that attract that type of audience, partially because viewers in this age group watch less television and are thus harder to reach.²⁵ For example, during the 1999–2000 season, The WB Television Network saw its advertising sales increase by 50% to \$450 million.²⁶ With shows like *Dawson's Creek*, The WB aimed directly at this youth market.²⁷

While that methodology of valuation may make some sense, it fails to take into account the viewer's intensity. Although African Americans represent 12% of the nation's population, they comprise more than 20% of the networks' prime time audience.²⁸ Latinos also watch more television than non-Latinos—4.4 hours per day versus 2.9.²⁹ Unlike cable television where the cable operator is paid directly by the audience for his service, broadcasters' income is derived solely from the advertisers. Therefore, the broadcasters attempt to develop programming that appeals to a large audience, but also satisfies the advertisers' needs.³⁰ This method of compensation does not account for the loyalty and intensity of certain segments of the audience. The divergence of audience size and perspective may lead to conflicts over programming that may have nothing to do with the audience share, and more to do with the advertisers' own predilections and prejudices.³¹ For example, in 1998, advertiser racism and adversity to advertising on minority radio stations was exposed when an internal memo of an ad-

But see Linda Winer, *Critical Mass: Age Jokes Are Getting Old*, NEWSDAY, Apr. 21, 2002, at D2, available at 2002 WL 2739381. Ultimately, David Letterman decided to stay with CBS, and ABC decided to keep *Nightline* for now. Verne Gay, *FLASH: Disney Boss Finally Backs Nightline*, NEWSDAY, Apr. 9, 2002, at A12, available at 2002 WL 2737313.

24. 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.

25. *Id.*

26. *Id.*

27. *Id.*

28. BOGLE, *supra* note 1, at 406 (citing a 1990 Nielsen study, which revealed that, although the overall audience for the networks declined, African Americans were watching television in much larger numbers). Non-African American households watched an average of forty-seven hours a week of television, whereas African American households averaged nearly seventy hours of television watching per week. *Id.*

29. Meg James, *Suitors Stay Tuned for Univision's Next Move*, L.A. TIMES, Nov. 4, 2001, at C1 (citing a survey by Strategic Research Corp. of Miami).

30. *See* Lowry et al., *supra* note 24.

31. *See* Block, *supra* note 11.

buying firm, Katz Media Group, was leaked to the press.³² The memorandum directed salespeople not to place ads with ethnic media because advertisers wanted “prospects, not suspects.”³³

The federal government actually owns the frequencies through which broadcasters transmit their signals.³⁴ The Federal Communications Commission (“FCC”) now allocates licenses to broadcasters through a competitive bidding process, whereby the highest bidder gains an eight to ten year license to operate its frequency in the airwaves.³⁵ Technically, the broadcaster does not own the frequency and is obligated to operate its facilities in the “public interest, convenience, and necessity.”³⁶ The concept of “public interest” is very elastic and has no clear definition.³⁷ Broadcast licenses theoretically can be revoked or not renewed, but the FCC has very infrequently revoked broadcast licenses.³⁸

The broadcast executives have to be aware and mindful of FCC regulations, and also the threat (albeit somewhat limited) of license revocation for failure to comply with such regulations.³⁹ The broadcasters also have to operate in the public interest, a concept which is ill defined.⁴⁰ However, some of the public interest con-

32. *Id.*

33. *Id.*

34. See discussion *infra* Part IV.D.1.

35. See 47 U.S.C. § 309(j) (2000). Historically, the FCC allocated these licenses through the comparative hearing process whereby the FCC would determine through hearings which applicant was the best qualified to hold a license. See Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 MICH. J.L. REFORM 87, 91–94 (2000).

36. 47 U.S.C. § 303 (2000).

37. It is not entirely clear where the term “public interest, convenience, or necessity” originated. Allegedly, Senator Clarence C. Dill told former FCC Chairman Newton Minow that the drafters of the Communications Act could not reach an agreement on statutory language, therefore, a young lawyer who had worked at the Interstate Commerce Commission proposed the words “public interest, convenience, and necessity” because they were used in other Federal statutes. NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 4 (1995).

38. Sixty-four radio and television licenses were revoked between 1970 and 1978, compared with seventy-eight during the years 1934 to 1969. Frederick A. Weiss et al., *Station License Revocations and Denials of Renewal, 1970–1978*, 24 J. BROAD. 69, 69 (1980).

39. *But see, e.g.*, *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998) (invalidating FCC equal employment opportunity rules on the grounds that the goals were likely to make the broadcasters comply because of concern over the FCC’s ability to sanction the broadcaster by revoking licenses).

40. See discussion *infra* Part IV.D.

tours were clearer in a more regulated environment.⁴¹ Since the courts have invalidated (and the FCC has repealed) some of these rules, the exact scope of the public interest requirement is less clear, but such uncertainty makes it much more difficult for the broadcasters.⁴² As a consequence, the broadcasters may inadvertently compromise their public interest mandate.⁴³

Unlike many other corporations, broadcasters have a great deal of exposure to the public. Ninety-eight percent of the U.S. population has at least one television in their home.⁴⁴ In many parts of the country, there are several broadcasters in one geographic market. These broadcasters air programming sometimes twenty-four hours a day, seven days a week.

Broadcasters are in a unique situation when it comes to the business judgment rule and the fiduciary duty of care because the corporate executives have to balance each of these interests, i.e., profit maximization, the regulatory environment, their public interest mandate, and their image and reputation in the commu-

41. The FCC regulation of broadcasters consisted of the following: (1) the Fairness Doctrine required the broadcasters, in reporting a controversial issue, to provide opposing viewpoints on both sides of a controversial issue; (2) the Personal Attack Rules required the broadcasters, when reporting on a controversial issue, to allow an individual who was attacked as to his or her character, honesty, or integrity to have an opportunity to respond during that coverage; and (3) the Political Editorial Rules required broadcasters, when they endorsed a candidate for office or a particular political position, to give those with opposing views an opportunity to respond. *See generally* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.18, at 90–94 (2d ed. 1992 & Supp. 1999) (discussing the Fairness Doctrine and the regulation of the broadcast media).

In addition, broadcasters were required to ascertain the needs of the community. *See id.* at 93. They were supposed to keep detailed records of what they actually broadcast. *See id.* Further, there were severe limits on the number of stations that broadcasters could own nationally and locally. *See generally* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 181–85 (2002) (discussing the Chain Broadcasting Rules).

Many of these regulations have been invalidated by the courts or repealed by the FCC.

42. The FCC still regulates the broadcasters as to programming for children and indecency. *See* Media Bureau, Federal Communications Commission, *The Public and Broadcasting* (June 1999) at http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html (last visited Jan. 24, 2003). There are also rules regulating political broadcasting and advertising. *Id.* In addition, the “public interest” invariably requires that broadcasters not violate any other existing laws or public policy. *See id.*

43. *See* discussion *infra* Part IV.D.1.

44. Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 162 n.13 (1984).

nity.⁴⁵ Each of these interests is rationally related to the corporate executives' duties to the shareholders.⁴⁶

The *Smith v. Van Gorkom*⁴⁷ case teaches us that the board of directors and the senior executives of the corporation have to make fully informed decisions.⁴⁸ The broadcast executives may lose the protection of the business judgment rule if they fail to consider each of the above factors, and, therefore, may be liable for a violation of the duty of care.⁴⁹ So if the broadcast executives have never made a deliberate decision as to whether to have minority programming, they would not be protected from liability under the business judgment rule.⁵⁰ If they made a decision not to broadcast minority programming for discriminatory reasons, they would not be protected from liability under the business judgment rule.⁵¹ If they failed to consider profit maximization in their decision making, they also could be found to violate their duty of care.⁵² And if they made a decision that was not fully informed—like focusing solely on profit maximization and not other factors like the regulatory environment, their public interest mandate, and their image and reputation in the community—they would not be protected from liability by the business judgment rule.⁵³

This article explores the unique and complex challenges faced by the broadcasters with respect to people-of-color-focused entertainment programming. In Part II, the article explores the historic and recent controversies dealing with minority characters on broadcast television. In Part III, the article lays out the current standard for breach of the duty of care and the business judgment rule. In Part IV, the article analyzes whether the broadcasters' decision making is protected by the business judgment rule or violates the duty of care. In Part V, the article concludes that, based on all the information available to date, the broadcasters'

45. See discussion *infra* Part IV.

46. See generally *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) (holding that concern for corporate constituencies should be rationally related to a benefit for the stockholders).

47. 488 A.2d 858 (Del. 1985).

48. *Id.* at 872–73; see also *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981).

49. *Smith*, 488 A.2d at 872–73.

50. See discussion *infra* Part IV.B.1.

51. See discussion *infra* Part IV.A.2.

52. See discussion *infra* Part IV.A.1.

53. See discussion *infra* Part IV.B.

actions with respect to minority representation and stereotypes are unprotected by the business judgment rule and they have therefore violated the duty of care. The network executives have lost the protection of the business judgment rule, because of the type and quality of the decision making in determining the network schedules and the programming of minority-themed television shows. They would have been protected by the business judgment rule if they had made stupid decisions or well-considered, nondiscriminatory decisions to broadcast their current mostly all-white program line-up. But, given the publicly available evidence, the broadcast executives have either made irrational or not fully informed decisions. The article then suggests and supports the decisions of several of the major broadcasters to establish an oversight panel to evaluate their programming. The panel should of course consist of representatives of all interested parties in the current controversy, so that any decisions are truly representative and fully informed.

II. THE CONTROVERSY OVER CHARACTERS OF COLOR OR THE LACK THEREOF

In the fall of 1999, the then-new broadcast television schedule was announced and of the twenty-six new shows, none starred an African American, Asian American, Latino, or Native American in a starring role, and few featured people of color in secondary roles.⁵⁴ Until recently, the major networks have not had a specific policy with respect to the depiction of people of color.⁵⁵ Rather, they have basically dealt with the issue on a protest-by-protest basis.⁵⁶ The broadcasters in the 1940s and 1950s were concerned about the reaction of Southern audiences to certain race-themed programming.⁵⁷ In several instances, these Southern affiliated stations refused to broadcast African American themed programming.⁵⁸

54. Williams, *supra* note 3, at 100 (citing Greg Braxton, *A White, White World on TV's Fall Schedule*, L.A. TIMES, May 28, 1999, at A1); see also Liz Leyden, *NAACP's Mfume Warns of TV Boycott*, WASH. POST, Nov. 4, 1999, at C7.

55. See generally KATHRYN C. MONTGOMERY, *TARGET: PRIME TIME, ADVOCACY GROUPS AND THE STRUGGLE OVER ENTERTAINMENT TELEVISION* 15 (1989).

56. See, e.g., *id.* at 14.

57. *Id.* at 15.

58. *Id.* Networks needed to have their programs carried in many cities to assure that

From 1955 to 1964, 2% of all television characters were Latino, 1% were Asian American, and .5% were African American.⁵⁹ From 1967 to 1975, the portion of African American characters increased to 7%.⁶⁰ During the 1990s the percentage of Latino characters decreased to 1% while the number of African American characters increased to approximately 14% of the portrayals.⁶¹ This increase in African American characters and shows on broadcast television was primarily the result of the Civil Rights Movement of the 1960s.⁶²

A. *The Early Years*

In 1948, an African American entertainer named Bob Howard starred in his own fifteen-minute, nightly program called *The Bob Howard Show* on the New York CBS affiliate.⁶³ Bob Howard sang and danced on his program.⁶⁴ CBS seemed unconcerned about any adverse consequences from airing the program.⁶⁵ But many of the early character performances bolstered the status quo. For example, *Beulah* was a show that depicted a large, dark-skinned African American woman in the role of a maid to a middle-class, white family.⁶⁶ The *Beulah* character was a throwback to the "Mammy" of the Old South. She was the all-knowing, good-natured, docile African American servant who took care of the

advertisers would reach the national market that they had been guaranteed. The reluctance of Southern affiliated stations to carry positive race-themed programming heavily influenced broadcasters. See *id.* This past discriminatory behavior may make a case for demanding reparations from these corporations. See, e.g., Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 52 RUTGERS L. REV. (forthcoming 2003) (on file with author).

59. S. ROBERT LICHTER ET AL., PRIME TIME: HOW TV PORTRAYS AMERICAN CULTURE 337 (1994) [hereinafter PRIME TIME].

60. *Id.* at 339.

61. See NATIONAL COUNCIL OF LA RAZA, OUT OF THE PICTURE: HISPANICS IN THE MEDIA, STATE OF HISPANIC AMERICA 1994 2 fig.1 (1994).

62. MONTGOMERY, *supra* note 55, at 22.

63. BOGLE, *supra* note 1, at 13.

64. *Id.* at 14.

65. *Id.*

66. *Id.* at 19. The *Beulah* character first appeared on radio in 1939 in the show *Homeward Incorporated*. *Id.* In 1945, CBS spun the character off into her own show on radio. *Id.* In October 1950, ABC broadcast the weekly, half-hour sitcom as a television program. *Id.* at 20. On radio, the *Beulah* lead character was portrayed by a white male, which was both culturally disturbing and an oppressive deletion of both race and gender. See COLEMAN, *supra* note 5, at 63.

master and his family without regard to her own needs and desires.⁶⁷

Amos 'n' Andy was a show that depicted the experiences of two African American men “who had migrated from the South to the North.”⁶⁸ These men were known for being “bumbling, stumbling, and dim-witted.”⁶⁹ In 1928, the radio program was first aired fifteen minutes each night.⁷⁰ The characters were first played by white actors, speaking in what was supposed to be a thick African American dialect.⁷¹ The show was immensely popular.⁷² When the program aired, then-President Calvin Coolidge insisted that he not be disturbed.⁷³ George Bernard Shaw said, “There are three things that I shall never forget about America—the Rocky Mountains, Niagara Falls, and *Amos 'n' Andy*.”⁷⁴

On June 28, 1951, the show premiered on CBS television.⁷⁵ The television characters were very similar to the ones on radio, except African American actors starred in the title roles.⁷⁶ The characters were always trying to “get over” without doing very much work.⁷⁷ They were unintelligent, loud, common, and vulgar.⁷⁸ Like the radio program, the television series was also a ratings success.⁷⁹

After the first broadcast of the television show, the New York chapter of the National Association for the Advancement of Colored People (“NAACP”) criticized *Amos 'n' Andy* for “the perpetuation of stereotyped characterizations.”⁸⁰ At the NAACP national convention in 1951, the NAACP denounced the series.⁸¹ The NAACP listed its grievances in a document entitled, “Why

67. COLEMAN, *supra* note 5, at 64.

68. BOGLE, *supra* note 1, at 27.

69. *Id.*

70. *See id.*

71. *See id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 31.

76. *See id.* at 28–29.

77. *Id.* at 32.

78. *See id.* at 34.

79. *Id.* at 32.

80. *Id.*

81. *Id.* at 32–33.

the *Amos 'n' Andy* TV Show Should Be Taken Off the Air.”⁸² The NAACP also sought an injunction in federal court to prevent CBS from broadcasting *Amos 'n' Andy*.⁸³ The show also received criticism from the reviewers.⁸⁴ *Variety* wrote:

Considering that this is the first major use of [African Americans] in commercial broadcasting, the [broadcasters'] responsibility was two-fold: (1) not to offend the sensibilities of a large segment of the U.S. population; (2) and to present them honestly without caricaturing weaknesses that are inherent in any human, regardless of race or color.⁸⁵

82. *Id.* at 33. The grievances consisted of the following:

It tends to strengthen the conclusion among uninformed and prejudiced people that [African Americans] are inferior, lazy, dumb, and dishonest.

Every character in this one and only TV show with an all-[African American] cast is either a clown or a crook.

[African American] doctors are shown as quacks and thieves

[African American] lawyers are shown as slippery cowards, ignorant of their profession and without ethics.

[African American] women are shown as cackling, screaming shrews, in big-mouth close-ups, using street slang, just short of vulgarity.

All [African Americans] are shown as dodging work of any kind.

There is no other show on nation-wide television that shows [African Americans] in a favorable light. Very few first-class [African American] performers get on TV and then only as a one-time guest.

Amos 'n' Andy on television is worse than on radio because it is a *picture*, a living, talking, moving *picture* of [African Americans], not merely a story in words over a radio loudspeaker.

Millions of white Americans see this *Amos 'n' Andy* picture of [African Americans] and think the entire race is the same.

Millions of white children learn about [African Americans] for the first time by seeing *Amos 'n' Andy* and carry this impression throughout their lives in one form or another.

Since many whites never meet any [African Americans] personally, never attend any lectures or read any books on the race problem, or belong to any clubs or organizations where intergroup relations are discussed, they accept the *Amos 'n' Andy* picture as the true one.

An entire race of 15,000,000 Americans is being slandered each week by this one-sided caricature on television, over the Columbia Broadcasting System, sponsored by Blatz Brewing Company, to advertise and sell Blatz beer.

Id. (quoting NAACP Bulletin, *Why the Amos 'n' Andy TV Show Should Be Taken Off the Air* (Aug. 15, 1951) (on file with the Schamburg Center for Research in Black Culture)).

83. *Amos 'n' Andy Show*, at <http://www.museum.tv/archives/etv/A/htmlA/amosnandy/amosnandy.htm> (last visited Jan. 24, 2003). *But see* E-mail from Sandford Kryle, Vice President and General Counsel, CBS Television, to Stanley Conrad, Research Librarian, St. John's University School of Law (Sept. 13, 2002, 14:06:00 EST) (on file with author) (“CBS voluntarily withdrew the series from distribution as a result of an understanding reached with the NAACP. There was no lawsuit.”).

84. *See* BOGLE, *supra* note 1, at 32.

85. *Id.* (quoting Rose, *Television Reviews Amos 'n' Andy Show*, VARIETY, July 4, 1951,

The protests continued for two years, and then CBS, bowing to pressure, canceled *Amos 'n' Andy* in 1953.⁸⁶ Although it was canceled, the program continued in syndication until 1966.⁸⁷ CBS agreed to withdraw the show from syndication after five years of litigation by the NAACP.⁸⁸

In 1956, NBC debuted *The Nat "King" Cole Show*.⁸⁹ Nat "King" Cole was a polished, debonair, and silky smooth singer.⁹⁰ His style was compared to Frank Sinatra and Bing Crosby.⁹¹ Every week, Cole would perform standard pop tunes.⁹² He would have guest stars such as Pearl Bailey, Peggy Lee, and Cab Calloway, and critics loved the show.⁹³ *Variety* wrote that "[h]e was completely at ease on the opening stanza and dished out lotsa [sic] charm in song and speech."⁹⁴ However the show's ratings were low.⁹⁵ Many Southern affiliates refused to carry the show because it was not a comedy, and it had a diverse group of guests and regular performers.⁹⁶ One Birmingham, Alabama television station manager said, "I like Nat Cole, but they told me if he came back on they would bomb my house and my station."⁹⁷ The show also suffered from a lack of advertising revenue because sponsors were afraid "that Southern viewers would boycott their products."⁹⁸ Since Cole was popular in the entertainment industry, many stars agreed to perform on his show at payments well below what they ordinarily would earn.⁹⁹ NBC stayed with the show until December 1957.¹⁰⁰ When the show was canceled, Cole blasted

at 37).

86. *Id.* at 40.

87. *Id.* In 1963, CBS attempted to sell the syndication rights to the African nations of Kenya and Nigeria. *Id.* Later, Kenya announced that *Amos 'n' Andy* would be banned in that country. *Id.*

88. *See id.*

89. *Id.* at 74.

90. *See id.* at 75.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* (quoting Gros, *Television Review: Nat King Cole*, VARIETY, Nov. 7, 1956, at 33).

95. *Id.*

96. *See id.* at 76.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 77.

Madison Avenue for their lack of support.¹⁰¹ He said that the advertisers “didn’t want their products associated with [African Americans].”¹⁰²

When Lucille Ball proposed that her then real-life husband Desi Arnaz play her television husband on the *I Love Lucy* show, the network made her take the concept on the road.¹⁰³ The network was concerned that the viewing audience would not accept Desi Arnaz as Ms. Ball’s television husband because he was Cuban American.¹⁰⁴ The network finally agreed to let her star in the show with her husband, and the show went on to be one of the most successful shows in the history of television.¹⁰⁵

B. *The 1960s*

In the 1960s, the television networks attempted to be more socially conscious.¹⁰⁶ In 1963, CBS debuted the drama *East Side, West Side* starring George C. Scott and Cicely Tyson as social workers.¹⁰⁷ The characters confronted problems of urban renewal, blockbusting, rape, and mental disability.¹⁰⁸ The show lasted for only one season, and was canceled for low ratings.¹⁰⁹ The producer, David Susskind, alleged that CBS dropped the show because twenty-six Southern affiliates refused to broadcast an integrated program.¹¹⁰ Speaking of Ms. Tyson’s character, Susskind stated that “in her role as a social worker’s aide, [she] had frequent disputes with her white co-star. They don’t like that down South.”¹¹¹

101. *Id.*

102. *Id.*

103. See RICK MITZ, *THE GREAT TV SITCOM BOOK* 41, 43 (1980) (discussing the reluctance of TV executives in casting Desi Arnaz as Lucille Ball’s TV husband).

104. 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, available at 1995 WL 5668676.

105. See *PRIME TIME*, *supra* note 59, at 112.

106. See *BOGLE*, *supra* note 1, at 108–11 (discussing *East Side, West Side*’s portrayal of various social issues).

107. *Id.*

108. *Id.*

109. *Id.* at 112.

110. *Id.* CBS denied the allegations, but acknowledged that several Southern affiliates refused to carry the show for the entire season. *Id.*

111. *Id.*

During this time, Bill Cosby and Diahann Carroll became major leads in television shows.¹¹² Bill Cosby starred in the buddy spy drama entitled *I Spy* with Robert Culp.¹¹³ They were two international secret agents working for an unidentified government agency who traveled undercover in foreign countries.¹¹⁴ Network executives and sponsors were uneasy about executive producer Sheldon Leonard's idea of casting an African American actor opposite a white one in a television drama.¹¹⁵

Even after Leonard sold the networks on the idea, many remained uneasy about the interracial casting.¹¹⁶ For example, "would the two men ride in the front seat of car?"¹¹⁷ Would they go out on double dates together?¹¹⁸ Would they share a room in a hotel together?¹¹⁹ Would there be any incidents when Cosby's character would be denied service because of his race?¹²⁰ The show was a ratings success, usually ending up in the top twenty shows.¹²¹ NBC announced that 180 affiliates carried the show, but several affiliates in the South failed to carry the show.¹²² Unlike the situation with *The Nat "King" Cole Show*, *I Spy* found sponsors.¹²³ Cosby received a great deal of critical acclaim for his performance in *I Spy*, including three Emmy awards for outstanding continued performance by an actor in a drama.¹²⁴

112. COLEMAN, *supra* note 5, at 84, 86.

113. *Id.* at 86. Cosby played an articulate "Rhodes Scholar who trained world-class tennis players, wrestled foes, saved lives, and counseled religious and political leaders." *Id.* Cosby's role had been criticized for its conformity to white culture as opposed to highlighting African American culture. *See id.* at 87.

114. BOGLE, *supra* note 1, at 115.

115. *Id.* at 118.

116. *See id.* at 119.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 121.

122. *See id.* In 1966, the D.C. Circuit took the unprecedented step of overturning an FCC ruling by vacating a grant of a license to a television licensee in Jackson, Mississippi. *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994, 1009 (D.C. Cir. 1966). It was alleged that during the civil rights debate, the licensee failed to broadcast network news feeds on civil rights demonstrations and failed to present both sides of an issue in accordance with the Fairness Doctrine. *Id.* at 998-99. The *United Church of Christ* case, therefore, must have encouraged Southern licensees not to discriminate against programs with African American actors.

123. BOGLE, *supra* note 1, at 121.

124. GEORGE H. HILL & SYLVIA SAVERSON HILL, *BLACKS ON TELEVISION: A*

In 1968, NBC premiered *Julia*.¹²⁵ Actress Diahann Carroll starred in the title role and portrayed a widowed nurse with a young son.¹²⁶ The character lived and worked in a fully integrated setting.¹²⁷ Her show was the first show that revolved around the life of an African American character who was the series star.¹²⁸ Her show had the highest ratings for its time slot.¹²⁹ Ms. Carroll also received an Emmy nomination for outstanding continued performance by an actress in a situation comedy.¹³⁰ However, the show had a lot of critics.¹³¹ Robert Lewis Shayon of *The Saturday Review* “denounced *Julia* for its sugarcoated portrait of Black lives completely untouched by contemporary politics or current history.”¹³² He later stated that the show “distorts reality and deals in double-truth.”¹³³ There were also concerns that the title character was a single mother, and no strong African American male figure was involved in the household.¹³⁴

C. The 1970s

In the 1970s, the networks had a number of shows that were ratings hits, which starred African Americans.¹³⁵ They were the self-titled variety show starring the comedian Flip Wilson and three seminal situation comedies entitled *Sanford and Son*, *Good Times*, and *The Jeffersons*.¹³⁶ Each were assailed by African

SELECTIVELY ANNOTATED BIBLIOGRAPHY 3, 4 (1985); *I Spy*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003).

125. BOGLE, *supra* note 1, at 142.

126. COLEMAN, *supra* note 5, at 84.

127. BOGLE, *supra* note 1, at 145; *see also* COLEMAN, *supra* note 5, at 85 (discussing the portrayal of *Julia*'s world as one without racial hostility or economic and political conflicts despite the prevalent civil rights movement, the murder of civil rights workers, and the assassination of Dr. Martin Luther King).

128. *See* BOGLE, *supra* note 1, at 140.

129. *Id.* at 145.

130. HILL & HILL, *supra* note 124, at 4; *Julia*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003).

131. BOGLE, *supra* note 1, at 142, 145.

132. *Id.* at 142; *see* Robert Lewis Shayon, “*Julia*: Breakthrough or Letdown?”, *SATURDAY REV.*, Apr. 20, 1968, at 49.

133. BOGLE, *supra* note 1, at 142 (quoting Robert Lewis Shayon, “*Julia*: A Political Relevance?”, *SATURDAY REV.*, July 20, 1968, at 37).

134. *Id.* at 145.

135. PRIME TIME, *supra* note 59, at 349.

136. *Id.* at 348–49. *Sanford and Son*, *The Jeffersons*, and *Good Times* were among the top seven rated shows during the 1974–1975 season. *Id.*

American critics for the stereotypical portrayal of African Americans.¹³⁷

The Flip Wilson Show drew an audience of forty million viewers.¹³⁸ It was the number one variety show and number two in overall ratings.¹³⁹ Mr. Wilson won an Emmy award for Outstanding Writing in Variety or Music Programs.¹⁴⁰ The show was broadcast for four years.¹⁴¹ Some African American intellectuals believed that Wilson's characters, especially Geraldine and Reverend LeRoy, were repackaged stereotypes.¹⁴²

Sanford and Son premiered on NBC in 1972.¹⁴³ The series revolved around an African American junk dealer and his adult son.¹⁴⁴ The show was a ratings hit and was the most successful African American oriented show on television.¹⁴⁵ Although it never won an Emmy, the show received seven Emmy award nominations during its network run.¹⁴⁶ Actor Redd Foxx received three nominations for outstanding continued performance by an actor in a situation comedy, and the show was nominated in 1972 and 1973 as outstanding comedy series.¹⁴⁷ *Sanford and Son* was so successful that it even spawned two sequels: *The Sanford*

137. See MONTGOMERY, *supra* note 55, at 72. The National Black Media Coalition assailed these situation comedies for being about blacks, but not for them. Pluria Marshall, the head of the National Black Media Coalition, maintained that these shows were not positive images of African American youth and constantly portrayed African American men as "always hav[ing] trouble finding jobs or keeping jobs." *Id.*

138. BOGLE, *supra* note 1, at 180.

139. *Id.*

140. HILL & HILL, *supra* note 124, app. 3 at 198; *The Flip Wilson Show*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003).

141. BOGLE, *supra* note 1, at 182.

142. *Id.* at 181. For example, Lerone Bennett wrote in *Ebony* that:

Who would have believed that the Afros and dashikis would lead to Geraldine?

....

[S]uch a preposterous reversal of images could only happen in a community without a sure sense of the meaning of its experience and the overwhelming power of electronic and film media to distort and debase even the best artistic intentions.

Lerone Bennett, *The Emancipation Orgasm: Sweetback in Wonderland*, EBONY, Sept. 1971, at 106.

143. BOGLE, *supra* note 1, at 188.

144. *Id.*

145. *Id.* at 189.

146. *Sanford and Son*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003).

147. *Id.*

Arms in the 1977 season and *Sanford* in the 1980–1981 season.¹⁴⁸ However, some African American critics were concerned that it was a replay of *Amos 'n' Andy*.¹⁴⁹ The men were portrayed as infantile, lazy, and always trying to “get over.”¹⁵⁰

Good Times revolved around a two-parent family with three children who lived in a tenement on the south side of Chicago.¹⁵¹ The show was “considered a breakthrough because it acknowledged poverty and other urban ills.”¹⁵² At first, some critics praised the show.¹⁵³ Unfortunately, the show’s focus shifted to the oldest son in the family, a character named J.J.¹⁵⁴ He became known as “Kid Dyn-o-mite.”¹⁵⁵ The character became a throwback to *Amos 'n' Andy*. He was shiftless, lazy, outlandishly dressed, and constantly flashing his teeth.¹⁵⁶ Both lead actors, John Amos and Esther Rolle, left the series several years before it concluded its run because they were unhappy with the direction of the show.¹⁵⁷ John Amos’s departure led to criticism that the show was

148. COLEMAN, *supra* note 5, at 90.

149. MITZ, *supra* note 103, at 282. One critic wrote:

Fred Sanford and his little boy Lamont [were] conceived by white minds and based upon a white value system, [they] are *not* strong black men capable of achieving—or even understanding—liberation. They are merely two more American child-men. We—all of us—need to be surrounded by positive—and true—images of blackness based upon black realities, not upon white aberrations.

Eugenia Collier, *Television Reviews: Sanford and Son*, N.Y. TIMES, June 17, 1973, at 3 (emphasis added).

150. BOGLE, *supra* note 1, at 189. Fred Sanford was also seen as ridiculing his own blackness and sometimes was an ignorant bigot who made derogatory remarks about Puerto Ricans in Harlem. *Id.* at 190; COLEMAN, *supra* note 5, at 90.

151. BOGLE, *supra* note 1, at 199.

152. *Id.*

153. *Id.* at 200. John J. O'Connor wrote in the *New York Times*:

On the one side, Black viewers are being afforded material that provides immediate personal and psychic identification. . . . They no longer have to be content with *Father Knows Best*, which was unreal even for white Americans. On the other side, whites are being given glimpses of Black life that, however simplified, can't help but weaken artificial racial barriers.

Id. (quoting John J. O'Connor, *Good Times for the Black Image*, N.Y. TIMES, Feb. 2, 1975, at 27). “*Ebony* said that [*Good Times*] offered the ‘tube’s best effort to date of showing a real slice of ghetto Black life.” *Id.* (quoting Louie Robinson, *Bad Times on the “Good Times” Set*, EBONY, Sept. 1975, at 33).

154. COLEMAN, *supra* note 5, at 92. The popularity of J.J.’s character became a signal to the writers and the producers that ridicule and buffoonery were formulas to fall back on when creating African American portrayals. *Id.*

155. *Id.*

156. *See id.*

157. MITZ, *supra* note 103, at 318–19 (citing John Amos’s criticism in an *Ebony* maga-

another stereotype of a household headed by an unmarried African American woman.¹⁵⁸ The show was eventually canceled after five seasons.¹⁵⁹

The Jeffersons was another African American situation comedy.¹⁶⁰ The show revolved around an African American family that consisted of George Jefferson, his wife Louise, and their adult son Lionel.¹⁶¹ George was a successful businessman who moved his family to a deluxe apartment on the upper East side of Manhattan.¹⁶² *The Jeffersons* had a longer run than any other African American show in television history.¹⁶³ *The Jeffersons*'s characters were also considered somewhat stereotypical.¹⁶⁴ George was loud, common, and frenetically child-like.¹⁶⁵ However, his character was an updated stereotype because he was neither lazy nor shiftless.¹⁶⁶ His wife Louise was large, dark, and very maternal, especially in dealing with her sometimes immature African American husband.¹⁶⁷ The show received some critical acclaim.¹⁶⁸ Isabel Sanford, the actress who portrayed Louise Jefferson, received an Emmy award for outstanding lead actress in a situation comedy in 1981.¹⁶⁹ Some critics noted the show's strong points in defeating some stereotypes.¹⁷⁰ *Essence* magazine reported that:

The fact that the show has avoided turning Black success into the brunt of the humor, that the story lines have not evolved into George's buying Cadillacs and mismanaging his business to the point where Louise has to fire Florence and apply for welfare, is a fear all

zine article of the show's portrayal of minorities as the reason for his departure and citing "black pride" as the reason for Esther Rolle's departure).

158. BOGLE, *supra* note 1, at 204. The National Black Media Coalition complained after John Amos's departure that the series now fed into the familiar stereotype of a female-dominated African American family. *Id.*

159. *Id.* at 205.

160. *Id.* at 210.

161. *Id.*

162. *Id.*

163. *Id.* at 214.

164. *Id.* at 212.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 213.

169. HILL & HILL, *supra* note 124, app. 3 at 197; *The Jeffersons*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003).

170. BOGLE, *supra* note 1, at 213.

by itself—and an indication of how far we've come in dispelling certain stereotypes.¹⁷¹

D. *The 1980s*

The television show *Gimme a Break!* was basically a modern-day remake of *Beulah*.¹⁷² It starred Nell Carter as Nell Harper.¹⁷³ Prior to joining the show, Nell Carter was a Tony-award winning actress.¹⁷⁴ On *Gimme a Break!*, Ms. Carter portrayed a housekeeper who worked for a widowed police officer and his children.¹⁷⁵ Ms. Carter was large and comforting.¹⁷⁶ Nell was the modern "Mammy."¹⁷⁷ Actress Nell Carter received two Emmy award nominations for outstanding lead actress in a comedy series for her portrayal.¹⁷⁸

The A-Team was an action series modeled after *Mission Impossible*.¹⁷⁹ The members of the team were soldiers of fortune.¹⁸⁰ Mr. T portrayed the character Bosco B.A. Baracus.¹⁸¹ He wore gold chains, sported muscular biceps, and a Mohawk-style haircut.¹⁸² Mr. T became very popular—in essence, he became a cartoon character.¹⁸³

In the 1980s, *The Cosby Show* was a ratings success and broke with the stereotypical depictions of African American families by presenting a strong and very successful black family.¹⁸⁴ NBC even

171. *Id.* (quoting Bonnie Allen, *Movin' on with the Jeffersons*, ESSENCE, Oct. 1981, at 130).

172. *Id.* at 257.

173. *Id.* at 255.

174. *Id.* at 258.

175. *Id.* at 255.

176. *Id.*

177. *Id.* at 258.

178. *Gimme a Break!*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 22, 2003).

179. BOGLE, *supra* note 1, at 269.

180. *Id.*

181. *Id.*

182. *Id.* at 270.

183. *Id.* at 271.

184. *See id.* at 293. *The Cosby Show*, however, raised other concerns. 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*, EVERYDAY MAG., ST. LOUIS POST-DISPATCH, Feb. 9, 1995, at 01G, available at 1995 WL 3291409.

consulted Dr. Alvin Poussaint, noted Harvard psychiatrist, to advise on the script and character development.¹⁸⁵ But the network executives were initially concerned about broadcasting *The Cosby Show*.¹⁸⁶ 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.”¹⁸⁷ The show’s premiere episode was in Nielsen’s Top Ten and the show later was consistently ranked number one from 1985 to 1989, with about 63 million viewers tuning in at its peak.¹⁸⁸ When it became the most popular series of the decade, the same network executives were “stunned” and “confounded.”¹⁸⁹ *The Cosby Show* also made a lot of money for the network and producers; unit prices for its advertising were \$45,000 each, totaling \$81.9 million.¹⁹⁰ Viacom auctioned off *The Cosby Show* spots and all the spots were bought by three companies: Proctor & Gamble, General Foods, and Group W Productions.¹⁹¹ In addition, approximately 180 stations spent \$600 million in exchange for *The Cosby Show* syndication rights.¹⁹² The critics loved the show.¹⁹³ *The Cosby Show* received six Emmy awards during its network run.¹⁹⁴ *Newsweek* called *The Cosby Show* an “irresistibly charming, flawlessly executed sitcom.”¹⁹⁵ *People* magazine called *The Cosby Show* “a supersitcom, funny, fast-paced, loveable and real.”¹⁹⁶ John J. O’Connor, the *New York Times* critic, said that:

185. Don Aucoin, *TV Networks Under Fire for Diversity Gap*, BOSTON GLOBE, July 15, 1999, at A1, available at 1999 WL 6072126.

186. *Id.*

187. *Id.*

188. BOGLE, *supra* note 1, at 293.

189. Aucoin, *supra* note 185.

190. Mariane Paskowski, *Three Firms Buy All 1820 “Cosby” Spots*, ELECTRONIC MEDIA, May 9, 1988, at 4.

191. *Id.*

192. Peggy Ziegler, *Stations Hopeful as Cosby Run Begins*, ELECTRONIC MEDIA, Oct. 3, 1988, at 4.

193. BOGLE, *supra* note 1, at 293.

194. *The Cosby Show*, Emmy Awards Archives, at <http://www.emmys.org/awards/index.htm> (last visited Jan. 24, 2003). The awards were for outstanding comedy series, outstanding directing in a comedy series, outstanding writing in a comedy series, outstanding editing, and outstanding guest performer. *Id.*

195. BOGLE, *supra* note 1, at 293 (quoting Harry F. Waters & Peter McAlevy, *Bill Cosby Comes Home*, NEWSWEEK, Nov. 5, 1984, at 93).

196. *Id.* (quoting Jeff Jarvis, *Tube: The Cosby Show*, PEOPLE, Sept. 24, 1984, at 4).

The Cosby Show is the rare commodity—a truly nice development in a medium that seems increasingly preoccupied with trash. . . . At a time when blacks were once again being considered ratings liabilities by benighted television executives, the middle-class Huxtables have become the most popular family in the United States. And at a time when so many comedians are toppling into a kind of smutty permissiveness, Mr. Cosby is making the nation laugh by paring ordinary life to its extraordinary essentials. It is indeed a truly nice development.¹⁹⁷

It has been more than ten years since *The Cosby Show* was aired during prime time. It seems as though *The Cosby Show* is still in a class by itself,¹⁹⁸ since many situation comedies still present very stereotypical images of African Americans.

The 1980s also saw the major networks casting an African American or a Latino as a member of an ensemble cast for dramas.¹⁹⁹ *Hill Street Blues* presented African American characters Bobby Hill and Neal Washington, who were members of the police

197. *Id.* (quoting John J. O'Connor, *Bill Cosby's Triumph*, N.Y. TIMES, May 9, 1985, at C30). *The Cosby Show* also had a top-five-ranked spin off entitled *A Different World*, which NBC broadcast from 1987–1993. COLEMAN, *supra* note 5, at 98. *A Different World* was credited with presenting positive images of the black experience. *Id.* The show managed to preserve black cultural experiences through its setting at Hillman College, a fictional, historically black college. *Id.* The characters were from a wide-range of socio-economic backgrounds. *Id.*

198. There is a new show called *My Wife and Kids*, which has been “the first major network family sitcom revolving around an African American [family] since *The Cosby Show* to achieve wide popularity with white audiences.” 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, calendar section, at 8. “It is also the first black family sitcom to succeed on one of the major networks since NBC’s *The Fresh Prince of Bel-Air* went off the air in 1996.” *Id.* In addition, Fox launched *The Bernie Mac Show* in 2001. Lisa de Moraes, *Multiethnic Casting Levels the Viewing Field*, WASH. POST, Apr. 16, 2002, at C1. The premise of the show revolves around a successful comic raising his sister’s children. *Id.* It is the highest ranked new show on the Fox network, but ranks ninety-fourth among white households and first among black households. *Id.* Both *My Wife and Kids* and *The Bernie Mac Show*, however, are blamed for the decline in popularity of crossover shows that appeal to both African American and white audiences. See Donna Petrozzello, *Black-White Ratings Gap Is Widening*, N.Y. DAILY NEWS, Apr. 16, 2002, at 90, available at 2002 WL 19317605. *The Bernie Mac Show* has also achieved critical acclaim; it has been honored with a Peabody Award for broadcast excellence. *The Bernie Mac Show Among Winners of Peabody Awards*, JET, Apr. 15, 2002, at 17, available at 2002 WL 8735198. In addition, the show’s star has recently been nominated for an Emmy for outstanding lead actor in a comedy series. See Mathew Gilbert, *New Series Have the Edge in Emmy Nominations*, BOSTON GLOBE, July 19, 2002, at D1, available at 2002 WL 4139224; Steve Johnson, *Emmy Has a New TV Darling, HBO’s Drama Six Feet Under*, CHI. TRIB., July 19, 2002, at 6.

199. BOGLE, *supra* note 1, at 271.

department.²⁰⁰ Hill and his partner Andy Renko were not originally scheduled to be regular members of the cast, but, when NBC tested the show, viewers liked these characters the best.²⁰¹ *St. Elsewhere* introduced actor Denzel Washington to television audiences as Dr. Philip Chandler.²⁰² He “was a handsome, articulate, well-educated African American male, functioning successfully in an integrated workplace.”²⁰³ In addition, Alfre Woodard played a very professional obstetrician-gynecologist.²⁰⁴

E. *The 1990s*

1. Drama Series

There have been a few very thoughtful, well-defined, and full-bodied depictions of African American characters in several ensemble drama series. Shows like *LA Law*, *ER*, *Chicago Hope*, and *Homicide* come to mind. Several attempts have been made to create an all-black family drama series.²⁰⁵ One debuted several seasons ago entitled *Under One Roof*.²⁰⁶ It starred James Earl Jones, Joe Morton, and Vanessa Bell Calloway.²⁰⁷ Even though it was critically acclaimed, the network canceled the show after only a few months.²⁰⁸

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).²⁰⁹ *I'll Fly Away* introduced the character of Lilly Harper, an African American domestic who cared for the house and children of her white boss Forest Bedford,

200. *Id.* at 272.

201. *Id.*

202. *Id.* at 278.

203. *Id.*

204. *Id.*

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

206. *Id.*

207. Zurawik, *supra* note 184.

208. See Braxton & Lowry, *supra* note 205.

209. See John J. O'Connor, *PBS Revives a Series on Race and America*, N.Y. TIMES, Oct. 11, 1993, at C16 (discussing the series cancellation 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.

a lawyer.²¹⁰ Unlike earlier series, *I'll Fly Away* gave the black character Lilly a life outside of the white boss's home.²¹¹ The series brought the civil rights struggle to the consciousness of the characters.²¹² The show was also canceled for low ratings, even though it was critically acclaimed.²¹³

2. Sitcoms

In the 1990s, the newer networks produced a lot of African American situation comedies, which were panned by the critics and by the African American community.²¹⁴ 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."²¹⁵ Film director Spike Lee criticized the "networks for airing shows that feed stereotypes about [African Americans]."²¹⁶ Spike Lee said: "I would rather see *Amos 'n' Andy*, . . . [a]t least they were just straight-up Uncle Tommin'. We've gone backwards."²¹⁷ Bill Cosby said that he "finds it difficult, often painful, to watch television."²¹⁸ He sees himself "as an African American who is exploited."²¹⁹ He stated, "He can't believe the way [African Americans] are being portrayed on the small screen."²²⁰

210. Mimi White, *Reliving the Past Over and Over Again: Race, Gender, and Popular Memory in Homefront and I'll Fly Away*, in *LIVING COLOR: RACE AND TELEVISION IN THE UNITED STATES* 118, 128 (Sasha Torres ed., 1998).

211. See O'Connor, *supra* note 209.

212. *Id.*

213. Dudek, *supra* note 209; Jubera, *supra* note 209.

214. BOGLE, *supra* note 1, at 430.

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

216. Joseph H. Brown, *Commentary: Worse by Far Than Amos 'n' Andy*, *TAMPA TRIB.*, Mar. 9, 1997, at 6 (noting Spike Lee's criticism of United Paramount and Warner Brothers television over the program *Homeboys in Outer Space*); see also 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 over misrepresentation of African Americans in the industry).

217. Brown, *supra* note 216.

218. 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.

219. *Id.*

220. *Id.* Cosby leveled specific criticism on *Def Comedy Jam*. *Id.* at 104. He said that it

Shows like *Homeboys in Outer Space* are examples of how new networks attempt to exploit the African American market by producing stereotypical and poorly developed situation comedies. This pattern shows that the networks think they know how to produce programs that highlight what they at least believe to be African American life. In the past fifteen years, when a new network has been formed, it has sought programming directed to those members of society that are under-represented on television. It gives the new network an automatic market niche that is otherwise not being filled. So, it was no surprise that the Fox network programmed several shows with a substantial minority cast like *Martin*, *Living Single*, *New York Undercover*, and *In Living Color*.²²¹ Once Fox became an established network and won acclaim for some of its other shows like the *X-Files* and *Ally McBeal*, it abandoned this minority programming and demographic and displayed the same preference for white programming as the other major networks. Some fear that the two new fledgling networks, UPN and The WB, may abandon their current emphasis on the minority demographic as well, once they become more established.²²²

Currently, 32% of UPN's and 27% of The WB's viewers are African American.²²³ So it should come as no surprise that 45% of the characters on UPN are African American and 23% of the characters on The WB are African American.²²⁴ In fact, The WB programs seem to be targeted more towards young, white audiences, and the UPN black-oriented shows are now relegated to Monday nights.

was the *Amos 'n' Andy* of the '90s. *Id.* "When you watch it," he said, "you hear a statement or a joke and it says "niggers." And sometimes they say "we niggers.""²²¹ *Id.*

221. See Lowry, *supra* note 24.

222. It has been reported that UPN and The 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 E1.

223. 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 (Cleveland), Aug. 15, 1999, at 1A (noting that the other networks have much smaller percentages of African Americans as part of their overall audience: 13% of Fox's audience is African American; 12% of CBS's audience is African American; 11% of ABC's audience is African American; and 8% of NBC's audience is African American), available at 1999 WL 2377048.

224. *Minorities Are Relatively Prevalent on TV, Study Says*, STAR TRIB. (Minneapolis-St. Paul), Sept. 28, 1999, at 8E.

As for the broad-based situation comedies on the major networks, less than one-fifth of them had racially mixed casts in the 1990s.²²⁵ Part of this racial division may be the result of the fact that whites and African Americans have different viewing patterns in watching the sitcoms.²²⁶ For instance, NBC calls its Thursday night “Must-See TV.”²²⁷ It had some of the network’s most popular shows like *Friends* and *Seinfeld*—often ranked in the top ten Nielsen Ratings.²²⁸ But most of the viewers of these shows are white.²²⁹ Ironically, despite taking place in New York City, none of the NBC shows had any regular minority characters.²³⁰

A similar divergence in viewer demographics also took place in the 2001–2002 prime time season.²³¹ Only seven of TV’s twenty top-ranked shows in African American homes made white viewers’ top twenty list.²³² This demographic divergence in viewer preference was actually worse (by one show) than the previous year.²³³ In the 2001–2002 prime time season, the number one-ranked show for African American viewers was the *Bernie Mac Show* and for whites it was *Friends*.²³⁴

3. Depictions of Latinos

The viewing patterns for Latinos are also different than those of whites.²³⁵ The number one show viewed by Latinos in 1996 was

225. 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 50% of the television dramas have racially mixed casts. *Id.*

226. *See id.*

227. *See id.*

228. *See id.*

229. *Id.*

230. *Id.*

231. *See* Petrozzello, *supra* note 198 (reviewing results of 2001 study by the Manhattan-based advertising buyer, Initiative Media).

232. *Id.*

233. *Id.*

234. *Id.*

235. Galan Enterprises had a deal with Fox to bring Latino-themed programs to the U.S. in English and for distribution in Spanish to Latin American countries. Perigard, *supra* note 104. In some locations basic cable includes feeds from Mexico and features a mix of variety show, news, novellas, and MTV Latina (MTV’s Spanish counterpart). *Id.* Of course, the foreign cable feed does not do enough because the U.S. broadcasters should be

New York Undercover on Fox.²³⁶ Very few Latino actors starred in roles in night-time dramas.²³⁷ Jimmy Smits starred in *LA Law* in the 1980s and starred in *NYPD Blue* in the 1990s.²³⁸ Actor Hector Elizondo starred in *Chicago Hope*.²³⁹ From the 1999 television season to the present, actor Martin Sheen has starred in the night-time drama, *The West Wing*.²⁴⁰ In each of these cases, the actors' racial identities are "e-raced" since they play non-Latino characters.²⁴¹ The casting of Latino actors in non-Latino roles gives some Latino actors more opportunities²⁴² to work their craft in ways that African American actors are usually unable to do.²⁴³ As a result of this "erasure" of some Latino actors in television dramas, the audience does not have the opportunity to counter any of their negative stereotypes about Latinos by experiencing positive modern-day images.

According to a study commissioned by the National Council of La Raza, "Latino characters are either absent from television or frequently based on stereotypes."²⁴⁴

developing more Spanish programming. *See id.* It is also complicated because you do not want to run into the stereotype that Latinos are foreigners; but the positive side of the feeds from Mexico is that it allows recent immigrants to keep in touch with their place of origin.

236. *See* Robin Dougherty, *When Spanish 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 (explaining that *New York Undercover's* story line focused on the detective work and lives of African American and Puerto Rican undercover detectives), available at 1997 WL 3539095.

237. *See generally* Perigard, *supra* note 104 (listing Latino sitcoms that have been aired during prime time). CNN has a twenty-four hour network in Spanish. *See generally* <http://www.cnn espanol.com> (last visited Jan. 24, 2003). Small nuggets of Spanish dialogue have been incorporated into some mainstream television shows, including several shows during the 1996–1997 season: *Chicago Hope*, *New York Undercover*, *The X-Files*, *Cosby*, *ER*. Dougherty, *supra* note 236.

238. Valerie Kuklenski, *After All the Criticisms, Latino Show Is Resurrecting a New Attitude*, L.A. DAILY NEWS, June 25, 2000, at L12.

239. *Id.*

240. James Poniewozik, *What's Wrong with This Picture?*, TIME, May 28, 2001, at 80.

241. *See generally id.* at 81 (discussing what counts as a "real" Hispanic character).

242. *Id.* The National Council of LaRaza in making its ALMA awards for film, TV, and music gives an award each year to a Latino actor who plays a non-Latino character. *See id.*

243. You may recall that Jennifer Beals was the lead actress in the movie *Flashdance*. She was cast in a "white" role—although she is of mixed race ancestry. There was some controversy after the film was released because the producers did not realize in advance that they had made an inter-racial love story. *See generally* FLASHDANCE (PolyGram Filmed Entertainment 1983), at <http://us.imdb.com/Title?0085549> (last visited Jan. 24, 2003).

244. Susan Ferriss, *Prime Time: Latino Characters Now TV's Favorite Criminal Target*,

The study . . . surveyed more than 300 shows and 7,000 characters for one month during the 1992 fall television season. The authors compared the 1992 content to programs aired during the 1950s. [The study] found that the number of Latino characters on television in 1992 had declined to only 1 percent of all characters, even though Latinos [were, at the time] 9 percent of the population. In the 1950s Latinos were 3 percent of all television characters.²⁴⁵

According to the study, 16% of the Latino characters committed crimes as compared to 4% of the African American and white characters.²⁴⁶ Approximately 28% of the Latino characters were poor, in comparison with 24% of the African American and 18% of the white characters.²⁴⁷ "Only one Latino . . . was depicted as a business . . . executive."²⁴⁸ Offensive images of Latinos declined by almost half from the 1992–1993 television season to the 1994–1995 season.²⁴⁹ However, the reality-based television shows disproportionately depicted Latinos and African Americans committing a crime.²⁵⁰ Latinos are often portrayed as drug pushers, violent individuals, and foreigners with no ties to the United States.²⁵¹ For example, the penultimate episode of *Seinfeld* angered many Puerto Ricans when the character 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.²⁵²

CHI. TRIB., Sept. 27, 1994, at C5.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*; see also Roman, *supra* note 15, at 42 (explaining that most Latino characters portray gang members or illegal immigrants, instead of working professionals or business leaders).

249. Darlene Superville, *Stereotypes of Hispanics Still on TV, Study Shows*, FORT WORTH STAR-TELEGRAM, Apr. 20, 1996, at A38 (explaining that the study was also performed for LaRaza by the Center for Media & Public Affairs.).

250. See Ferriss, *supra* note 244. Reality based shows are shows like *Cops* and *America's Most Wanted*. See *id.* These shows are called reality based because they involve "real events." In *Cops*, cameramen shoot footage by traveling with police officers on their activities in a particular city. *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.* *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 criminals. See Ken Parish Perkins, *Love and Smaltz: Will Viewers Cozy up to Reality-Based Romance on TV?*, CHI. TRIB., Sept. 9, 1994, at 3.

251. Superville, *supra* note 249.

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

In response 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.²⁵³

Ironically, during the “Hispanic Brownout” of the network programs in the fall of 1999,²⁵⁴ the premiere episode of the sitcom *Will & Grace* had an offensive scene in which a white character, Karen Walker, used an ethnic slur toward her Salvadoran maid.²⁵⁵ In the scene, the white character noticed that the Salvadoran character had paused from working and was engaged in conversation.²⁵⁶ The white character tells the Salvadoran character “Hey, you’re on the clock, *tamale*. Get to work.”²⁵⁷

Another study found that Latino characters make up only 1% of the roles in prime time and 0.5% on children’s shows—although Latinos comprise about 10% of the U.S. population.²⁵⁸ According to the study, 41% of those portrayals of Latino males were negative stereotypes.²⁵⁹ The Latino male character was either a failure or criminal.²⁶⁰ In comparison, white characters were failures only 23% of the time.²⁶¹ Negative portrayals of Latinos and cultural insensitivity in the media contributes to many Latinos turning to Spanish-language broadcasts.²⁶² The Spanish-language broadcasts are perceived to be more balanced.²⁶³

The National Hispanic MEDIA Coalition urged the networks to put a Latino-themed series on the air and increase the number of Latino actors in supporting roles on the other shows.²⁶⁴ Felix San-

253. See sources cited *supra* note 252.

254. See generally Poniewozik, *supra* note 240 (discussing the lack of Latinos on television).

255. Lynn Elber, *Amid Hispanic Boycott Comes Slur on NBC*, SUN-SENTINEL (Ft. Lauderdale), Sept. 21, 1999, at 4E.

256. *Id.*

257. *Id.* (emphasis added).

258. See NATIONAL COUNCIL OF LA RAZA, *supra* note 61, at 3.

259. *Id.* at 6.

260. *Id.* at 8 fig.3.

261. *Id.*

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

263. See *id.*

264. Russell Shaw, *Latino Group Protests Lack of Hispanics on ABC*, ELECTRONIC MEDIA, May 8, 1995, at 33. The Coalition chair, Alex Nogales, planned to boycott ABC because he said that ABC reneged on a promise to put a Latino-themed show on the air and increase the number of Latino actors in supporting roles by fall 1994. *Id.* The Coalition

chez of the National Hispanic Foundation for the Arts has said that "Latinos are mad . . . and we're not going to take it anymore."²⁶⁵ Alex Nogales said "We're all tired of talking to networks about the same thing, day in and day out, with nothing changing at the end of the day."²⁶⁶ Mr. Nogales went on to say that "[i]f you don't want us in Hollywood, if you're not going to hire us, we're not going to consume your product."²⁶⁷

4. Depiction of Asian Pacific Americans

In the 1994 television season, *All American Girl* debuted as the first all Asian American sitcom starring Margaret Cho.²⁶⁸ The Asian American community had mixed reactions to the pilot.²⁶⁹ The show had two Asian American writers and a consultant on Korean culture for the project.²⁷⁰ Unfortunately the show was canceled in its first season.²⁷¹ In the 1996–1997 television season, there was only one show that had an Asian American as the lead character.²⁷² The show was the *Mystery Files of Shelby Woo*, which starred Irene Ng.²⁷³ The 1998 fall line up included a new

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 are under-represented among station employees. *Id.*

265. Claudia Kolker, *Latino Groups Urge Boycott of Network TV*, L.A. TIMES, July 28, 1999, at A12 (quoting Felix Sanchez).

266. *Id.* (quoting Alex Nogales).

267. *Id.* (quoting Alex Nogales).

268. Greg Braxton, *It's All in the (Ground-Breaking) Family*, L.A. TIMES, Sept. 14, 1994, at F1.

269. *Id.* The sitcom was praised by Guy Aoki, head of the Media Action Network for Asian Americans. *Id.* Sumi Haru, President of the Association of Asian Pacific artists commented: "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." *Id.* 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*. *Id.* He said: "[A] lot of people didn't think it was funny. . . . It showed the older people in the family not speaking English very well. There was a funny confusion of various Asian cultures. Much of the stuff from the show was not from the Korean culture." *Id.*

270. *Id.*

271. Jae-Ha Kim, *Just What She Wants: Comic-Actress Margaret Cho Takes Control*, CHI. SUN-TIMES, Sept. 23, 1999, § 2, at 50.

272. See Sylvia Lawler, *Irene Ng as Shelby Woo*, THE MORNING CALL (Allentown), Mar. 17, 1996, at T3.

273. *Id.*

show broadcast on CBS called *Marshall Law*.²⁷⁴ The show starred Sammo Hung and the cast included Asian American actress Kelly Hu and African American actor Arsenio Hall.²⁷⁵ The show was about an Asian American police officer who used martial arts to apprehend criminals.²⁷⁶ Even though the show had Asian American characters, it often portrayed them in a stereotypical setting—practicing Kung Fu. In the late 1990s, Lucy Liu was one of the supporting actresses in the hit Fox series *Ally McBeal*, her character also played to stereotypes as the “dragon-lady.”²⁷⁷ Some television shows still use white actors to portray Asian American characters.²⁷⁸

5. Native Americans

The television show *Northern Exposure*, which took place in Alaska, had Native American characters played by Native American actors; the show was critically acclaimed for its sensitive and non-stereotypical portrayal.²⁷⁹ With the exception of *Dr. Quinn, Medicine Woman*, *Walker Texas Ranger*, and *Star Trek Voyager*,

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

275. Dawidziak & Feran, *supra* note 223.

276. Michaelson, *supra* note 274.

277. See Cheryl Luj-Lien Tan, *White House or Bust*, L.A. TIMES, Aug. 4, 2000, at E2. Television commercials (and a late night talk show) have featured the “Dancing Itos,” as a very disparaging reference to Judge Lance Ito, the presiding judge in the OJ Simpson criminal case. Daniel Howard Gerone, *Leno Feels “Tonight” Finally His: He Has Taken Control with His Own Style*, PLAIN DEALER (Cleveland) May 31, 1995, at 6E. Some shows have made fun of Asian Americans by having someone speak in a stereotypical, heavily accented Asian American dialect—all feeding into the stereotype that Asian Americans are foreign born. Cf. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1244–58 (1993) (discussing the burdens that many Asian Americans face as the “model minority”).

278. *Kung Fu*, a show that was broadcast during the 1970s, has been revised in the 1990s as *Kung Fu: The Legend Continues* with the same white actor playing the lead Asian character. See Don Aucoin, *NBC Pledge on Diversity*, BOSTON GLOBE, July 30, 1999, at D1 (Scott M. Sassa, President of NBC West Coast, stated that “seeing David Carradine [in *Kung Fu*] as a Chinese guy really ticked you off.”).

279. Beth Kleid, *Morning Report*, L.A. TIMES, Feb. 7, 1994, calendar section, at F2. The prevailing Native American stereotype is that of the proud and brave Indian—“the Noble Savage.” See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Plights*, 34 ARIZ. ST. L.J. 299, 319–20 (2002). Even though this may appear to be a positive stereotype, it is still a stereotype and limiting to those affected by it. See *id.*

which have recurring Native American characters,²⁸⁰ few Native American characters or actors appear on prime time television shows.²⁸¹ In addition, many stereotypical portrayals still are re-run in old Westerns, which are the staples of cable and syndication.

F. *The 1999 Television Season*

In the fall of 1999, the new television schedule was announced and, of the twenty-six new shows, none featured an African American, Asian American, Latino, or Native American in a starring or secondary role.²⁸² This absence caused the National Council of La Raza to organize a protest called "National Brownout," in which they advised their members to refrain from watching television during the week of September 12, 1999.²⁸³ At the same time, Kweisi Mfume, the President of the National Association for the Advancement of Colored People ("NAACP"),²⁸⁴ threatened a

280. Greg Braxton, *Networks Still Struggling with Diversity, Study Says*, L.A. TIMES, July 18, 2000, calendar section, at F2; Kleid, *supra* note 279.

281. Braxton, *supra* note 280; see also Noel Holston, *The Color of Prime Time: When It Comes to More and Better Roles for Minorities in Dramas TV Executives Deliver Little More Than Snow and Static*, SUN SENTINEL (Ft. Lauderdale), Aug. 25, 2002, at 1D.

282. Williams, *supra* note 3, at 220; see Leyden, *supra* note 54.

283. Michael Fletcher, *Latinos Plan Boycott of Network TV: Goal of Brownout Is Better Roles for Hispanics*, WASH. POST, July 28, 1999, at C1; Kolker, *supra* note 265, at A12.

284. Leyden, *supra* note 54. This was not the first time in recent history that the NAACP, at least a local branch, criticized media portrayals of African Americans. See, e.g., Greg Braxton, *Groups Call for Changes in Portrayal of Blacks on TV Entertainment: Protest Targets Comedies on Fox, UPN and WB. Actors, Producers Dispute Criticisms*, L.A. TIMES, Feb. 8, 1997, at A1. 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 African Americans in a buffoonish manner. *Id.* The groups targeted eight series that aired on Fox, The WB, and UPN networks. *Id.* 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*. *Id.* 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. . . . What's on these shows is just 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. *Id.* The groups backed down due to pressure by the national NAACP. Greg Braxton, *Rift Slows NAACP Protest of 8 Shows*, 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

boycott²⁸⁵ and also threatened to file legal challenges against the networks' broadcasting licenses based on the belief that the networks might be in violation of the 1934 Communications Act.²⁸⁶ Consequently, the major networks scrambled to add actors of color to their previously all white shows.²⁸⁷ The NAACP held hearings in Los Angeles in November of 1999.²⁸⁸ Three of the four major networks walked out of the NAACP-sponsored hearings; only CBS participated.²⁸⁹

Ultimately the major networks and the NAACP announced an agreement in which the networks agreed to hire more actors, producers, writers, and directors of color.²⁹⁰ Each of the networks agreed to hire a vice president of diversity to monitor their progress in hiring writers, directors, actors and executives from diverse backgrounds.²⁹¹ Each network agreed to place some empha-

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.*

285. Leyden, *supra* note 54.

286. See Williams, *supra* note 3, at 133 (noting that there was an increase of roles for African Americans in the Fall 2000 television season); Greg Braxton, *NAACP Will Fight Network TV Lineups*, L.A. TIMES, July 12, 1999, at A1 (noting that Mr. Mfume stated that he would "call for congressional and Federal Communications Commission hearings on network ownership, licensing and programming" and indicated that a viewer boycott of the networks, and of advertisers, was also under consideration).

The absences and stereotypes of people of color by the broadcasters may be a violation of the Communications Act because the broadcasters have received a license from the FCC to broadcast in the public interest. If the broadcasters fail to place people of color on television or have stereotyped people of color, the broadcasters may have violated their public interest mandate. As a consequence, their actions may have violated the Communications Act. See 47 U.S.C. §§ 151–615b (2000).

287. Braxton, *supra* note 286.

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

289. *Id.* 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 networks sent lower-ranking executives. NAACP OUT OF FOCUS—OUT OF SYNC 7, (2001) available at <http://www.naacp.org/news/releases/tv2001.pdf>. (last modified Aug. 21, 2001) [hereinafter NAACP REPORT]. When only Mr. Moonves was allowed to speak at a certain segment of the hearing, the executives from the other networks walked out. *Id.* According to the NAACP report, the walkout created a perception that the other three networks were resistant to correcting the problem of exclusion. *Id.*

290. Brian Lowry, *To Increase Diversity, 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. 5, 2000, at C7 (noting that 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).

291. NAACP REPORT, *supra* note 289, at 29; see also Williams, *supra* note 3, at 133

sis on employment, hiring, training, and promotion of people of color.²⁹² They agreed to promote the recruitment of minority writers and minority-owned production companies.²⁹³ The agreements have been called "vague," because they have no specified goals or timetables.²⁹⁴ In its report, *Out of Focus—Out of Sync*, the NAACP noted that CBS, NBC, and Fox created positions for a vice president of diversity, who reported directly to each networks' president and/or chairman of the board.²⁹⁵ ABC was the only network, however, that failed to have their vice president of diversity report directly to the network president.²⁹⁶ Instead, ABC's vice president of diversity reports directly to the vice president of human resources and meets with the network president periodically.²⁹⁷ The report also indicates that both Fox and CBS have established diversity advisory boards that are actively involved in various stages of development, sometimes influencing casting decisions.²⁹⁸ Neither ABC nor NBC have established a comparable institutional structure to promote diversification.²⁹⁹

After the NAACP and network agreements, a little more diversity seemed to appear on the major television networks. To great fanfare, CBS launched a predominantly African American drama series entitled *City of Angels*,³⁰⁰ produced by Steven Bochco, the creator of such other television hits as *LA Law*, *Hill Street Blues*, and *NYPD Blue*.³⁰¹ Unfortunately due to low ratings, the *City of Angels* lasted for only two seasons.³⁰² In addition, PBS launched a

(discussing the steps taken by television studios to help diversify the medium).

292. NAACP Report, *supra* note 289, at 29.

293. *Id.* at 30.

294. Waxman, *supra* note 290. What is also disturbing, but will not be addressed in this article, is the stereotyping that occurs on news programs. This stereotyping is more insidious and pernicious than what occurs in entertainment programming because people take the news as gospel; however, sometimes it distorts reality and leaves lasting impressions about people of color in the minds of viewers. A Pew Research Center survey reported that 64% of "those polled watched local TV news on a regular basis in 1998, down from 77% in 1993." Jennifer Schulze, *Four Model Stations*, COLUM. JOURNALISM REV., Jan./Feb. 1999, at 74.

295. NAACP REPORT, *supra* note 289, at 31-36.

296. *Id.* at 38.

297. *Id.*

298. *Id.* at 31, 33.

299. *See id.* at 36-40.

300. L.A. TIMES, Jan. 13, 2000, calendar section, at F58.

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

302. Steve Johnson, *Getting Color on Television: African Americans on TV; A History of*

drama called *American Family* about a Latino family in Los Angeles.³⁰³ Originally developed for CBS's 2000–2001 lineup, the network later decided not to include it in its schedule.³⁰⁴ Overall, in the 2000–2001 season, there were more roles for African Americans than ever before.³⁰⁵

In August 2001, NAACP President Mfume said that the major networks had still made little progress in diversifying what is shown on television.³⁰⁶ In fact, prior to September 11th, 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.”³⁰⁷

Last year, a multi-ethnic coalition (consisting of the NAACP, the National Latino Media Council, American Indians in Film & Television, and the Asian Pacific American Coalition) gave low marks to four of the networks in terms of diversity.³⁰⁸ The coalition gave ABC a D-minus, CBS a D-plus, Fox a C-minus, and NBC the highest grade of a C.³⁰⁹

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.³¹⁰ The report indicated that “[39%] of dramas featured *mixed* opening credit casts compared to 7% of situation comedies.”³¹¹ Also, “more than two-thirds of the drama series (71%) featured at least one racial minority character in a primary recurring role.”³¹² The report indicated that the current season featured more programming with

Talent, Ambition and Frustration, CHI. TRIB., Feb. 1, 2002, section 5, at 1.

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

304. Alissa MacMillan, *All in the Familia*, N.Y. DAILY NEWS, Jan. 20, 2002, New York Vue section, at 3.

305. Williams, *supra* note 3, at 133.

306. Greg Braxton, *Mfume Appears to Delay Boycott*, L.A. TIMES, Oct. 17, 2001, calendar section, at F1.

307. *Id.*

308. Greg Braxton, *Networks' Showcases Aim to Improve Diversity Effort*, L.A. TIMES, Jan. 21, 2002, calendar section, at F1.

309. *Id.*

310. CHILDREN NOW, FALL COLORS 2001–2002 PRIME TIME DIVERSITY REPORT 12 (2002), available at <http://www.childrennow.org/media/fc2002/fc-2002-report.pdf> (last visited Jan. 24, 2003).

311. *Id.*

312. *Id.*

racially homogenous casts that were either all black or all white.³¹³ Only 25% of 2001–2002 season’s programs featured casts that were racially mixed.³¹⁴ Most of the diversity gains over the past three years have been attributable to non-recurring and secondary characters.³¹⁵ For example in the 2001–2002 season, “Latinos comprised 4% of the entire prime time population” but “only 2% of the opening credits cast.”³¹⁶ Similarly, Asian Americans comprised 3% of the total prime time population but only 1% of the opening credits cast.³¹⁷

Since the 1940s the networks have made major progress in the quantity of depictions of African American characters. Some of the situation comedies like *The Cosby Show* and some of the dramas like *ER* and *Homicide* have had full-bodied positive characters. However, African Americans are still underrepresented on the major networks and some of the portrayals are still stereotypical. With Latinos, Asian Americans, and Native Americans, the networks have been far less successful. In many instances, the networks have not necessarily planned any particular strategy, have been reluctant to take risks, and have succumbed to pressures in the 1950s and 1960s from Southern affiliates and until very recently from advertisers. The behavior of the networks raises the question of whether they have made informed business decisions about minority characterizations and portrayals that are protected by the business judgment rule.³¹⁸

313. *Id.* at 35.

314. *Id.*

315. *See id.*

316. *Id.*

317. *Id.*

318. Cable television is not necessarily an alternative to broadcast television’s absences of minority characters and stereotypes primarily because cable is a pay service whereas broadcast is free. Even if cable had better offerings, it would be unfair to require the viewer to pay for more diversity when the broadcasters are required to operate their stations in the public interest and provide programming for all of the public. Cable does offer a number of options for people of color. BET, which used to be black-owned, has primarily black-oriented programming and plays a lot of music videos for which it has been criticized. Hofmeister, *supra* note 2. In some markets, BET is available as part of the basic package, in some markets it is offered as a premium channel, and in some markets it is not available at all. In 2000, Viacom purchased BET for \$2.34 billion. *Id.* BET reaches 62.4 million of the nation’s 76 million pay television households. *Id.* BET viewership has actually increased by 20% since the purchase. R. Thomas Umstead, *BET Specials, Movies Prompt Record Ratings*, MULTICHANNEL NEWS, June 18, 2001, at 46; R. Thomas Umstead, *Lifetime Leads Cable Ratings Rise*, MULTICHANNEL NEWS, Apr. 9, 2001, at 3. Nonetheless,

III. THE DUTY OF CARE AND THE BUSINESS JUDGMENT RULE

The shareholders of corporations elect a board of directors to

BET was not the top channel viewed by African Americans in 2000. Michael Schneider, *Blacks and Whites Share More TV Faces*, DAILY VARIETY, Feb. 12, 2001, at 5. In fact, African Americans' order of preference was ABC, CBS, UPN, Fox, NBC, and The WB. *Id.* Unfortunately, BET viewers have the lowest median incomes among adults 18 to 49 of any network. See Jon Lafayette, *NBC Most Upscale*, ELECTRONIC MEDIA, Feb. 7, 2000, at 10. Having viewers with such low median incomes makes it harder for BET to attract the advertising dollars that other networks get, and having fewer advertising dollars makes it harder to produce quality programming.

Latinos have more cable options from which to choose, but all of these are foreign owned and produced. They fail to give the viewer a modern view of the North American Latino experience. Latinos have Univision, Telemundo, and Galavision. See Ronald Grover, *Media Giants are Glued to Latino TV*, BUS. WEEK, Sept. 24, 2001, at 105. The Hispanic Television Network has recently been launched and now reaches 15% of the country and consists of twenty television stations. *Id.* In addition, some of the other cable networks have created Spanish-language alternatives like *Discovery en Espanol*, *CNN en Espanol*, and *Fox Sports World en Espanol*. Allison Romano, *Checking the Census*, BROADCASTING & CABLE, Oct. 1, 2001, at 32. Univision captures 80% of the market, and Telemundo 20%, even though it has an audience reach of 88% of Latino households. Harry Berkowitz, *Spanish-Language Telemundo Bought by NBC*, NEWSDAY, Oct. 12, 2001, at A62. Univision has twenty-six stations and thirty-two affiliated stations. Meg James, *Suitors Stay Tuned for Univision's Next Move*, L.A. TIMES, Nov. 4, 2001, at C3. In contrast, Telemundo has ten full power stations and forty affiliated stations. Berkowitz, *supra* at A62; Andrew R. Sankin, *NBC Is Paying \$1.98 Billion for Telemundo*, N.Y. TIMES ABSTRACTS, Oct. 12, 2001, at C1. Univision owns Galvision, which is available to 25 million cable subscribers. James, *supra*. In addition, it owns an Internet portal and music label while planning to launch a second television broadcast network. *Id.* Univision and Telemundo may enter viewers' homes as a local broadcast station that is carried by the cable providers pursuant to the FCC's must-carry rules. Simon Appelbaum, *Spanish Flying*, CABLEVISION, Sept. 3, 2001, at 24. In other markets, there may be an expanded basic offering. *Id.*

Galavision sometimes has some English language spots and broadcasts. See Shirley Brady, *Growth of Hispanic Market a Wake-Up Call for Cable*, CABLE WORLD, Oct. 15, 2001, at 42. But most of these cable networks broadcast only in Spanish so they do not benefit those Latinos whose primary language is English. It should come as no surprise that these Spanish language networks draw only 35% of U.S. Latino viewers. Poniewozik, *supra* note 240. U.S. Latinos spend more time watching programs in English, rather than Spanish-language shows on Telemundo, Univision or Galavision. James, *supra*.

There have also been a few other Latino-themed shows on other cable networks. For instance, *The Brothers Garcia* is a new show that debuted on Nickelodeon. Dale Russakoff, *Keeping up with the Garcias, Children's TV Leads Latino Emergence*, WASH. POST, Sept. 23, 2000, at A1. In 2000, Showtime also debuted a Latino-themed television show called *Resurrection Blvd.* Suzanne C. Ryan, *Latinos Finally Beginning to See Themselves on Television*, BOSTON GLOBE, Mar. 24, 2002, at L8. Even though Latinos 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 households than other American households. Romano, *supra* (63% compared to 81%). The lower penetration rate may also be due to lower average household income for Latinos as compared to the national average. *Id.* So even if Latinos have more choices, they may not be able to partake of the choices. In addition, if the goal is widespread 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.

manage the corporation.³¹⁹ In turn, the board may elect officers as is specified in the corporate bylaws.³²⁰ The officers, senior executives, and members of the board of directors of a corporation owe a duty of care to shareholders and the corporation.³²¹ Both the directors and officers of a corporation are required to perform their duties in good faith and with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances.³²² A director, in performance of his or her duties, shall be fully protected by relying upon the records of the corporation and upon the information, opinions, reports, and statements of the corporation's officers and employees.³²³ In some jurisdictions, officers also benefit from relying on information from employees.³²⁴ In any event, breaches of fiduciary duty are tempered by the business judgment rule, which protects corporate decisions against after-the-fact substantive review by a court, unless the corporate action was the result of misconduct going to the good faith of the decision, principally as a result of fraud, illegality, irrationality, conflict of interest, or gross negligence.³²⁵

Mere errors of judgment and honest mistakes are insufficient as grounds for breach of the duty of care.³²⁶ These specific negligent acts are protected by the business judgment rule because the power of the board members and senior managers is discretionary.³²⁷ Traditionally, courts generally do not want to interfere with the corporate executives' discretion.³²⁸ They do not want disgruntled shareholders to second-guess important decisions.³²⁹ Conversely, they want the corporate executives to be able to oper-

319. DEL. CODE ANN. tit. 8, § 141(a) (2001).

320. N.Y. BUS. CORP. LAW § 715(a) (Consol. 1983); DEL. CODE ANN. tit. 8, § 142(b) (2001).

321. See, e.g., MODEL BUS. CORP. ACT § 8.30(a) (1999) ("Each member of the board of directors . . . shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.").

322. N.Y. BUS. CORP. LAW § 715(h); see, e.g., *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981).

323. N.Y. BUS. CORP. LAW § 717(a) (Consol. 1983); DEL. CODE ANN. tit. 8, § 141(e) (2001).

324. See N.Y. BUS. CORP. LAW § 715(h).

325. See, e.g., *Joy v. North*, 692 F.2d 880 (2d Cir. 1982); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

326. *Leslie v. Lorillard*, 18 N.E. 363, 365 (N.Y. 1888).

327. *Id.*

328. See *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (N.Y. Sup. Ct. 1944).

329. See *Joy*, 692 F.2d at 885.

ate in an environment where they feel safe to take the necessary business risks.³³⁰ Therefore, if directors make fully informed, good faith decisions, without a conflict of interest, courts employ a presumption that they have exercised due care, which is rebuttable by a showing that the decision had no rational basis.³³¹

Corporate executives may lose the benefit of the business judgment rule, however, if they fail to base their decisions at least partially on a goal to maximize profits.³³²

In *Dodge v. Ford Motor Co.*,³³³ for example, the Dodge brothers were minority shareholders of Ford who brought suit to mandate that the corporation continue declaring special dividends.³³⁴ The corporation announced that it would retain the cash for expansion.³³⁵

The *Dodge* court held that the directors abused their discretion by failing to declare dividends.³³⁶ The court principally was concerned by the fact that Ford Motor Co. was earning very large profits that it was not sharing with shareholders.³³⁷ Henry Ford hurt his case when he testified that his reasons for expanding the business did not include maximizing profits.³³⁸ He specifically stated that the corporation should lower its price and expand its production, not to earn profits, but to enable every American to own a car and to provide employment for more people.³³⁹ The court disagreed and stated that a corporation is organized "primarily for the profit of the shareholders."³⁴⁰ The court noted that

330. *See id.* at 886.

331. *Casey*, 49 N.Y.S.2d at 643; *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORP. GOVERNANCE § 4.01(c)(3) (1994).

332. *See Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 812 (N.Y. Sup. Ct. 1976). Recent polling data suggests that business executives do not principally focus on maximizing shareholders' profits; they instead focus on customers, self-interest, employees, colleagues, the public and shareholders in that order. *See Barry Z. Posner & Warren H. Schmidt, Values and the American Manager: An Update Updated*, 1992 CAL. MGMT. REV. 80, 85 (1992). Moreover, 95% of the U.S. public rejected the view that the only role of a corporation is to make money. *Editorial, New Economy, New Social Contract*, BUS. WK., Sept. 11, 2000, at 182.

333. 170 N.W. 668 (Mich. 1919).

334. *Id.* at 670, 673.

335. *Id.* at 671.

336. *See id.* at 684.

337. *See id.* at 685.

338. *Id.* at 683-84.

339. *See id.* at 683.

340. *Id.* at 684.

the directors have a great deal of discretion in getting to profit maximization, but will breach their duty if they stray too far from this goal—especially if they, as in Henry Ford's case, specifically disavow this as a goal.³⁴¹

In contrast, in *Shlensky v. Wrigley*³⁴² the court allowed the corporation to consider a non-profit-maximizing reason for its ultimate decision.³⁴³ In *Wrigley*, plaintiff minority shareholders alleged that the corporation's policy of not having night baseball games lowered attendance and caused the corporation to lose money.³⁴⁴ The majority shareholder, Philip Wrigley, believed baseball was a daytime sport and that night games would have a deleterious effect on the surrounding neighborhood.³⁴⁵ The court stated:

[W]e are not satisfied that the motives assigned to Phillip K. Wrigley . . . are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood.³⁴⁶

The courts, therefore, are saying that board of director members may consider things other than profit maximization, provided that those other things are rationally related to that goal.³⁴⁷ In fact, a business needs to maintain a good relationship with its surrounding neighborhood. If it does not, it may have long term consequences on its bottom line because the neighbors might, for instance, try to change the zoning use to get the business moved.

Because statutes governing corporations charge the board with managing the corporation, the board of directors ought to be respected. Conversely, both corporate executives and directors may violate the duty of care and lose the protection of the business

341. Of course none of this discussion was the holding of the case. It was merely dicta. The court ordered the corporation to pay dividends and refused to halt Ford's expansion plans.

342. 237 N.E.2d 776 (Ill. App. Ct. 1968).

343. *Id.* at 780.

344. *Id.* at 777-78.

345. *Id.* at 778.

346. *Id.*

347. See, e.g., *Revlon, Inc. v. MacAndrews & Fortes Holdings*, 506 A.2d 173, 176 (Del. 1986); *Wrigley*, 237 N.E.2d at 780.

judgment rule in those cases where directors and senior executives have been inactive in corporate management. For example, in *Francis v. United Jersey Bank*,³⁴⁸ Mrs. Pritchard was the largest shareholder and a member of the board of directors of a reinsurance company.³⁴⁹ After her husband died, she drank heavily and was bedridden.³⁵⁰ During this time, her sons, who were also board members, withdrew large sums of money from the corporation in the form of "loans."³⁵¹ Mrs. Pritchard failed to obtain and read the annual statements of the financial condition of the company that would have disclosed that her sons were misappropriating funds from the corporation.³⁵²

The court found that Mrs. Pritchard breached her duty by being derelict in her responsibilities.³⁵³ The *Francis* court set out minimum standards for board members and senior executives.³⁵⁴ The court stated that business executives must

acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. Because directors are bound to exercise ordinary care, they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care. If one "feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act."³⁵⁵

In *Smith v. Van Gorkom*,³⁵⁶ the board of directors was found liable for breaching the duty of care after they did not fully inform themselves in approving a cash-out merger.³⁵⁷ The board relied exclusively on a twenty-minute presentation and the advice of the Chairman and Chief Executive Officer ("CEO") of the corporation,

348. 432 A.2d 814 (N.J. 1981).

349. *Id.* at 818.

350. *Id.* at 819.

351. *Id.* at 818.

352. *Id.* at 826.

353. *Id.* (finding that Mrs. Pritchard breached her duty of care to creditors of her reinsurance corporation).

354. *Id.* at 821-22.

355. *Id.* (citation omitted) (quoting *Combelle v. Watson*, 50 A. 120 (N.J. Ch. 1901)).

356. 488 A.2d 858 (Del. 1985).

357. *Id.* at 893.

who negotiated the merger agreement.³⁵⁸ They did not take adequate steps to ensure that the corporation got the best deal under the circumstances.³⁵⁹ The CEO failed to disclose how he arrived at the merger price.³⁶⁰ In fact, neither the CEO nor the board read the merger documents.³⁶¹ They were both uninformed and the individuals that they relied upon in making their decision were equally uninformed.³⁶²

The court held that the board had no reasonable basis to rely on the counsel and advice of uninformed officers.³⁶³ The court also rejected the argument that the directors were highly sophisticated and experienced persons giving them the discretion to approve the transaction with such a cursory review.³⁶⁴ Professor Clark is of the opinion that

[p]erhaps the key legal proposition of the [*Van Gorkom*] case is that, though the business judgment rule does create a presumption that the board's decision was an informed one, plaintiffs can rebut the presumption . . . by showing that the directors failed to meet their duty to inform themselves "prior to making a business decision, of all material information reasonably available to them."³⁶⁵

However, the directors' duty to inform themselves is not necessarily that far reaching. In *Graham v. Allis-Chalmers Manufacturing Co.*,³⁶⁶ the Department of Justice indicted Allis-Chalmers for violation of federal antitrust laws because certain middle managers were engaged in price-fixing activities.³⁶⁷ The corporation and several of these employees pled guilty to those charges.³⁶⁸ Several shareholders, therefore, brought a derivative action to recover—from the directors and non-director employ-

358. *Id.* at 869.

359. *Id.* at 874.

360. *Id.* at 868.

361. *Id.* at 874.

362. *Id.* at 875.

363. *Id.* Reliance on good faith report is sometimes a statutory defense. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(e) (2001).

364. *Van Gorkom*, 488 A.2d at 880.

365. CLARK, *supra* note 18, at 128–29 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

366. 188 A.2d 125 (Del. 1963).

367. *Id.* at 127.

368. *Id.*

ees— damages that the corporation incurred as a result of the antitrust suit and resultant penalties.³⁶⁹

The Delaware Supreme Court rejected the plaintiffs' suit against the directors because the court did not believe that the business judgment rule required directors to install an internal system of monitoring the legality of employees' conduct.³⁷⁰ The court stated that:

The precise charge made against these director defendants is that, even though they had no knowledge or any suspicion of wrongdoing on the part of the company's employees, they still should have put into effect a system of watchfulness which would have brought such misconduct to their attention in ample time to have brought it to an end. However, . . . directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong. If such occurs and goes unheeded, then liability of the directors might well follow, but absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.³⁷¹

Professor Clark is of the opinion that the court reached this decision because it was influenced by the corporations' large size and decentralized decision making.³⁷²

In *In re Caremark*,³⁷³ plaintiffs brought suit on similar grounds to *Allis-Chalmers*, in that the board breached its duty of care in connection with the alleged violations by Caremark employees of federal and state laws and regulations.³⁷⁴ Caremark pled guilty to a single felony of mail fraud and agreed to pay civil and criminal fines.³⁷⁵ The court found that "there is a very low probability that it would be determined that the directors of Caremark breached any duty to appropriately monitor and supervise the enterprise."³⁷⁶ The court noted that "the business judgment rule is pro-

369. *Id.*

370. *Id.* at 130–31.

371. *Id.* at 130.

372. CLARK, *supra* note 18, at 131.

373. 698 A.2d 959 (Del. Ch. 1996).

374. *Id.* at 964.

375. *Id.* at 965.

376. *Id.* at 961.

process oriented and informed by a deep respect for all *good faith* board decisions.³⁷⁷ In fact, the court stated that

whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through “stupid” to “egregious” or “irrational,” provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in *good faith* effort to advance corporate interests.³⁷⁸

Interestingly, the court also appears to narrow the *Allis-Chalmers* holding. The *Caremark* court stated that the *Allis-Chalmers* case

can be more narrowly interpreted as standing for the proposition that, absent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company’s behalf. A broader interpretation of [*Graham v. Allis-Chalmers*]³⁷⁹—that it means that a corporate board has no responsibility to assure that appropriate information and reporting systems are established by management—would not . . . be accepted by the Delaware Supreme Court³⁷⁹

The court concluded that

a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.³⁸⁰

Even if a member of the board of directors breaches the duty of care, she may escape liability in Delaware if her corporation has adopted a provision in the certificate of incorporation that eliminates or limits liability.³⁸¹ In addition, the corporation could agree to indemnify officers and employees for liability from derivative suits brought by shareholders for breaches of the duty of care.³⁸²

377. *Id.* at 967–68.

378. *Id.* at 967.

379. *Id.* at 969–70.

380. *Id.* at 270.

381. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

382. *Id.* § 145(b) (2001); N.Y. BUS. CORP. LAW § 722(a) (Consol. 1983). The New York indemnification provisions apply to both directors and officers. *Id.* No provision exists in the New York statute, however, that allows a New York corporation to eliminate or limit

Of course, the advantages provided in these provisions are not absolute. The corporation can not eliminate liability or indemnify officers and directors for breaches of the duty of loyalty, for acting in bad faith, or for knowingly acting against the best interests of the corporation.³⁸³

The question presented here as to whether the networks lose the protection of the business judgment rule and, therefore, have breached their duty of care centers on the type and quality of the decision-making processes the networks follow in determining their programming of minority-themed television shows or lack thereof. The broadcast executives will lose the benefits of the business judgment rule if their decisions were irrational,³⁸⁴ not fully informed,³⁸⁵ or failed to properly monitor³⁸⁶ the diversity of their broadcast schedules, violating the Communications Act. They will be protected by the business judgment rule if they made stupid decisions or well-considered nondiscriminatory decisions to broadcast their current all-white program line-up. This author believes, given the publicly available evidence of the broadcast executives' actions, that they have either made an irrational decision or one that was not fully informed.

IV. ANALYSIS OF WHETHER BROADCAST CORPORATIONS' DECISION MAKING VIOLATES THE DUTY OF CARE

Analyzing whether the major networks have breached their duty of care and should lose the protection of the business judgment rule is complicated. One problem is we were not present when certain decisions were or were not made.³⁸⁷ We do not know who said what at particular meetings. All we know is what we have read in the media and what we can speculate that was said

liability for directors in their certificate of incorporation.

383. DEL. CODE ANN. tit. 8, § 145(b) (2001).

384. See, e.g., *Dodge v. Ford Motor*, 170 N.W. 668, 684 (Mich. 1919).

385. See, e.g., *Smith v. Van Gorkum*, 488 A.2d 858, 874 (Del. 1985).

386. See, e.g., *In re Caremark*, 698 A.2d 959, 970 (Del. Ch. 1996).

387. "No smoking guns" or "smoking tapes" that surfaced in *Roberts v. Texaco*, 979 F. Supp. 185, 190 (S.D.N.Y. 1997), have surfaced to date. See BARI-ELLEN ROBERTS, *ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA* 1 (1998); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 *PITT. L. REV.* 389 (2002).

and done. But we also know that the end result does not necessarily satisfy anyone.

The premise of this article is that the senior executives of the broadcast corporations would be protected by the business judgment rule only if they make fully informed decisions that take into account profit maximization as well as possible regulatory responses, including the broadcasters' public interest mandate. Regulation and the public interest doctrine are rationally related to the goal of profit maximization. If the broadcast executives failed to consider each of these factors in their decision making, then they may very well have violated the duty of care. In addition, the broadcast executives have a social responsibility to eradicate harmful media stereotypes. This section explores each of these factors.

A. *Profit Maximization or Advertising Discrimination*

1. Profit Maximization

*Dodge v. Ford Motor Co.*³⁸⁸ teaches us that senior corporate executives have to make rational decisions. In *Dodge*, the board failed to consider the maximization of shareholder profits.³⁸⁹ The court found that the board abused its discretion by failing to award dividends to the shareholders.³⁹⁰

In the context of creating television shows, broadcasters always seemed to guess wrong, at least when it comes to the popularity of shows with mostly minority casts. Broadcasters have historically believed that many minority-focused shows would be unpopular with the general viewing audience. From *I Love Lucy* and *I Spy*, to *The Cosby Show*, broadcasters have often been hesitant in broadcasting these shows. However, when these shows were successful, they reaped the benefits in terms of awards and profits. Of course, hesitancy and caution are often virtues, but one wonders whether these particular attributes have to do more with the races of the character and actors than with the content of the shows.

388. 170 N.W. 668 (Mich. 1919).

389. *Id.* at 685.

390. *Id.*

In other circumstances, broadcast executives just replicate successful formats; that is why many of the television shows of the 1990s consisted of white, successful, single people working and playing in New York City. It is not particularly creative, but it is a very cautious and disciplined response to a proven and popular format. After *The Cosby Show*, however, there were very few attempts to duplicate the format.³⁹¹ For the most part, after *The Cosby Show* ended its run, there has been an absolute absence of sophisticated African American situation comedy on broadcast television. Instead, in the mid-1990s, there was a resurgence of outdated stereotypes like *Homeboys in Outer Space* on the new networks like UPN and The WB.

How does one explain this? As in other formats, why didn't the very successful African American comedy, *The Cosby Show*, spawn many imitators? Did the broadcasters even consider what they were doing or were they blind to the possibilities of that format? To this author, it seems that the broadcasters were asleep at the switch as to the possible future success of the Cosby-like format. Indeed, if they followed what they normally do—copying successful formats—they could have saved themselves from the grief that they are now incurring because of their policies, or lack thereof.

As for the Latino-focused entertainment, it appears that the broadcasters again have been asleep at the switch. Since the early 1990s, newspapers have reported that Latinos would be the largest minority group in the United States by 2000.³⁹² One would think that most rational businesses would attempt to deal with this significant demographic trend by providing this expanding ethnic group with the kinds of service and products that they require. However, as the Latino population in the United States grew to 9% of the population, the percentage of Latino characters reached all-time lows to a mere 1% of all characters.³⁹³ The broadcast executives' apparent lack of knowledge is particularly frightening since the entertainment community is mostly located in

391. The television show, *Roc*, comes to mind. Fox broadcasted the show, and it was billed as the working-class alternative to *The Cosby Show*. See BOGLE, *supra* note 1, at 411–12. *Roc*, in no way had the same level of acting, scripts, or character development of *The Cosby Show*. See *id.* at 412.

392. See, e.g., Ken P. Perkins, *A Cristina That Goes Rat-a-Tat-Tat*, DALLAS MORNING NEWS, Apr. 29, 1993, at 1C.

393. Ferriss, *supra* note 244.

California, where Latinos became the largest demographic group in the mid-1990s.³⁹⁴ It is hard to imagine that the broadcast executives were not seeing what was happening in their own backyard. In addition, they obviously were not paying attention to the success of the Spanish-language cable stations like Univision and Telemundo. For example, in 1998 Univision was ranked number one in the Miami market.³⁹⁵ To date, such rating success for a cable network is unparalleled. One would think that the network executives would have taken note and planned to take advantage of this demographic trend. They have not. Since the 1990s, only 1% of the characters on network television were Latino, and a large majority of them were stereotyped.³⁹⁶ In fact, even though there has been a slight increase in Latino characters, most of the increase has taken place in non-recurring characters on network shows.³⁹⁷ It is obvious that the market for Latino entertainment content is under-served.

Broadcast executives were not paying attention to the market. They failed to try to maximize their audience size, which would have maximized their profit. Many minority focused and themed shows were successful crossover hits in the past; therefore, there is no excuse for failing to develop those kinds of programs in the present. To some extent, you may not have to raise the issue of discrimination and regulatory issues concerning the breach of the duty of care since it appears that the broadcasters may have failed to take care of their primary business, i.e., maximizing profits. They have failed to maximize audience size, which is related to their profitability. Such failure is a breach of the duty of care.

These market anomalies, however, beg the question—why? Why have these executives not seen these opportunities? Are they always blind? Or are they just blind when it comes to issues of race? One explanation for this blindness may be that the broadcasters have been passively complicit in discrimination by advertisers towards minority broadcast audiences.

394. See Harry P. Pachon, *A Flirtation with the GOP Turns Cold Politics: Wilson's Embrace of Prop. 187 Will Have Repercussions as New Latino Voices Enter the Electorate*, LA TIMES, Nov. 6, 1994, pt. m., at 5.

395. See Marie Arana, *Spanish-Language TV, A Channel to Latino Voters*, WASH. POST, Aug. 17, 2000, at C4.

396. See Ferriss, *supra* note 244.

397. See CHILDREN NOW, *supra* note 310, at 18.

2. Advertising Discrimination

In the case of the broadcast industry, profit maximization depends on the quantity and the price of the commercials sold. However, 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. This search for the right demographics may conflict with the fact that African American viewership is almost double their size of the population.³⁹⁸ This “search” for the “right audience demographics” seems reminiscent of past advertiser practices in refusing to place spots on *The Nat “King” Cole Show*; *East Side, West Side*; or even to some extent *I Spy* because of fear of Southern boycotts of their products.³⁹⁹ This author wonders whether the “search” is merely a pretext designed to avoid advertising on programs that have large minority viewership.

A recent preliminary study on advertising practices conducted by the Civil Rights Forum on Communication Policy and commissioned by the FCC may be illustrative of the fact that advertisers have engaged in prejudicial thinking in deciding where to place advertisements.⁴⁰⁰ According to the station owners surveyed at 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.⁴⁰¹ When these radio stations did receive advertising, the rates were often discounted from what other stations received.⁴⁰² Consequently, even though these minority-formatted stations in certain markets may have larger audiences than other stations,⁴⁰³ the minority-formatted radio stations earn less advertising revenue per lis-

398. See *supra* note 28 and accompanying text.

399. See BOGLE, *supra* note 1, at 112.

400. CIVIL RIGHTS FORUM ON COMMUNICATIONS POLICY, WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS (1999), available at http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study (last visited Jan. 24, 2003) [hereinafter CIVIL RIGHTS FORUM].

401. *Id.* at 12.

402. *Id.* at 2.

403. *Id.* at 4–7, 7 n.32. 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. *Id.* at 7 n.32.

tener than other radio stations.⁴⁰⁴ The study indicated that 91% of the minority broadcasters encountered the “no Urban/Spanish dictates.”⁴⁰⁵ The minority broadcasters estimated that 61% of the advertisements placed on their radio stations were discounted and they estimated the size of the discount to be 59%.⁴⁰⁶ The “no Urban/Spanish dictates” together with the “minority discounts” were estimated to reduce revenues on these stations by 63%.⁴⁰⁷

This advertising study is a treasure trove of anecdotal evidence, which supports the conclusion that since advertisers stereotype the minority consumer, they lack the interest in placing advertisements on minority-formatted radio stations.⁴⁰⁸ For example, 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.”⁴⁰⁹ Further, 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.”⁴¹⁰ “[A] major mayonnaise manufacturer refused to buy commercial time based upon the perception that ‘Black people don’t eat mayonnaise.’”⁴¹¹ 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.’”⁴¹²

404. *See id.* at 49.

405. *Id.* at 13.

406. *Id.*

407. *Id.*

408. *See id.* at 40–43.

409. *Id.* at 43 (quoting the Katz memo).

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

411. *Id.* at 2.

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

The report also noted that “there are categories of products in which people of color are predominant customers.”⁴¹³ For example, African Americans represent 60 to 70% of the purchasers of expensive cognacs, but advertisers almost never directly target them.⁴¹⁴

The same is true with respect to Latinos and groceries. One of the interview respondents, Tom Castro, 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.”⁴¹⁵ Mr. Castro posited that Latinos spend more on groceries because the size of their households tends to be larger, and there is a cultural tradition and lifestyle that families eat meals at home with each other.⁴¹⁶ Instead, Mr. Castro found that the advertising people state: “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.”⁴¹⁷

In the advertising study, Mr. Castro speculated that the reason that some advertisers are not acting in an economically rational manner in the case of Latino consumers is that there is “prejudice, which is hard to quantify and prove, but is there.”⁴¹⁸ Advertisers will say “Well, I don’t want Hispanics in my grocery store.”⁴¹⁹ They only know about Hispanics what “[t]hey 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.”⁴²⁰

Advertisers are sometimes concerned that advertising to customers of color will cause too many minorities to come into their businesses.⁴²¹ For example, Michael Banks, Station Manger of the

413. *Id.* at 35.

414. *Id.* (citing 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. *See id.*

415. *Id.* at 41.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *See id.* at 42.

urban formatted station, WBGE-FM, was told by one potential advertiser: "Your station will bring too many Black people to my place of business."⁴²²

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.⁴²³ An anonymous co-owner of an AM & FM radio station 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."⁴²⁴ The business owner placed an advertisement on the radio station and the African American clientele increased.⁴²⁵ Shortly thereafter, the business owner told the station owner, "I'm going to have to cancel my business."⁴²⁶ When questioned about the cancellation, the business owner explained, "Well, my pilferage rate is higher."⁴²⁷ When asked if he could prove that statement, the business owner said, "No, but, I don't have enough people, and I have suspicious people coming in here. And I believe they're shoplifting."⁴²⁸

Luis Alvarez, the sales manager of WSKQ and WPAT (Spanish Broadcasting System) reported that he had a similar experience.⁴²⁹ Mr. Alvarez stated "I was managing a station where the sales [representative] came back and she was practically in tears because the agency had told her that the client said that the reason they don't advertise in the Hispanic market (it was a Macy's department store) was because their pilferage will increase."⁴³⁰

This preliminary study reviewed the practices of the advertisers only with respect to minority-owned and minority-formatted radio stations.⁴³¹ The study reported that there were very few minority-owned or minority-formatted television stations.⁴³² The study did not evaluate the advertising practices on network tele-

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 1.

432. *See id.* at 86 n.229.

vision shows.⁴³³ However, it is not a great leap to postulate that advertisers probably hold the same views towards advertising on network television shows that have a minority theme.⁴³⁴ The advertisers' apparent ignorance and stereotyping of the minority community seems self evident. One can only speculate that their search for the "right" demographics may be pretext for discrimination.

The question then becomes: How does this advertising discrimination relate to the business judgment protections that are afforded to corporate officers and directors? The officers and directors of broadcast corporations will argue that they are protected by the business judgment rule and that they have acted rationally by trying to maximize profits. If evidence of discrimination is found, as in the *Texaco* race discrimination case,⁴³⁵ then officers and directors would not be protected by the business judgment rule. Discrimination is illegal, and illegal conduct is not protected.⁴³⁶ Moreover, even violations of public policy might not be protected by the business judgment rule.⁴³⁷ It is unlikely that we will find a "smoking gun" here.

There are strong indicia, however, that broadcast executives have participated passively in discrimination. Historically, the advertising industry failed to sponsor minority-themed shows in the 1950s and 1960s.⁴³⁸ In addition, in the 1950s and 1960s many

433. *See id.*

434. *See id.*

435. *See Roberts v. Texaco*, 979 F. Supp. 185, 190 (S.D.N.Y. 1997). For example, if the broadcast executives made racial epithets during their decision to exclude programs featuring Latinos as major characters, those comments would be strong evidence of an attempt to discriminate.

436. *Cf. Miller v. AT&T*, 507 F.2d 759 (3d Cir. 1974). Stockholders sued AT&T's directors because they failed to collect an outstanding debt of \$1.5 million owed by the Democratic National Committee. *Id.* at 761. The plaintiffs claimed that the directors negligently failed to collect the debt, but the plaintiffs also claimed that the failure to collect the contribution was a violation of the federal statute on campaign contributions. *Id.* The Third Circuit refused to dismiss the complaint and held that the corporate directors are not protected by the business judgment rule if in fact they violated the campaign contribution statute. *Id.* at 763.

437. *See Abrams v. Allen*, 74 N.E.2d 305, 307 (N.Y. 1947) (holding that illegal acts committed for the benefit of the corporation may amount to a breach of fiduciary duty because they are against public policy).

438. *See BOGLE, supra* note 1, at 76.

of the Southern affiliates of the major broadcasters boycotted television shows that had a minority theme.⁴³⁹

More recently, the anecdotal evidence from the advertising study conducted by the Civil Rights Forum teaches us that advertisers are still discriminating against certain formats—not necessarily for rational economic reasons, but instead based on stereotypes.⁴⁴⁰ The minority broadcasters know it, and thus, one can presume that the majority broadcasters do too.

Therefore, it seems that the broadcasters have acted as a “passive participant” in the discrimination of others.⁴⁴¹ Justice O’Connor found discrimination as a result of passive participation sufficient grounds for establishing a race-based affirmative action program.⁴⁴² For example, if prime contractors on a government project were discriminating against minorities and this discrimination became known to the government, which funded the contracts, the government might be deemed sufficiently complicit (a kind of joint tortfeasor, co-conspirator, or aider and abettor) to allow for remedial action.⁴⁴³

Discrimination is illegal and against public policy. The business judgment rule does not protect directors and officers if they have engaged in some sort of illegality as to their decision and duties.⁴⁴⁴ If the broadcasters have in fact passively participated in discrimination against minority-themed programming, then their decisions are unprotected by the business judgment rule.⁴⁴⁵ Also, the broadcast executives could in fact be liable for breach of the duty of care.⁴⁴⁶

The next question that arises is even though the broadcast executives may have breached their fiduciary duty, can they escape

439. *See id.* at 112.

440. CIVIL RIGHTS FORUM, *supra* note 400, at 42.

441. *See City of Richmond v. T.A. Croson. Co.*, 488 U.S. 469, 492 (1989).

442. *Id.* The Supreme Court 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.*

443. *See Contractors Ass’n v. City of Philadelphia*, 91 F.3d 586, 599 (3d Cir. 1996).

444. *See Biondi v. Beekman Hill House Apt. Corp.*, 731 N.E.2d 577, 581 (N.Y. 2000). Of course, you might have to have an actual judgment or finding by a court or regulatory agency to establish that the executives had violated the anti-discrimination laws in order for them to lose the protections of the business judgment rule.

445. *See id.*

446. *See id.*

liability by reason of the statutory benefits of indemnity and elimination of liability? Most of the statutory provisions that afford senior executives these protections are limited to those acts or omissions that are done in good faith.⁴⁴⁷ If broadcast executives have discriminated against the minority audience, then broadcast executives would most probably be found to be acting in bad faith and, therefore, lose the protection of the indemnity.⁴⁴⁸

For example, in *Biondi v. Beekman Hill House Apartment Corp.*, the court found that a corporation was barred from indemnifying a director for punitive damages imposed against him.⁴⁴⁹ In that case, the director denied a sublease arrangement because of the race of the subtenant and retaliated against a shareholder for opposing the director's denial.⁴⁵⁰ The court pointed out that "the key to indemnification is a director's good faith towards the corporation."⁴⁵¹ The court went on to say that "a judgment against the director, standing alone, may not be dispositive of whether the director acted in good faith," but held that it was dispositive for *Biondi*.⁴⁵² In *Kaufman v. CBS Inc.*,⁴⁵³ while at a public dinner party, the vice president made a lewd comment about a female employee and also pulled on her clothing. The court found that the vice president's conduct could not be construed as an "act [] in good faith for the purpose reasonably believed to be in the best interests of the corporation."⁴⁵⁴ Whether acts of discrimination are made in bad faith and in contravention of the best interests of the corporation are questions of fact.⁴⁵⁵ The courts have instructed us to conduct an independent determination on whether a director acted in bad faith.⁴⁵⁶ Unfortunately, in most cases, we do not have enough publically available information to make a determination as to whether the officers and directors of corporations have acted in bad faith. If they have discriminated against the minority audience in contravention of the Communications Act, then there can be a showing that they are acting in bad faith, but it will de-

447. See *infra* notes 451-57 and accompanying text.

448. See *Biondi*, 731 N.E.2d at 580-81.

449. *Id.* at 580-81.

450. *Id.* at 578.

451. *Id.* at 580.

452. *Id.* at 580-81.

453. 514 N.Y.S.2d 620 (N.Y. Sup. Ct. 1987).

454. *Id.* at 620-21.

455. *Biondi*, 731 N.E.2d at 580.

456. *Id.* at 581.

pend on finding out all the facts. As in *Texaco*, if any tapes mysteriously appear, it might bring to light what the broadcast executives' motives are.⁴⁵⁷

B. *Have the Broadcast Executives Made Rational and Fully Informed Decisions?*

It appears that broadcasters have made two distinct, but related, decisions as to the issue of minority programming. The first decision relates to the smaller number of shows with predominately minority casts, and the second relates to the small number of shows with integrated casts.⁴⁵⁸ In making these decisions, a director in performance of his or her duties "shall . . . be fully protected in relying . . . upon the records of the corporation and upon [the] information, opinions, reports, or statements . . . of the corporation's officers and employees."⁴⁵⁹ In some jurisdictions, officers also benefit from relying on information from employees.⁴⁶⁰

1. Minority-Focused Programming

Television programming and schedules are approved and given the "green light" by the president of the entertainment division of the networks. The concepts, the themes, and location in the schedule are all approved at this level. This approval includes the decision, or non-decision, concerning minority-focused programming. Of course, the officer who ultimately makes this approval relies on her creative staff to develop concepts, schedules, and formats. Presumably, the officers—the president or vice president of the entertainment division—advise the board of what the prime-time programming will be and the expected audience shares and ratings. Thus, the board and the officers who head the entertainment division will argue that they relied on the information, opinions, reports, and statements of the corporation's officers and employees in reaching their decision. Therefore, they will claim that they are protected by the business judgment rule.

457. See *Roberts v. Texaco*, 979 F. Supp. 185, 190 (S.D.N.M. 1997).

458. See *supra* Part II.F.

459. DEL. CODE ANN. tit. 8, § 141(e) (2001); N.Y. BUS. CORP. LAW § 717(a) (Consol. 1983).

460. N.Y. BUS. CORP. LAW § 715(h) (Consol. 1983).

However, *Van Gorkom*⁴⁶¹ teaches us that board members and officers do not receive this protection if they have no reasonable basis to rely on the parties when they know that the parties are uninformed.⁴⁶² In the case of minority-focused programming, the creative people and the heads of the entertainment divisions have been just as uninformed as the CEO in *Van Gorkom*. In that case neither the president of the corporation nor the board of directors were fully informed about the intrinsic value of their corporation.⁴⁶³ In addition, the officers and directors in *Van Gorkom* failed to read the merger agreements before approving the deal.⁴⁶⁴ The board relied exclusively on the CEO who was also ill informed.⁴⁶⁵ In *Francis*,⁴⁶⁶ the majority shareholder and board member did not read the financial statements of the corporation and was, therefore, not able to detect that her sons, who were also board members, were defrauding the corporation.⁴⁶⁷ In each case, there was significant misfeasance, and as a consequence, the defendants lost the protection of the business judgment rule.⁴⁶⁸

It does not appear that either the directors or senior officers of broadcast corporations have considered the size of the minority market⁴⁶⁹ or how profitable minority-themed shows have been.⁴⁷⁰ In addition, it does not appear that the creative people in developing these shows considered the minority market.⁴⁷¹ Therefore, as in *Van Gorkom*, the broadcast directors cannot rely on the uninformed advise of their underlings.⁴⁷² Thus, this author does not believe that they will benefit from this statutory protection. In the case of shows with all-white casts, it also appears that the board and senior officers should not benefit from this statutory protection.

461. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

462. *Id.* at 872.

463. *Id.* at 874.

464. *Id.*

465. *Id.*

466. *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981).

467. *Id.* at 819.

468. *Id.* at 829; *Van Gorkom*, 488 A.2d at 874.

469. *See supra* Part IV.A.1.

470. *See supra* notes 188–92 and accompanying text.

471. *See supra* Part II.E.

472. 488 A.2d at 874.

2. Integrated Programming

In terms of programming with integrated casts, the board and the officers who head the entertainment division will argue that they relied on the information, opinions, reports, and statements of the corporation's officers and employees in reaching their decision. Therefore, they will claim that they are protected by the business judgment rule. Furthermore, many of the casting decisions are delegated to casting directors.

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.⁴⁷³ Rene Balcer, the executive producer of the NBC crime drama *Law & Order* said that “[t]he story dictates who’s going to be what.”⁴⁷⁴ 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 you write it down and if you want a white person you don’t write it.”⁴⁷⁵ How is the decision being made if race is not specified in 90% of the casting decisions? That’s not a decision. Based on *Van Gorkom* and *Francis*, the directors and officers can not rely on this non-decision.⁴⁷⁶ The historical and present absences or stereotypes of people of color suggest that the networks never have made a fully informed decision on these matters.⁴⁷⁷ Again if you somehow can show that this failure to make an informed decision was made in bad faith, the corporation would not be able to indemnify or eliminate liability for their misfeasance.⁴⁷⁸

473. See Breakdown Services, Ltd., at <http://www.breakdownservices.com> (last visited Jan. 9, 2003); see also Dana Calvo, *Applying the First Light Coat: 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).

474. Kinney Littlefield, *What Goes on in Closed-Door Casting Sessions Paints Racial Mix at Prime Time*, ORANGE COUNTY REG., Dec. 18, 1999, at F10.

475. *Id.*; see also Williams, *supra* note 3, at 109–10 (explaining that many casting directors feel compelled to follow the race agreed upon by the writers and studio executives).

476. See *Van Gorkom*, 488 A.2d at 874; *Francis v. United Jersey Bank*, 432 A.2d 814, 829 (N.J. 1981).

477. Lowry, *supra* note 24 (noting that sometimes the decision may not have been made because of the high turnover in the broadcaster executive suites.)

478. *Biondi v. Beekman Hill House Apartment Corp.*, 731 N.E.2d 577, 580–81 (N.Y. 2000).

Casting is a very critical issue. The right actress can make or break a television show. Even in a non-racial context, the personality of a television show is subtly shaped by stature, height, weight, features, skin, and hair color of the characters.⁴⁷⁹ It reminds me of one of my favorite shows, *The Golden Girls*, which was a hit television show in the late 1980s and early 1990s. One of the funniest aspects of the casting was having the very tall actress Bea Arthur⁴⁸⁰ play the daughter of the diminutive actress Estelle Getty.⁴⁸¹ Similarly, the casting of characters of color in unconventional ways would itself effect the context of the program. So like these other factors, one would think that for most rational decision makers, race would be a consideration in casting decisions.⁴⁸²

Acting on prime time television is often not about who is the best qualified for the role or who is even necessarily the best actor. It is about fitting a certain type that the directors and writers want.⁴⁸³ The casting decision means fitting into someone else's fantasy of what the world is like.⁴⁸⁴ These fantasies seem to be dreams of an all white world.⁴⁸⁵

Even assuming that the casting directors are making decisions on behalf of the corporation, it raises the issue of whether whites can write effective stories about people of color. Poll after poll shows that there is a great gap in understanding between white Americans, who often believe that things are much better for African Americans, and African Americans, who often think that

479. Littlefield, *supra* note 474.

480. Beatrice Arthur played Dorothy Zbornak, a witty, divorced schoolteacher.

481. Estelle Getty played Sophia Petrillo, Dorothy's crotchety, eighty-year-old mother.

482. See Littlefield, *supra* note 474.

483. See Williams, *supra* note 3, at 108–09.

484. See *id.* at 110. 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. When races and ethnic groups do not appear on television, they may appear not to exist.

485. See *id.* 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% of all roles in television series, movies and miniseries. Lewis Diguid & Adrienne Rivers, *The Media and the Black Response*, 569 ANNALS AM. ACAD. POL. SOC. SCI. 120, 132 (2002); see also Williams, *supra* note 3, at 106 (noting the study). But on the four major networks, African Americans represent only 10% of all characters compared with 17% in the 1992–1993 season. Hall, *supra* note 222. Hispanic actors filled 3.3%; Asian actors filled 1.9%; Native American actors 0.2%; and white actors 78.9%. *Id.*

white Americans are delusional.⁴⁸⁶ In 1995, the *Washington Post* did a random survey of 1,970 people with Harvard University and the Kaiser Family Foundation.⁴⁸⁷ Fifty-eight percent of whites thought that the average African American had an equal or better job than the average white person.⁴⁸⁸ In fact, African Americans are underrepresented in the professions of engineering, law, medicine, architecture, and journalism.⁴⁸⁹ African Americans are most represented in occupations that many whites are not willing to do, e.g., hotel maids and nursing aides.⁴⁹⁰ They also have the greatest representation in lower level civil service jobs, e.g., postal clerks and correctional officers, and occupations with high turnover, e.g., security guards and taxicab drivers.⁴⁹¹ In 1995, 56% of whites believed that African Americans had better education than whites.⁴⁹² The reality was that young whites were twice as likely to finish college and less likely to drop out of high school.⁴⁹³ Forty-five percent of whites believed that African Americans had better homes than whites.⁴⁹⁴ In fact, whites were nearly twice as likely to be homeowners as African Americans and the average value of homes owned by whites was \$80,300 and for African Americans it was \$50,500.⁴⁹⁵ Many African Americans live in hyper-segregated housing.⁴⁹⁶ Forty-one percent of whites believed that African Americans earned more income than whites.⁴⁹⁷ However, in 1995, the average white family earned \$37,630 while the average African American family earned only \$22,470.⁴⁹⁸ Most whites guessed that whites made up only 49.9% of the U.S. population when they in fact made up 74%.⁴⁹⁹ Most

486. Richard Morin, *Reality Check: A Distorted Image of Minorities; Poll Suggests That What Whites Think They See May Affect Beliefs*, WASH. POST, Oct. 8, 1995, at A1.

487. *Id.*

488. *Id.*

489. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 110 (1992).

490. *Id.*

491. *Id.*

492. Morin, *supra* note 486.

493. *Id.*

494. *Id.*

495. *Id.*

496. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE RANKING OF THE UNDERCLASS* 10 (1993).

497. Morin, *supra* note 486.

498. *Id.*

499. *Id.*

whites guessed that African Americans were 23.8% of the population when in fact they were only 11.8%.⁵⁰⁰

Most writers, directors, and producers may be better educated than the average white American, but they may still be ill informed. Since we tend to live in a segregated society, by not having people of color in the room thrashing out these decisions, officers and directors of broadcast corporations could not possibly be making fully informed decisions. With the early vanguard of minority-focused television shows, often only the actors were of color; all the writers, directors, and producers were white.⁵⁰¹ There is now more participation of the minority community in the production of prime time television shows.⁵⁰² The pinnacle of success was *The Cosby Show* of the 1980s when a Harvard-trained African American psychiatrist reviewed scripts.⁵⁰³ The broadcast networks have now hired vice presidents of diversity that are reporting directly to the president of the corporation.⁵⁰⁴ Thus, the networks are clearly moving in the right direction. Those networks that have appointed diversity boards to help with casting and producing decisions are making an even better decision, but we must remember that only two major broadcast corporations agreed to do so.⁵⁰⁵ Much decision making about television programming still seems uninformed from a minority perspective.

Black Enterprise magazine cited industry sources as indicating that "most networks will only use 'network approved' writers, directors and producers for their shows."⁵⁰⁶ Most of the writers are white.⁵⁰⁷ Of the 839 writers employed on prime time network shows during the 1999–2000 season, only fifty-five were African American.⁵⁰⁸ "Of that fifty-five, 45 (77%) of these positions were on the UPN and the WB."⁵⁰⁹ Additionally, "83% of those 55 [Afri-

500. *Id.*

501. Deborah M. Wilkinson, *Power Beyond the Remote Control*, BLACK ENTERPRISE, Dec. 1990, at 81 (calling for blacks to take a more active role in television production).

502. *Id.*

503. See *supra* notes 184–87 and accompanying text.

504. See generally *supra* note 291 and accompanying text.

505. Fox and CBS have diversity boards. See *supra* note 298 and accompanying text.

506. Wilkinson, *supra* note 501.

507. *Id.*

508. NAACP REPORT, *supra* note 289, at 27.

509. *Id.*

can American] writers are employed on black-themed shows.”⁵¹⁰ In fact, at one point 33% of the African American writers worked for “UPN’s *Moesha* and its spin-off *The Parkers*.”⁵¹¹ “[O]nly 11 Latino and 3 Asian American writers are working on prime time series this fall [1999] . . . [and] [t]here are no Native American writers employed on a prime-time series.”⁵¹² None of the major television networks, ABC, CBS, NBC, and Fox carried a show that employed more than one African American writer per show and fewer than 2% of all writers on major prime time shows were African American.⁵¹³

There is also a dearth of minority directors employed by the major networks.⁵¹⁴ A recent Directors Guild of America study showed that, of “the 40 most popular series of the 2000–2001 season, . . . 80% of drama and comedy episodes . . . were directed by white males.”⁵¹⁵ African American males directed 3% of these popular series, Latino males 2%, and Asian American males about 1%.⁵¹⁶ The fact that there are so few writers and directors of color and that most of those who are African American work on minority-themed shows, helps to explain why there are underrepresentations and stereotypes still on television. The low percentage and, in some cases, the absence of people of color at the casting and program conception stage lends itself to a breach of the duty of care.

C. *Have the Broadcast Executives Taken into Account Possible Regulatory Responses?*

The FCC regulates the broadcast corporations. Thus, as part of their fiduciary duty, the board of directors and senior officers have an obligation to monitor and oversee regulatory developments and to ensure that the corporation is in compliance with

510. Greg Braxton, *Survey Cites Low Number of Minority Writers on Series*, L.A. TIMES, Oct. 9, 1999, at F2.

511. NAACP REPORT, *supra* note 289, at 27.

512. Braxton, *supra* note 510.

513. NAACP REPORT, *supra* note 289, at 27.

514. Greg Braxton, *Director Diversity Seen As Lacking*, L.A. TIMES, Jan. 30, 2002, at F1.

515. *Id.*

516. *Id.* (white women directed only 11%, and no women of color, except for two Asian American women, directed any of these episodes).

present and future regulatory mandates set forth by the FCC.⁵¹⁷ Broadcast corporations have an obligation to broadcast in the public interest. By failing to have diverse programming, broadcast corporations may be in violation of FCC case law.⁵¹⁸ A regulator may impose harsh regulations that might be costly and affect these corporations' profitability. Therefore, concern for regulation is rationally related to the corporate executives' goal to maximize profits.

The board of directors of each broadcaster should be on notice to put systems in place to evaluate the diversity of their program schedule. In the 1950s and 1960s, the Southern-affiliated stations and advertisers pressured broadcasters into refraining from broadcasting minority programming.⁵¹⁹ The Civil Rights Commission blamed the media for the civil rights unrest of the 1960s.⁵²⁰ The NAACP sued CBS for its broadcasting of the *Amos 'n' Andy Show* in the 1950s.⁵²¹ Many minority groups have consistently complained about the lack of programming choices for the past fifty years. The broadcasters' failure to put a monitoring system in place before now is unprotected by the business judgment rule.⁵²² The broadcast executives also may lose the possibility of indemnification, if it can be shown that their failure to monitor was done in bad faith.⁵²³

Interestingly, when the NAACP complained publicly about the lack of minority characters in the 1999 television season, the broadcasters found a way to add minority characters to their fall line-up.⁵²⁴ Then-Chairman William Kennard said: "[f]or too long, women and minorities have faced barriers to working in front of and behind the camera. . . . Our nation benefits when television better reflects the diverse market it serves."⁵²⁵ Some of the regu-

517. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963); *In re Caremark*, 698 A.2d 959, 967 (Del. Ch. 1996).

518. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461, 472 (1975).

519. See *supra* note 58 and accompanying text.

520. See NAACP REPORT, *supra* note 289, at 3.

521. *Id.* But see E-mail from Sanford Kryle, *supra* note 83.

522. See *In re Caremark*, 698 A.2d 959, 969-70 (Del. Ch. 1996).

523. See *Biondi v. Beekman Hill House Apartment Corp.*, 731 N.E.2d 577, 580-81 (N.Y. 2000).

524. Sherri Burr, *Television and Societal Efforts: An Analysis of the Media Images of African-Americans in Historical Context*, 4 J. GENDER, RACE & JUST. 159, 160-61 (2001); see also Braxton, *supra* note 286.

525. Burr, *supra* note 524, at 174 (quoting Greg. Braxton & Denton Calivo, *Executive*

lators were obviously watching the situation carefully. Given this environment, the lack of responsiveness to these communities may lead to increased regulation. African Americans, Asian Americans, Latinos, and Native Americans comprise almost 30% of the U.S. population.⁵²⁶ These groups have starkly different viewing tastes than white Americans.⁵²⁷ For example, in the 2001–2002 season, the number-one rated show for African Americans was *The Bernie Mac Show* while the number one-rated show for everyone else was *Friends*.⁵²⁸ Failure to provide members of their audience with the types of programming they desire could be grounds for taking disciplinary action against broadcasters.⁵²⁹ This lack of programming may be a form of discrimination illegal under the Communications Act.⁵³⁰ Kweise Mfume stated that the NAACP was considering a wide range of action against the networks, including litigation contending the absence of minorities was a violation of the 1934 Communications Act.⁵³¹

The broadcast executives' failure to monitor may lead to additional regulation. Several members of Congress have been concerned about the issue of negative minority media stereotypes.⁵³² In the 107th Session of Congress, Congressman Eliot Engel introduced legislation to amend the Communications Act, requiring the Federal Communications Commission to establish an office on

from 3 Networks Walk Out of Diversity Hearing, L.A. TIMES, Nov. 30, 1992, at B2) (quoting then-FCC Chairman William Kennard praising the NAACP for prompting a national dialogue about the glass ceiling in television)).

526. BUREAU OF THE CENSUS, POPULATION PROFILE OF THE UNITED STATES: 2000, 2-2 (2002), available at <http://www.census.gov/population/pop-profile/2000/profile2000.pdf> (last modified Feb. 20, 2002).

527. See James Sterngold, *A Racial Divide Widens on Network TV*, N.Y. TIMES, Dec. 29, 1998, at A1.

528. See *supra* note 234 and accompanying text.

529. The FCC could arguably not grant the renewal of the license of a broadcaster who fails to serve the public interest. 47 U.S.C. § 309(k)(i) (2000). Moreover, the FCC can impose a forfeiture against a broadcaster who violates a specific rule. See generally *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.

530. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461, 472 (1975).

531. Braxton, *supra* note 286. Mr. Mfume stated that he would call for Congressional and Federal Communications Commission hearings on network ownership, licensing, and programming. *Id.* He also indicated that a viewer boycott of the networks and advertisers was also under consideration. *Id.*

532. See *Ethnic, Minority, and Gender Bias Clearinghouse Act of 2001*, H.R. 2700, 107th Cong. (2001); see also *Lawmaker Wants FCC To Be a Watchdog Against Stereotyping*, MILWAUKEE J. SENTINEL, Aug. 8, 2001, at 12B.

victims of media bias.⁵³³ This office would function “as a clearing-house for complaints, grievances, and opinions relating to radio, television, and cable television . . . and their depictions of victims of media bias.”⁵³⁴ It would also collect and analyze data on media portrayals and conduct an annual conference designed to focus attention on the images of media bias.⁵³⁵ Some foreign countries handle the problems of negative media stereotypes by actually regulating the content of their broadcasters.⁵³⁶ This proposed legislation, therefore, is a good first step because having access to information often provides evidence of disparity.⁵³⁷ Further, some FCC officials, some members of Congress, and some academics are thinking about these issues and advocating proposals to deal

533. H.R. 2700, 107th Cong. (2001).

534. *Id.* § 2(f)(2)(A).

535. *Id.* § (2)(f)(2)(B)–(D).

536. See Steve Mark, *Is Conciliation of Racial Vilification Complaints Possible?, in* WITHOUT PREJUDICE 3 (1991) (discussing New South Wales Anti-Discrimination Act as being amended to include racial vilification as a ground of discrimination); see also CANADIAN BROADCAST STANDARDS COUNCIL, *SEX ROLE PORTRAYAL FOR TELEVISION AND RADIO PROGRAMMING* (1990) (guide for broadcasters setting standards to equalize the portrayal of men and women by broadcasters).

537. In another article entitled: *WHITEOUT: The Absence and Stereotyping of People of Color by the Modern Media*, this author proposes regulation to help eliminate the stereotyping. Baynes, *supra* note 16. In *WHITEOUT*, this author 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. *Id.*

Like the proposed legislation, H.R. 2700, the FCC would collect and analyze data and grievances, but the “ordinary viewer test” would require the FCC to evaluate the type of content that the broadcasters are broadcasting in two ways. *Id.* First, in those cases where there are no people of color cast in roles on a network in any given television season, there would be a per se violation of the Communications Act. *Id.* The broadcaster would have an opportunity to refute the violation by evidencing a bona fide reason for the lack of minority representation. *Id.* The “ordinary viewer test” standard would also require the FCC to determine whether there is a disproportionate number of observations of stereotypical behavior by the characters of color as compared to the white characters. *Id.* Evidence of such disparity in any given season would establish a prima facie case of discrimination under the Communications Act. *Id.* The disparity could be shown by statistical studies. *Id.* The FCC would conduct a proceeding to evaluate whether, on average, the network is discriminating by the absence or by the disproportionate portrayals of negative stereotypes of people of color. *Id.*

This evaluation may seem more onerous because it is scrutinizing the content, but is no more onerous or burdensome than what the FCC does in evaluating indecent programming or has done under the fairness doctrine in determining whether there was a need to respond. *Id.* In fact, the proposal is fairly modest; it does not require that all stereotypical programming be eliminated. *Id.* Rather it requires that such programming not be disproportionate in comparison to other programming. Both branches of the test should withstand judicial scrutiny. *Id.*

with the situation.⁵³⁸ Thus, any decision that broadcast executives make cannot be fully informed unless it takes into account that non-action may lead to increased regulation, which may lead to a decrease in profitability.

D. *Have Broadcast Executives Violated Their Public Interest Mandate?*

1. Public Interest, Convenience, and Necessity

Even if the proposed legislation or regulation is not enacted, broadcasters may have violated their public interest obligations. The federal government owns the electronic spectrum through which the broadcast signal travels.⁵³⁹ The FCC awards licenses to broadcasters in trust, and as fiduciaries, for the American public.⁵⁴⁰

The FCC has broad authority to regulate the communications industry “as the public interest, convenience, or necessity requires.”⁵⁴¹ This mandate even includes the right to suspend a license if the broadcaster has broken the law.⁵⁴² 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.”⁵⁴³

At first, some thought that this language gave the Commission only the power to regulate the engineering and technical aspects

538. See generally STEVEN BENDER, *GREASERS AND GRINGOS: LATINOS, LAW AND THE AMERICAN IMAGINATION* (forthcoming 2003); Baynes, *supra* note 16; Burr, *supra* note 524; Patricia M. Worthy, *Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 HASTINGS COMM. ENT. L.J. 509 (1996).

539. Mike Harrington, Note, *A-B-C See You Real Soon: Broadcast Media Mergers and Ensuring a “Diversity of Voices,”* 38 B.C. L. REV. 497, 505 (1997) (discussing Communications Act).

540. See 47 U.S.C. §§ 307(a), 309(a) (2000); see also Harrington, *supra* note 539, at 506.

541. 47 U.S.C. § 303 (2000).

542. *Id.* § 303(m)(1). It is not clear where the term “public interest, convenience, or necessity” originated. See *supra* notes 36–37 and accompanying text.

543. HENRY FRIENDLY, *THE FEDERAL ADMINISTRATION AGENCIES* 54–55 (1962).

of broadcasting. The Supreme Court held, however, “that the Commission’s powers are not limited [solely] to the engineering and technical aspects” of broadcasting.⁵⁴⁴ 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, and necessity.’”⁵⁴⁵ As such, the FCC may consider who is going to provide the best service in awarding a license.

Consistently, the Court has held that because of the scarcity of the spectrum, the FCC has a lot of latitude in regulating broadcasters.⁵⁴⁶ In *National Broadcasting Co. v. United States*, for example, the Supreme Court stated that the Communications Act mandates that the FCC assure broadcasters operate in the public interest, a power “not niggardly but expansive.”⁵⁴⁷

The *Alabama Educational Television Commission*⁵⁴⁸ case is right on point to the current situation dealing with minority absences and media stereotypes. In this case, there was an absence of people of color on the state educational system television.⁵⁴⁹ The FCC found that this absence of minorities created a strong inference that there was discrimination.⁵⁵⁰ Moreover, the FCC

544. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943).

545. *Id.* at 217.

546. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969). Similar restrictions imposed on print journalists might be considered a violation of the First Amendment guarantees of freedom of speech. The Court, however, has upheld FCC-imposed regulations on chain broadcasting. *See, e.g., Nat'l Broad. Co.*, 319 U.S. at 227. Chain broadcasting includes the permissible relationship between networks and stations in terms of affiliation, network programming of affiliate’s time, and network ownership of stations. *See id.* at 194. In addition, the Supreme Court has upheld the fairness doctrine, the personal attack doctrine, and the political editorial rules. *See Red Lion Broad. Co.*, 395 U.S. at 378.

The fairness doctrine required the broadcasters to broadcast important issues of controversy and allow for alternative views of those issues. *Id.* The personal attack and political editorial rules relied on the fairness doctrine. *Id.* 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. *Id.* The personal attack and political editorial rules were overturned by the D.C. Circuit because the FCC failed to establish within a reasonable time why the public interest would benefit from the retention of rules. *See Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

547. 319 U.S. at 219. The public interest standard is very broad and would provide the FCC with the authority to regulate discriminatory conduct by the broadcasters, including the absences of people of color on network programs. *See Baynes, supra* note 16.

548. 50 F.C.C.2d 461 (1975).

549. *Id.* at 465, 469.

550. *Id.* at 465.

held that intent or purpose was irrelevant.⁵⁵¹ Based on the *Alabama Educational Television Commission* case, the burden would be on the networks to show that their all-white new season was within the public interest.⁵⁵²

Some might argue that because the *Alabama Educational Television Commission* case was decided in a different era, the FCC might not follow that precedent today. Some might say that in light of all the media outlets available, there is no longer a scarcity in the market. Moreover, some would say that the FCC no longer regulates broadcaster format⁵⁵³ and has left broadcast format to be determined by the market.⁵⁵⁴ The absence of people of color in network entertainment shows is not a question of format; it is a question of discrimination.⁵⁵⁵ Analogizing back to what the FCC said in *Alabama Educational Television Commission*,⁵⁵⁶ not having anyone of color in the new fall season when people of color comprise almost thirty percent of the population seems to be prima facie evidence of discrimination. Moreover, having characters of color disproportionately depicted in stereotypical ways may also be discriminatory. By broadcasting programs with an insufficient number of people of color, or by stereotyping them, the broadcast executives may have inadvertently violated their public interest mandate and, therefore, may have lost the protection of the business judgment rule.⁵⁵⁷

2. Large Percentages of the U.S. Populations Still Hold Stereotypes

Even if broadcasters are not legally obligated to broadcast diverse programming and the executives have not breached their fiduciary duty, broadcasters have a social responsibility to do so. In doing so, they will help to eradicate stereotypes, which this author believes is within the public interest mandate of the broad-

551. *Id.* at 468-69.

552. *See id.* at 463-64.

553. *See, e.g.,* FCC v. WNCN Listeners Guild, 450 U.S. 582, 584-86 (1981).

554. *Id.* at 590.

555. *See Alabama Educ. Television Comm'n*, 50 F.C.C.2d at 465. *See generally* Williams, *supra* note 3 (examining the general issues of diversity and discrimination on television).

556. *See* 50 F.C.C.2d at 465.

557. *See id.* at 472.

casters. People of color have historically known that there is a correlation between media portrayals and status in society.⁵⁵⁸ There is a long history of concern and comment by prominent people of color concerning how they are depicted.⁵⁵⁹ They realize that the stereotypes can affect one's ability to succeed in society. Very often the racial identity of people of color is two-pronged. The first prong involves the personal view of individuals and the second is society's view of the group.⁵⁶⁰

On the other hand, whites often do not have to worry as much about their stereotypes for several reasons. First, whites are the dominant group in society and they often set the order and tone for things.⁵⁶¹ There are very few negative stereotypes of whites as a whole.⁵⁶² Whites often are seen more as individuals rather than as members of a group.⁵⁶³ Therefore, if there is a negative stereotype about whites, it would be rationalized away. It also might be considered isolated to some specific group of whites—such as those that live in trailers, those that are from Appalachia, and those that might have certain southern European origins. But again, those stereotypes do not apply to all whites as a class or group, just to some particular subcategories.

558. See Williams, *supra* note 3, at 114–16.

559. *Id.* at 103.

560. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (Krous-Thomson 1973) (1905).

[T]he Negro is a sort of seventh 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 twoness

The history of the American Negro is the history of this strife,—this longing to attain self-conscious manhood, to merge his double self into a better and truer self.

Id. at 3–4; see also Juan F. Perea, *Los Olvidados: On Making of Invisible People*, 70 N.Y.U. L. REV. 965, 970 (1995) (indicating that Latinos feel like *Olvidados* (“Forgotten Ones”) because there are so few media images of Latinos making them invisible in American society).

561. Robert S. Chang, *Closing Essay: Developing a Collective Memory To Imagine or Better Future*, 49 UCLA L. REV. 1601, 1605–06 (2002).

562. Sylvia R. Lazos Vargas, *Deconstructing Homol[ogeneous] Americans: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TULANE L. REV. 1493, 1526 (1998).

563. See *id.* at 1527.

These days, most whites are not the classic racists who, like George Wallace, will block a school house door to prevent African American kids from entering.⁵⁶⁴ It is estimated that only 20% of whites hold these traditional racist views.⁵⁶⁵ Whites are more likely to have more ambivalent feelings on race issues and individuals of different races.⁵⁶⁶ On the one hand, they admire Colin Powell and his accomplishments; they are astonished over Michael Jordan's ability to play basketball; they love and are comforted by Oprah Winfrey's compassion and understanding; their kids listen to hip-hop music; and they often work side by side with people of color. However, many whites still have stereotypical views of people of color.

For instance, in a 1990 general social survey by the University of Chicago, 52.8% of respondents attribute violence to a characteristic of African Americans, 42.8% attribute violence to a characteristic of Latinos, 21.3% attribute violence to a characteristic of Asian Americans, and only 18.8% attribute violence to a characteristic of whites.⁵⁶⁷ A little over 57% of the respondents felt that African Americans preferred welfare to work, 45.6% found the same true of Latinos, 19.1% found the same for Asian Americans, and only 4.6% found that whites preferred welfare.⁵⁶⁸ In 1996, the survey results indicated that 27.8% of the respondents believed that African Americans were lazy, 18.1% believed that Latinos were lazy, and a mere 7% believed that whites were lazy.⁵⁶⁹ These results, therefore, rate whites most favorably and African Americans least favorably.

A study conducted in 2001 found that one-third of all Americans thought Chinese Americans "have too much influence" in high technology" and "are more loyal to China than the United States."⁵⁷⁰ Almost one-quarter of the respondents thought that

564. See *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743, 747 (M.D. Ala. 1964).

565. MASS MEDIA AND RECONCILIATION, A REPORT TO THE ADVISORY BOARD AND STAFF, THE PRESIDENT'S RACE INITIATIVE 9 (1998) [hereinafter MASS MEDIA AND RECONCILIATION] (indicating that there is still a large amount of racism and that there are three white racists for every two African Americans).

566. See HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS & INTERPRETATIONS 7 (1997).

567. MASS MEDIA AND RECONCILIATION, *supra* note 565, at 14.

568. *Id.*

569. *Id.* The survey only had results for Asians as to laziness for 1990, in which 15% felt that Asians were lazy. *Id.*

570. Thomas B. Edsall, *25% of U.S. View Chinese Americans Negatively, Poll Says*,

Chinese Americans were taking too many jobs from other Americans.⁵⁷¹ Further, “23[%] said that they would be ‘uncomfortable’ if an Asian American were elected President” of the United States.⁵⁷² Overall, 25% held “consistently negative views” of Asian Americans, and 43% hold “somewhat negative views,” while only 32% had “positive attitudes.”⁵⁷³

This polling information is very interesting. It shows that there is still a lot of misinformation and some very negative views about people of color. It reflects a form of racial hierarchy that still exists.

Negative stereotypes of people of color are sometimes learned from the prejudices of friends and family members. Sometimes these stereotypes may be learned through limited, bad experiences. However, since we live in a fairly segregated society, many of these stereotypes may be learned through electronic encounters, i.e., what people see on television.⁵⁷⁴ 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.⁵⁷⁵ When stereotypical images are presented, the larger society seizes upon these images to define who people of color are as a group.⁵⁷⁶ These stereotypical views can influence behavior and policy.⁵⁷⁷

The programs or issues that are more likely to be perceived to be directed at, or affect, people of color, are profoundly influenced by the negative stereotypes. For example, if I hold the view that African Americans and Latinos prefer welfare to work, but that whites prefer work over welfare, I would support candidates who require welfare recipients to work in almost all circumstances. If I believe that African Americans and Latinos are more violent

WASH. POST, Apr. 25, 2001, at A4; *see also* FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 12–13 (2002).

571. Edsall, *supra* note 570.

572. *Id.* (In contrast, only 15% said that they would be uncomfortable electing an African American president). *Id.*

573. *Id.*

574. Burr, *supra* note 524, at 177–80.

575. *Id.*

576. Roman, *supra* note 15, at 41.

577. MALLORY WOBBER & BARRIE GUNTER, *TELEVISION AND SOCIAL CONTROL* 13–17 (1988).

than whites, I would also support stiff penalties for convicted criminals in almost all circumstances. Not only do these stereotypes influence policy, they also influence us in our every day dealings with each other. These negative stereotypes may lead to discrimination against people of color in procuring employment, in renting housing, and in every day life.⁵⁷⁸

The electronic media has a very strong influence over the cultural, political, social, and racial attitudes of our society. This influence comes about because of the electronic media's near-omnipresence in the lives of our citizens. Ninety-eight percent of U.S. homes have a television set; forty-nine percent have more than one set.⁵⁷⁹ The average family watches over seven hours of television a day.⁵⁸⁰ The absence and the stereotyping of people of color by the mass media is a source of concern for all. The depictions of people of color by the media have to be presented in non-stereotypical ways to avoid the perpetuation of harmful stereotypes.

3. Broadcast Media Stereotypes Are Against Public Policy

The jurisprudence of the Supreme Court of the United States demonstrates that eradicating stereotypes is in the public interest. The Court has consistently criticized and warned about negative racial stereotypes.⁵⁸¹ In *Brown v. Board of Education*⁵⁸², for example, the plaintiffs introduced psychological evidence showing that African American children were harmed by segregation in that it made them think less highly of themselves.⁵⁸³

578. See, e.g., Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1337-38 (2002) (indicating that negative stereotypes of African Americans by employers can impact employment opportunities).

579. Adler & Pittle, *supra* note 44, at 162 n.13.

580. Roland F. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 760 (1994); Edward Rubin, *Television and the Experience of Citizenship*, 68 TEX. L. REV. 1155, 1158 (1990).

581. See, e.g., *Bush v. Vera*, 517 U.S. 952, 985-86 (1996); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986).

582. 347 U.S. 483 (1954).

583. *Id.* at 483 n.11 (1954) (noting Dr. Kenneth Clark's report that African American children were more likely to identify with white dolls than African American dolls).

The Court quoted the findings of a Kansas court:

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.⁵⁸⁴

Further, the Supreme Court has invalidated legislation because it was based on impermissible racial stereotypes. In *Loving v. Virginia*,⁵⁸⁵ for example, the Court invalidated Virginia's anti-miscegenation laws that made it a crime for whites to marry people of different races.⁵⁸⁶ The Court found the statute unconstitutional and designed to maintain white supremacy.⁵⁸⁷

Even more recently, the Supreme Court has spoken disapprovingly of the use of stereotypes in a variety of cases, ranging from affirmative action, to voting rights, to jury selection. Justice O'Connor, in her dissent in *Metro Broadcasting, Inc. v. FCC*,⁵⁸⁸ 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 the Government by history and the Constitution."⁵⁸⁹

In *City of Richmond v. J.A. Croson*,⁵⁹⁰ the Supreme Court invalidated the City of Richmond's affirmative action plan for hir-

584. *Id.* at 494 (quoting the findings of the trial court).

585. 388 U.S. 1 (1967).

586. *Id.* at 12.

587. *Id.* at 11.

588. 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). 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. *But see Adarand v. Peña*, 515 U.S. 200, 227 (1995) (overruling the intermediate standard of review used in the *Metro Broadcasting* case).

589. *Metro Broad.*, 497 U.S. at 604 (O'Connor, J., dissenting).

590. 488 U.S. 469 (1989).

ing contractors, criticizing the use of stereotypes.⁵⁹¹ The Court stated:

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*.⁵⁹²

In *Shaw v. Reno*,⁵⁹³ the Supreme Court addressed the constitutionality of a reapportionment plan submitted by the State of North Carolina, which provided for a majority-black voting district.⁵⁹⁴ The Supreme Court stated:

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.⁵⁹⁵

The *Shaw* Court further stated that racial stereotypes hinder the battle for racial equality.⁵⁹⁶

Similarly, in *Miller v. Johnson*,⁵⁹⁷ the Court found it impermissible to group citizens together solely on the basis of race, because in doing so, the impermissible stereotypes that all members of a group think alike and share the same political interests and ideas are being used.⁵⁹⁸ Likewise, in *Holland v. Illinois*,⁵⁹⁹ the Supreme

591. *Id.* at 493.

592. *Id.* (emphasis added).

593. 509 U.S. 630 (1993).

594. *Id.* at 633–64.

595. *Id.* at 647.

596. *Id.* at 648.

597. 515 U.S. 900 (1995).

598. *Id.* at 911–12.

599. 493 U.S. 474 (1990).

Court found that the assumption made by the prosecuting attorney—that an African American juror would be partial to the black defendant simply because he was black—was a violation of equal protection and was based on an impermissible stereotype.⁶⁰⁰ Further, in *Edmonson v. Leesville Concrete Co.*,⁶⁰¹ the Court stated, “If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes hurt and injury.”⁶⁰²

These Supreme Court cases show evidence of the Court’s disapproval of the use of racial stereotypes in decision making. However, all these cases dealt solely with situations where the government is using invidious racial stereotypes in its decision making. In the context of broadcast invisibility and stereotypes, it is the broadcasters who are the bad actors. However, we can not stop there in our analysis because the broadcasters are awarded their licenses from the federal government.⁶⁰³ The broadcasters do not own the spectrum; they merely have a right to use the government’s property. The spectrum for which they hold the license is still owned by the federal government. As a consequence, broadcasters hold the licenses as trustees for the public.⁶⁰⁴ Broadcasters, therefore, have certain responsibilities to operate pursuant to the public trust and in the public interest. As such, it is incumbent upon broadcasters to provide programming that is representative, yet non-stereotypical.

4. Broadcast Media Stereotypes Influence Behavior

Historically, people of color have either been absent or stereotyped by the media.⁶⁰⁵ In the film documentary, *Ethnic Notions*, Marlon Riggs shows how African Americans were historically stereotyped by the society and the media.⁶⁰⁶ However, African

600. *Id.* at 484 n.2.

601. 500 U.S. 614 (1991).

602. *Id.* at 630–31.

603. See 47 U.S.C. §§ 301, 303(a)–(m) (2000).

604. See *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 883 n.9 (D.C. Cir. 1999).

605. See generally *ETHNIC NOTIONS* (California Newsreel 1987).

606. *Id.*; see also Burr, *supra* note 524, at 161–74 (providing a detailed history of how African Americans have been depicted on television for the past fifty years).

Americans are not the sole victims of historic racial stereotypes. Richard Delgado and Jean Stefanic, in their article, *Images of the American Outsider in American Law and Culture*, have written about the different, yet common ways that members of American racial and ethnic minority groups have been stereotyped.⁶⁰⁷

These negative portrayals and stereotypes have an especially profound effect on children.⁶⁰⁸ Research suggests that children devote the greatest proportion of their leisure time to watching television.⁶⁰⁹ Many children spend more time watching television than attending school.⁶¹⁰ African American children have been found to watch nearly twice as much television as whites.⁶¹¹ Dr. Bradley Greenburg found that African American children identify with African American television characters and rate them high in handsomeness, friendliness, and strength.⁶¹²

What then is the impact on our children if they see minorities portrayed on television most often as criminals or other negative stereotypes? For white children, these minority portrayals have negative implications.⁶¹³ Dr. Greenberg's study shows that white children are more likely to learn about other races through electronic media rather than through personal interaction.⁶¹⁴ Forty percent of white children attributed their knowledge about how

607. See generally Richard Delgado & Jean Stefanic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?* 77 CORNELL L. REV. 1258 (1992). See also Burr, *supra* note 524, at 172-73; Williams, *supra* note 3, at 133 (noting that there was an increase of roles for African Americans in the Fall 2000 television season).

608. See Tom Walter, *Girls Remake TV in Their Own Image, Project Tunes Out Stereotype 'Messages,'* THE COMMERCIAL APPEAL (Memphis), Nov. 2, 1995, at 1C. Young girls are also influenced by the stereotypes against them. See *id.* A 1995 Lou Harris survey seems to confirm that girls are strongly influenced by the female characters that they see on television. *Id.* In the Lou Harris survey, 51% of girls in grades 3-6 acknowledged that they talk like a character they have seen on television, and 41% of girls in grades 7-12 do so. *Id.* Among the younger girls 24% wear clothes that they have seen television characters wear while 34% of the older girls do so. *Id.*

609. Jane Tagney & Seymour Feschbach, *Children's Television-Viewing Frequency: Individual Differences and Demographic Correlates*, 14 PERSONALITY & SOC. PSYCHO. BULL. 145, 149 (1988) (noting that children spend between 28.3 to 31.2 hours per week watching television).

610. *Id.*

611. *Id.*

612. See Brudley S. Greenberg, *Children's Reaction to TV Blacks*, JOURNALISM Q., Spring 1972, at 10. Even though these statistics deal with African American children, the concepts are probably basic enough to apply to other children of color.

613. *Id.*

614. *Id.*

African Americans look, talk, and dress to television.⁶¹⁵ Those white children who had the least opportunity to encounter African Americans were most likely to believe these television portrayals were realistic.⁶¹⁶

Children are more vulnerable to media images because they lack real world experience and the necessary basis for comparison. Often ideas, stereotypes, and roles put forth by the television industry do not reflect the real world.⁶¹⁷ As a result, young children may have difficulty distinguishing "between symbolic and social reality."⁶¹⁸ A recent study suggests that these stereotypes impact negatively on the self-concept of African American children.⁶¹⁹ The television roles in which African Americans are cast communicate to black children the negative value that society places on them.⁶²⁰ The negative images of minorities in the media impact how children perceive minority characters.⁶²¹ "Children more often associate positive qualities, such as financial success and intelligence, with white characters."⁶²² They associate negative qualities, "including lawbreaking and laziness, with minority characters."⁶²³ Seventy-one percent of the children surveyed believed that the role of the boss is typically played by a white character, while 59% noted that the criminal is typically played by African Americans.⁶²⁴

Given the fact that these stereotypes have a role in shaping children's perceptions of people of color, they may carry these notions through to adulthood. A 1990 University of Chicago study found that 52.8% of Americans believe that violence is a predominant characteristic of African Americans.⁶²⁵ Approximately 42.8%

615. *Id.* at 11.

616. *Id.* at 13.

617. Nancy Signarielli & Susan Kahlenberg, *Television's World of Work in the Nineties*, J. BROAD & ELECT. MEDIA, Winter 2001, at 4.

618. *Id.*

619. John Carmody, *Newschannel 8 Wins in Local Cable ACE Awards*, WASH. POST, May 7, 1998, at B9.

620. *Id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.*

625. Jody D. Armour, *Race Ipsa Loquitor: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (citing Tom W. Smith, *Ethnic Images* 9, 16 (Dec. 1990) (General Social Survey Topical Report No. 19, on file with the *Stanford Law Review*)).

believed the same to be true concerning Latinos.⁶²⁶ If children falsely learn from television that all criminals are African American or Latino and that these groups are inherently prone to violence, it follows that as adult voters, they have little to no incentive to favor policies to rehabilitate felons. These voters will be more likely to support candidates who believe in punishing, rather than rehabilitating, the criminal and in getting them off the street for good.

V. CONCLUSION

Generally, the business judgment rule provides strong protection for officer and director against liability for breaching the duty of care.⁶²⁷ They lose the business judgment protections in those cases where they have made an illegal decision, they made no decision on something that they should have addressed, or they have failed to make a rational decision or a fully informed one.⁶²⁸ Of course, the officers and directors of broadcast corporations have to be concerned about maximizing profit. But it appears that they have not been concerned about maximizing profits since historically many television shows with primarily minority characters have made a profit. Many have won prestigious awards. Many times the broadcast executives were misinformed about the public's acceptance of some of these shows. Moreover, since the broadcasters operate in a heavily regulated environment, concerns over regulation and their public interest mandate⁶²⁹ are rationally related to profit maximization. The broadcasters would have to monitor their programming in order to avoid regulatory problems. They have appointed vice presidents of diversity and diversity boards are just now setting up the infrastructure that will allow them to satisfy their duty to monitor this important aspect of their broadcasting. Each of these interests is rationally related to the corporate executives' duties to

626. *Id.*

627. Joseph W. Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 *YALE L.J.* 1078, 1099-100 (1968). The total number of reported cases in which a derivative action against directors of non-financial corporations was actually won (absent self dealing or fraud) is small.

628. *See supra* Part III.

629. *See supra* Part IV.D.1.

the shareholders.⁶³⁰ So the broadcast executives have to consider profit maximization, regulatory oversight, and their public interest mandate in their decision-making process in order to be afforded the protection of the business judgment rule.

But in the case of the broadcast corporations, the road to profit maximization may lead to illegal decisions. Unlike cable television where the cable operator is paid directly by the audience for his service, broadcasters' income is derived solely from the advertisers. Broadcast corporations earn their income based on how many (and the prices of) commercials that they sell for their broadcast programming. The price and demand for advertising on broadcast programming are a function of the audience share that the particular programming commands. The prices and demand are also influenced by the demographics of the audience that a particular programming reaches. Many of the minority-themed shows of the past had a great deal of crossover appeal. They also made a lot of money and won many awards. By failing to provide quality minority programming today when the percentage of the minority population has increased, the broadcasters may have been derelict in their duties to maximize the corporation's profits.

Advertisers say that they are interested in programming that appeals to the young and affluent audience. They are willing to pay a premium for programs that can attract that type of audience. Therefore, the broadcasters attempt to develop programs that appeals to a large audience but also satisfy the advertisers' needs. A recent study commissioned by the FCC presented strong anecdotal evidence that many advertisers are reluctant to place spots on minority-formatted radio stations because of uninformed and prejudicial views. If the broadcasters are aware of these views and have gone along with them in failing to broadcast minority programming, the broadcast officer and director may be passively participating in this discrimination. Under those circumstances, any decision that they make in this sensitive area would lose the protection of the business judgment rule because it would be a decision to engage in illegal behavior.⁶³¹ In addition, such a decision to go along with the advertisers' discrimination can be construed to be a decision of bad faith undeserving of indemnification (or elimination of liability) by the corporation.

630. See *supra* note 347 and accompanying text.

631. See *supra* note 445 and accompanying text.

The officers and directors of broadcast corporations have to monitor the company and make a fully informed decision to be protected by the business judgment rule.⁶³² Given the vast gulf in racial attitudes held by whites and African Americans, any television program that employs only members of one racial group as writers and directors is likely to be distorted. Historically, the broadcast company produced television shows with all white writers, directors, and producers. Even now, there is a dearth of minority writers, directors, and producers of television shows.

The officer and directors of broadcast corporations have made an uninformed decision. Not having people of color in the room while program ideas and scripts are hashed out is very similar to the *Van Gorkom* board of directors who failed to be informed about the intrinsic value of their company or even read the merger documents.⁶³³ These actions are a breach of the duty of care and should not be protected by the business judgment rule.⁶³⁴

Furthermore, the federal government actually owns the broadcast frequencies through which the networks transmit their signals.⁶³⁵ The FCC allocates licenses to the broadcasters through a competitive bidding process, and the broadcaster is statutorily obligated to operate its facilities in the "public interest, convenience, and necessity."⁶³⁶ The FCC ultimately has the power to revoke or not renew a broadcaster's license for violation of its public interest mandate.⁶³⁷ The broadcast executives have to monitor, and be cognizant of, FCC regulations because there is always the possible threat of license revocation for failure to comply with such regulations.⁶³⁸ The broadcasters also know that they have to operate in the public interest. Based on the *Alabama Educational Television Commission* case, the burden would be on the networks to show that their all-white new season was within the public interest.⁶³⁹ Not having anyone in the new fall season when people of color comprise almost thirty percent of the population seems to be prima facie evidence of discrimination. Moreover,

632. See *supra* notes 348–65 and accompanying text.

633. See *supra* notes 356–65 and accompanying text.

634. See *id.*

635. See *supra* Part IV.D.1.

636. 47 U.S.C. § 303 (2000).

637. See *supra* Part IV.D.1.

638. See *id.*

639. See *supra* notes 548–57 and accompanying text.

having characters of color disproportionately depicted as violent may also be discriminatory. By not broadcasting programs with sufficient number of people of color or stereotyping them, the broadcasters may have compromised their public interest mandate, violated the Communications Act, and as a consequence lost the protection of the business judgment rule.

To make sure that the broadcasters do not run into this situation again, this author proposes that the executives follow the model established by *The Cosby Show*. In order to have a fully informed decision as to minority-formatted programming, the broadcasters have to bring in minority experts on stereotypes to work on all levels of the process from conception to casting and writing. The scripts need to be closely examined to make sure that they are not sending any unintended messages. For those corporations that created a vice president of diversity position, that is a great first step, but unlikely to solve the problem in the long term. Each broadcaster should also establish a board committee that focuses specifically on the issues of diversity in programming. The committee should consist of members of the racial affinity groups, advertisers, affiliated stations, producers, writers, and directors. The committee should set policy addressing long term strategy in this area. If all the parties are in the room and the broadcast executives listen to and consider what each person has to say, only then would the decisions made on this very important issue be fully informed. As such, most decisions made through this interactive process would be protected by the business judgment rule.
