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## "Hell Man, They Did Invent Us:" The Mass Media, Law, and African Americans

Adeno Addis  
*Tulane University*

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# “Hell Man, They Did Invent Us!”<sup>1</sup>

## The Mass Media, Law, and African Americans

ADENO ADDIS\*

*The Orient is not only adjacent to Europe; it is also . . . one of [Europe's] deepest and most recurring images of the Other. In addition, the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience. . . . [W]ithout examining Orientalism as a discourse one*

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1. The first part of the title of this Article is taken from a story recounted by Derrick Bell:

A few years ago, I was presenting a lecture in which I enumerated the myriad ways in which black people have been used to enrich this society and made to serve as its proverbial scapegoat. I was particularly bitter about the country's practice of accepting black contributions and ignoring the contributors. Indeed, I suggested, had black people not existed, America would have invented them. From the audience, a listener reflecting more insight on my subject than I had shown, shouted out, 'Hell man, they did invent us.'

Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 767 (1988) (emphasis added). Two important insights emerge from the listener's comment. Specifically, the comment draws attention to how European Americans might have produced what it is to be an African American. The African American who is the subject of discourse among European Americans is in fact largely the invention of European Americans. Second, and more generally, the comment alerts us to the fact that, quite often, dominant groups invent the "Other." The Other is a relational invention. At this general level, Bell's listener is wearing a postmodernist hat.

It is the dominant group's tendency to incorporate the dominated or the less powerful as the Other that Oscar Wilde was resisting when he observed that "the whole of Japan is a pure invention. There is no such country, there are no such people." OSCAR WILDE, *The Decay of Lying*, in INTENTIONS 3, 47 (1905), cited in Kwame A. Appiah, *Is the Post- in Postmodernism the Post- in Postcolonial?*, 17 CRITICAL INQUIRY 336, 347 (1991). It may be argued that this is the theme that guides Edward Said's work. See EDWARD SAID, *ORIENTALISM* 1 (1978) ("The Orient was almost a European invention, and has been since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences.").

As I hope will be made clear during the course of this article, the claim here is not that there are no such things as an African American, or Japan or Africa. The point is that the images of each of these subjects, which are prepared for the consumption of European Americans, are the invention of Europeans and European Americans. In its consumability each subject is incorporated into the value system of the "appropriator," where the appropriated subject is defined as the objective Other in the cognitive and social map of the appropriator.

\* Associate Professor of Law, Tulane University. I am grateful to friends and colleagues for their thoughtful comments and suggestions. I would especially like to thank Kathryn Abrams, T. Alexander Aleinikoff, Robin Barnes, Ruth Colker, Michael Collins, Madeline Morris, Thomas Ross, Louis Seidman, Joseph Singer and Keith Werhan. I also thank Cathleen Cooper, Lisa Evans, David Matchen and Leon Rittenberg for their excellent research work.

*cannot possibly understand the enormously systematic discipline by which European culture was able to manage—and even produce—the Orient politically, sociologically, . . . and imaginatively . . .*<sup>2</sup>

### PROLOGUE

It was a Monday evening, April 6, 1987, and I sat down to watch the ABC news program *Nightline* on the occasion of the fortieth anniversary of the day Jackie Robinson became the first African American<sup>3</sup> to play major league baseball. The guest was introduced as Al Campanis, the vice-president for player personnel of the Los Angeles Dodgers. He had been a Dodger executive when Robinson broke the color barrier, and he spoke about Robinson's professional life. Then came the following exchange between Ted Koppel, the program's host, and Campanis:

Koppel: Why are there no black managers, general managers, or owners? Is there still that much prejudice in baseball today?

Campanis: No, I don't believe it's prejudice. I truly believe [African Americans] may not have some of the necessities to be, let's say, a field manager or perhaps a general manager.

Koppel: Do you really believe that?

Campanis: Well, I don't say that all of them, but they certainly are short. How many quarterbacks do you have, how many pitchers do you have that are black?

Koppel: Yeah, but I got to tell you, that sounds like the same garbage we were hearing forty years ago about players.

Campanis: No, it's not garbage, Mr. Koppel, because I played on a college team, and the center fielder was black, and in the backfield at NYU was a fullback who was black. Never knew the difference whether he was black or white. We were teammates. So it might just be, why are black men or black people not good swimmers? Because they don't have the buoyancy.<sup>4</sup>

During the above exchange, my feelings vacillated between rage and despair. Rage, because this man who had come on the program supposedly to celebrate the strength and courage of an African American who had suffered enormous pain and humiliation from

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2. SAID, *supra* note 1, at 1-3. If one substituted the word "African American" for "the Orient" and "European American" for "Europe," Edward Said's comment would aptly describe part of the concern of this article.

3. In this article I use the terms "African American" and "black" interchangeably.

4. *Nightline* (ABC television broadcast, Apr. 6, 1987), reprinted in PHILLIP M. HOOSE, NECESSITIES: RACIAL BARRIERS IN AMERICAN SPORTS xv-xvi (1989).

racism simply because he wanted to play baseball, was reproducing and repeating the very stereotypes against which Jackie Robinson struggled. Despair, because if a man who introduced himself as a friend of an African American could not only hold but express such views without the slightest hesitation, and apparently without feeling that he was being racist, then perhaps stereotypes about African Americans have become an accepted part of everyday life and a normal part of doing business.

There was another dimension to my despair that led me to reflect on the role of the media in the constitution of the identities of African Americans. It is people like Campanis, former athletes and coaches, mostly white, who are hired as sportscasters in the electronic media. If those sportscasters share Campanis's view of the black people whose activities as athletes they describe daily, then sportscasting might be a process which simply recycles myths and stereotypes about African Americans. Indeed, Campanis's description of African Americans is remarkably similar to the sort of descriptions about which African American athletes, especially male athletes, complain; white sportscasters<sup>5</sup> often describe African Americans as physically gifted, but lacking mentally.<sup>6</sup>

Less than a year later, in January 1988, I read the transcript of an interview given by Jimmy (the Greek) Snyder, then a CBS sports commentator. Snyder, with the confidence of the historian, the geneticist, and the anthropologist all in one, declared,

The black is a better athlete to begin with, because he's been bred to be that way. Because of his high thighs and big thighs that go up into his back. And they can jump higher and run faster because of their bigger thighs, you see. I'm telling you that the black is the better athlete and he practices to be the better athlete and he's bred to be the better athlete because this goes all the way to the Civil War when, during the slave trading, the owner, the slave owner, would breed this big woman so that he would have a big black kid, see. That's where it all started.<sup>7</sup>

Was this damaging stereotype limited to only some sportscasters in the media? Part of me desperately wanted to believe that it was just this handful of people who held these stereotypical views, but that the media on the whole presented a reasonably accurate view of African Americans. I wanted to believe this, because the alternative was to accept the rather depressing proposition that American society is locked into a cycle of racism in which the media

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5. In this article I use the terms "European American" and "white" interchangeably.

6. See HOOSE, *supra* note 4, at 10-20; Tony Kornheiser, *A Hue and Cry of Celtics' Gain*, WASH. POST, June 3, 1987, at C1.

7. Leonard Shapiro, *Jimmy the Greek Says Blacks are 'Bred' for Sports*, WASH. POST, Jan. 16, 1988, at A1, A10.

and real life reinforce each other in the invention of a stereotypical view of African Americans, and where that view is in turn employed to justify the daily exclusion of African Americans from the social and political life of the polity. But as I continued to follow the mainstream media's presentation of the lives of African Americans, I saw a pattern that seemed to dispel any hope that this stereotypical view of African Americans was a phenomenon isolated within the sports media. Indeed, the mainstream media has played an enormous role in the invention and reproduction of what the majority culture regards as the African American character. The picture portrayed of African Americans by the media is one that also enables the majority to hold a largely virtuous picture of itself and its institutions. The invention of the African American as the problem allows the majority simultaneously to acknowledge the predicament of African Americans and to absolve itself and its institutions from responsibility for that state of affairs. This is a phenomenon that William Connolly has termed "the second problem of evil . . . the evil that flows from the attempt to establish security of identity for any individual or group by defining the other that exposes sore spots in one's identity as evil or irrational."<sup>8</sup>

### I. INTRODUCTION

This Article is about how the mainstream media produces and reproduces a largely negative image of African Americans, and how that image is used to justify the continual exclusion of African Americans from the various social and political spheres of existence, and ultimately, to devalue their lives. The public discourse on African Americans has as its theme, at times implicitly and at other times explicitly, what can be referred to as the rhetoric of "collective fall."<sup>9</sup> The daily narratives about African Americans, whether the debate is about crime, drugs, politics, welfare or education, reinforce

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8. WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE* 8 (1991). Connolly's book is devoted to the exploration of the politics of identity and hence, of difference. Connolly argues that politics pervades the relation of identity to difference; he calls this relation "the site of two problems of evil." *Id.* at ix.

On the political level, the first problem of evil issues in a series of attempts to protect the purity and certainty of a hegemonic identity by defining as independent sites of evil (or one of its many surrogates) those differences that pose the greatest threat to the integrity and certainty of that identity. The second problem of evil emerges out of solutions to the first one. It flows from diverse political tactics through which doubts about self-identity are posed and resolved by the constitution of an other against which that identity may define itself.

*Id.* at ix-x.

9. What I mean to refer to by the rhetoric of "collective fall" is the daily narratives and images that suggest that race, and in particular, blackness, represent social disorder and civil decay.

that perception. It is this rhetoric of "collective fall" that has made possible another prominent theme of public discourse, the rhetoric of "white innocence."<sup>10</sup>

The debate about affirmative action is the clearest example of these themes, although not the only one. The rhetoric of the innocent white victim of affirmative action is compelling to many whites in part because of the familiarity of the discourse of the intellectually undeserving black. The public discourse about crime closely identifies crime with black people and has made the daily rhetoric of the white victim of black crime part of the general consciousness, even though the reality is quite different.<sup>11</sup> This Article argues that the media, an important cultural institution, continues to produce, reproduce, and legitimize a certain identity of African Americans that has enabled the discourse about the innocent white victim of black transgressions to become pervasive in this polity. This examination of the media is, therefore, partly an exploration of how the majority produces the public identities of minorities and how by this very process the majority produces a largely virtuous identity for itself.

This Article also explores how the public identities of African Americans are constructed in their absence. The daily narratives in the media about African Americans and the general community are told mainly by European Americans. The representation of African Americans as communicators in the media, electronic and print, is depressingly low.<sup>12</sup> Indeed, part of the claim of the Article is that the rhetoric of white innocence and of black collective fall are possible because African Americans have not been allowed to tell their story, what I call the "corrective story." The stereotypical pictures of African Americans painted daily in the mass media are made possi-

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10. The concept of "white innocence" is taken from Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990). Professor Ross uses the term "the rhetoric of white innocence" to refer to "the insistence on the innocence of contemporary whites" for the current condition of African Americans. *Id.* In this sense innocence refers to the claim by an individual or a group that it has not caused or contributed to the unfavorable condition of another. The resistance of many whites, especially young whites, to affirmative action is premised on this notion of innocence, that they were not responsible for slavery or segregation, and therefore affirmative action that disadvantages some of them punishes innocent people.

There exists another sense of innocence. The term "innocence" can also be used to describe purity and virtuosity. Thus, when I use the term "rhetoric of white innocence" I refer to both aspects of innocence: the attempt by the majority to absolve itself of responsibility for the current condition of African Americans, and the tendency of the majority to avoid dealing with difference by converting that difference into otherness.

11. See *infra* part III.A.2.a.

12. See *Black Journalists Report Progress in Hiring But a Lag in Promotion*, N.Y. TIMES, Aug. 27, 1988, § 1, at 7 [hereinafter *Black Journalists*].

ble because African Americans are seen and treated as subjects of deliberation, rather than as deliberating subjects. Both as victims and resisters, stories about African Americans are largely told by others.<sup>13</sup>

If the image the majority constructs of African Americans is erroneous, as this Article contends, then the image the majority has of itself is consequently erroneous. Identities are relationally constructed, and thus James Baldwin was right when he said, "If I'm not who you say I am, then you're not who you think you are."<sup>14</sup> For its persuasive force the rhetoric of white innocence assumes the validity of its correlative rhetoric device, the rhetoric of collective black fall.<sup>15</sup>

This Article further examines whether the current policies of the Federal Communications Commission<sup>16</sup> regarding minorities provide the means for the constitution of a less stereotypical image of African Americans. If identities are relationally constructed, then the measure of the "authenticity" of the product, identity, must rest to a large extent on the inclusiveness of the process. Policies promulgated by the FCC to further diversity in the electronic media by including more minority owners and broadcasters can be seen as part of the struggle to subdue "the second problem of evil"<sup>17</sup> by enabling minority narratives to challenge the majority's view of the

13. W.E.B. DuBois characterized this predicament as "this sense of always looking at one's self through the eyes of others." W.E.B. DuBois, *The Souls of Black Folk*, in *THREE NEGRO CLASSICS* 207, 215 (J.H. Franklin ed., 1965).

14. Interview with James Baldwin, *CBS News* (CBS television broadcast, Oct. 1967), cited in JANNETTE L. DATES & WILLIAM BARLOW, *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 5 (1990). Frantz Fanon expressed the same point when he commented "The Negro is not. Any more than the white man." FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 231 (C. Markmann trans., 1967). John Dewey made a similar point when he observed, "There is no self until you ask what the self is called to do in relation to other people." JOHN DEWEY, 1 *THE EARLY WORKS OF JOHN DEWEY, 1882-1898*, at 207 (1969). What Baldwin, Fanon and Dewey suggest is that identity and reality are the results of human labor, and that politics must therefore be understood not so much as a way to interpret reality but as a contest to create reality. Under this interpretation, democracy can properly be understood as the framework or process within which reality is collectively determined.

15. The rhetoric of white innocence and black collective fall may serve more than political and economic interests; they may have psychological functions. To quote James Baldwin again,

What is ghastly and really almost hopeless in our racial situation now is that the crimes we have committed are so great and so unspeakable that the acceptance of this knowledge would lead, literally, to madness. The human being, then, in order to protect himself, closes his eyes, compulsively repeats his crimes, and enters a spiritual darkness which no one can describe."

JAMES BALDWIN, *BLUES FOR MISTER CHARLIE* 6 (Dell Pub. 1970) (1964).

16. Hereinafter "Commission" or "FCC".

17. See *supra* note 8 and accompanying text.

minority, as well as of itself. It is a way to contest the tendency of the majority to assure self-certainty by defining that which deviates from it as intrinsically evil or unworthy.

Before recounting the structure of the Article, I think it might be useful to set out briefly why I chose the media and the communication industry from among numerous other exclusionary institutions as the focus of my inquiry. The most obvious reason is that this is the area I know best, but this is not the entire story. By choosing the media I mean to suggest that the media and the cultural industry warrant our special concern, and that we should take those institutions more seriously than we have in the past. There are a number of reasons, some general and others specific to this polity.

First, communication is a vital political activity. "Politics is not simply about the manner in which power adjudicates competing claims for resources. It is also a contest over who we are to become, a contest in which identity" becomes the objective.<sup>18</sup> Communication is a crucial subject, for communication is the political activity through which the contest for the constitution of identity is explicitly fought. Communication is "[t]he politics of becoming."<sup>19</sup> For too long the focus of analysis in the legal academy has been on the politics of distribution, to the near exclusion of the politics of identity formation, the daily contest over how to define oneself and others. This is not to say that the communication process is the only process by which identities are constituted and reconstituted; we produce ourselves and others through all of our various activities. But the communication process is one in which we explicitly engage in that endeavor.<sup>20</sup> Through communications and discursive formations we

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18. SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* 8 (1986).

19. *Id.* at 22.

In rejecting the premise of exogenous interests, we argue that an adequate conception of action must be based upon the notion that people produce themselves and others through their actions. According to this conception, action is neither instrumental toward the satisfaction of given wants nor expressive of objective interests, but it is an aspect of the very generation of wants and specification of objective interests. Individuals and groups, accordingly, act not merely to *get* but to *become*. The politics of becoming, we believe, provides a central corrective to both the normative and the explanatory dimensions of traditional political theory.

*Id.*

20. I think Raymond Williams was right when he wrote, "I think that a political strategy which doesn't take account of cultural questions is living in the past." RAYMOND WILLIAMS, *RAYMOND WILLIAMS ON TELEVISION* 215 (Alan O'Connor ed., 1989). Williams goes on to observe that the argument for taking cultural practices seriously does not mean that cultural practices take precedent over other societal spheres, but that they must be seen as implicating, and implicated by, other spheres. *Id.* One cannot fully understand disputes in the political and economic spheres unless one also understands that those disputes are about cultural institutions. *Id.*



identify, and hence bring into existence, factors and traits we deem central to our being, and we specify their domain of operation and consequently the nature of our very identity.

Second, in this country race relations are in such a poor state that often the only sustained contact one racial group has with the other is through the mass media. Neighborhoods are segregated.<sup>21</sup> Despite the efforts of the 1960s and 1970s, schools are largely segregated.<sup>22</sup> And often the workplace is segregated also, partly structurally and partly intentionally.<sup>23</sup> Given this limited contact, whites and blacks obtain information about each other largely from the media, rather than from individual contacts.<sup>24</sup> To ignore the media

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21. A 1991 study of census figures found that 30% of African Americans live in neighborhoods which are at least 90% black. *Blacks in Cities Still Are Isolated, New Study Shows*, THE TIMES-PICAYUNE (New Orleans), Apr. 10, 1991, at A3. The study also found that 68% of whites live in almost all-white neighborhoods. Douglas Massey, a University of Chicago sociologist, observed that "[a]ny way you look at it, blacks are still very segregated . . . . At this rate, blacks will stay segregated for a long time." *Id.*

22. A 1992 study sponsored by the National School Boards Association determined that segregation in the nation's schools is increasing. See Karen DeWitt, *The Nation's Schools Learn a 4th R: Resegregation*, N.Y. TIMES, Jan. 19, 1992, at E5 ("[S]egregated schools are on the rise again . . . . [I]n the North's urban centers and suburbs and in the West . . . minority youngsters find themselves increasingly in separate and unequal schools.") Segregation is also increasing at the college level, where due to recent increases in racial hostility on many college campuses, African American students are declining to attend predominantly white colleges and are instead choosing traditionally black colleges. See Isabel Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, N.Y. TIMES, May 9, 1990, at A1 ("The perception of racial hostility is inducing more families to send their children to historically black colleges to avoid the issue altogether, while others are scrutinizing predominantly white schools more carefully to weed out those that appear less racially tolerant. . . . But the choices seem to be getting narrower for blacks looking for predominantly white schools not touched by racial turmoil.") See also *infra* note 37.

For a critique of justifying the continuation of racial segregation in schools on the basis of individual "free choice" and the right of free association, see Wendy Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63 (1993).

23. See generally EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY: 1990 (1991).

24. One of the best social indicators of the state of relations among racial groups might be the extent to which interracial marriages and couples exist. It is interesting to note that more than twenty five years after the Supreme Court invalidated state statutes that outlawed interracial marriages, *Loving v. Virginia*, 388 U.S. 1 (1967), the number of interracial marriages, especially between blacks and whites, is extremely low.

Conveying a sense of progress, a 1993 analysis of census data indicates that now one out of fifty marriages are interracial, and that the number of interracial couples has almost doubled in the last twelve years. Tim Bovee, *Interracial Marriages Now 1 in 50*, THE TIMES-PICAYUNE (New Orleans), Feb. 12, 1993, at A1. The article observed:

There were 246,000 black-white couples last year, nearly four times the number in 1970, the Census Bureau said.

An additional 883,000 couples represented marriages between white people

and the cultural industry is therefore to ignore a crucial process of identity formation in American society.

Third, those able to define the identity of the political contestants are consequently able to define the relationship of the contestants. One of the most important modes of resistance to domination, therefore, is to deny the dominator the power to unilaterally define the public identity of the dominated. In any case, to be an agent must mean at a minimum having a part in the constitution of one's own identity.<sup>25</sup> To be produced in one's absence is to lose the claim of agency. This observation is premised on the proposition that the conventional way of accounting for communication, that "there is life, and then afterwards there are these accounts of it,"<sup>26</sup> is erroneous and fails to fully capture the role of communication in constituting sociality and identity.

Fourth, the communication process should be of great interest to lawyers and legal scholars, because in many ways the media and the communications process perform the same sort of functions that the law performs. Understanding the communication process might in fact enable legal scholars to better understand the law itself. The media, like the law, bases its legitimacy largely on the claim of neutrality, on not taking sides in relation to the various interests and disputes that exist in the social world that is being described. The media, like the law, also bases its legitimacy on serving the public interest. The media and the law therefore both claim to be simultaneously neutral and partial.<sup>27</sup> In addition, both claim that the stories

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and people of other races, such as Asian, Pacific Islander, or American Indian; 32,000 between black people and people of other races; and 1.2 million couples were Hispanics and non-Hispanics.

*Id.* If my calculation is correct, the number of black-white marriages is one in five hundred. This does not show spectacular progress. It does, however, demonstrate the level and intensity of the divide that still exists between blacks and whites.

25. To lead a life or occupy an identity that one does not critically endorse is to live the life of a robot. It is to surrender the very thing that makes humans who they are. To be produced by others, both in terms of one's identity and the purposes which animate that identity, is to lead a life relegated to non-human beings or objects. Gerald Dworkin notes that "[i]t is characteristic of persons that they are able to reflect on their decisions, motives, desires, emotions, habits, and so forth. In doing so they may form preferences concerning these. Thus, a person may not only desire to smoke. He can also desire that he desire to smoke. He may not simply be motivated by jealousy or anger. He can also desire that his motivations be different (or the same)." Gerald Dworkin, *Autonomy and Behavior Control*, in 6 HASTINGS CENTER REPORT 23, 24 (1976), cited in Lawrence Haworth, *Dworkin on Autonomy*, 102 ETHICS 129, 130-31 (1991); see also HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 11-25 (1988). Ronald Dworkin makes a similar point. See Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 484-87 (1989).

26. RAYMOND WILLIAMS, *COMMUNICATIONS* 11 (3d ed. 1976).

27. See RICHARD V. ERICSON ET AL., *REPRESENTING ORDER: CRIME, LAW AND JUSTICE*

they tell are informed by the requirements of certain procedural proprieties,<sup>28</sup> rather than being one of the choices among several possibilities.

Furthermore, the media and the law are two of the institutions by and through which we engage explicitly in a discourse about the basic terms and conditions of social life. Both the law and the media often frame moral and social questions in individual or group terms, where stories are presented "as serial narratives involving leading actors"<sup>29</sup> and responsibility is allocated to "troublesome persons [or troublesome groups] rather than troublesome social structures."<sup>30</sup> Systemic and structural accounts do not often have a place in the descriptive process employed by both institutions. In terms of their claims for legitimacy, the nature of the stories each tells, and the process by which each tells its stories, the law and the media share a great deal in common. Therefore, an intertextual and interspherical inquiry might enable lawyers and legal scholars to better understand their discipline.

Although this interconnection of the media and the law is not the explicit concern of this Article,<sup>31</sup> the issue has some importance for the concerns addressed here because the media and the law have long been prominent both in the construction of a certain identity of African Americans and in the use of that image to exclude African Americans from certain spheres of existence, and to thereby devalue their lives. Indeed, there is remarkable consistency in the stories

IN THE NEWS MEDIA 7 (1991) ("The news media and law also share an affinity in claiming that their policing is in the public interest. The basis of this claim is the appearance of neutrality."). Thus, while the media and the law both claim to derive legitimacy from neutrality, they also, at least partly, seek to ground the force of their authority on their partiality to what they regard to be the public interest.

28. *See id.* at 9 ("Both news and law can be described as social discourses of procedural propriety.").

29. *Id.* at 8.

30. *Id.* at 8; *see also* SHANTO IYENGAR, IS ANY ONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES (1991).

[N]ews about political issues almost invariably takes either an episodic or thematic frame. The episodic news frame focuses on specific events or particular cases, while the thematic news frame places political issues and events in some general context. It is well known that television news is distinctively episodic in its depiction of political issues . . . . The predominance of episodic framing in television news affects not only the . . . selection of news items, but also the public's attribution of responsibility for political issues.

*Id.* at 2. Iyengar's research suggests that episodic-style reports of societal problems leads viewers to attribute responsibility to individual actors, while thematic reports are more likely to lead the public to attribute responsibility for the problem to political institutions or leaders. *Id.* at 2-3.

31. I take up this issue in another work. *See* Adeno Addis, Law as Dialogue (unpublished manuscript, on file with the author); *see also* Adeno Addis, *In Defense of Crookedness*, 1992 U. ILL. L. REV. \_\_\_\_ (forthcoming 1993).

these two institutions tell about African Americans. In their daily representation of African Americans, the communication process and the legal process assume a normal and moral order to which African Americans are regarded as its negation. This normal and moral order is one that closely describes and represents the social world in a way that roughly accords with the world view of the majority.

Having briefly set out in Part I the reasons for selecting the focus of my inquiry, let me now outline the structure of the Article and the nature of the argument. Part II sets out the social and intellectual context to my specific concern and to which my argument responds.

Part III explores the mainstream media's description and coverage of young black males, black politicians and black athletes. This section argues that these images are overwhelmingly stereotypical and extremely negative, as a result of what I have referred to as "structural propaganda."<sup>32</sup> Structural propaganda works by omission as well as by inclusion. In relation to African Americans it takes three forms. First, the media omits from its agenda issues that are of interest to African Americans. Second, when African Americans *are* the subject of discourse, they are typically presented in stereotypical and negative ways. Third, both in their moments of invisibility and in their moments of caricatured presence, African Americans have virtually no role in the communication process and the production of their identity.

Part IV will inquire into the FCC's policies with respect to minorities to examine whether those policies do in fact provide the basis for a more inclusive communication process. In that regard, the section will examine in detail the current policies of the FCC, in terms of how those policies are structured and how they are enforced.<sup>33</sup> The purpose of this analysis is to determine whether the FCC policies can provide the means of controlling "the second problem of evil."

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32. For a discussion of structural propaganda, see Adeno Addis, *International Propaganda and Developing Countries*, 21 VAND. J. TRANSNAT'L L. 491, 516-20 (1988).

33. As is apparent from the nature of the discourse in both the political and the judicial arenas, attacks on such policies are becoming increasingly intense. It was only by the narrowest of margins, 5-4, that the United States Supreme Court upheld the constitutionality of two of the Commission's minority policies. *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990). Today, the author of the majority opinion, Justice Brennan, and two of the five who voted with him, Justices Marshall and White, are no longer on the Court. Given the current composition of the Court, it is safe to assume that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), will become the paradigmatic case, not *Metro Broadcasting*. Therefore, even after *Metro Broadcasting*, the challenge to affirmative action is going to continue and even intensify, and hence, the need to develop theoretical schemes that will attempt to justify affirmative inclusion of minorities in the communication process.

Part V is devoted to an exploration of the justifications for affirmative action in the communications industry. In agreement with the majority of the Supreme Court in *Metro Broadcasting v. FCC*,<sup>34</sup> I will argue that policies such as those adopted by the FCC need not be justified on the grounds of remedying past discrimination. Indeed, the focus on past discrimination, and the fashioning of affirmative actions to remedy such discrimination, is unhelpful for two reasons. First, this approach wrongly leads us to assume that discrimination is a thing of the past. Second, the notion of past discrimination, at least in this area, prevents us from seeing the complete picture of exclusion; it turns the issue of discrimination into what it is not, a simple employment discrimination concern. The larger problem, however, is that the majority, through the media, continues to invent an African American character which is viewed as the negation of the identity of the majority. It makes little sense to fashion remedies to such a problem by invoking the notion of past discrimination.

I will argue instead that the justification for affirmative action is diversity, the encouragement of a multiplicity of narratives. On this level the Article is in agreement with the majority in *Metro Broadcasting*. But Part V attempts to do more than endorse the proposition that diversity is the most secure foundation for inclusive policies in the area of communication; it also explores the objectives which make diversity necessary and constructs a scheme of justification around those objectives. As such, the section serves simultaneously as an endorsement of the general claims of the majority in *Metro Broadcasting* and as an attempt to develop a theoretical scheme upon which to ground those claims.

The notion of diversity that I develop in this Article draws from recent postmodernist writings that have attempted to construct conceptual schemes for dealing with the issue of the ethic of responsibility toward otherness. As I shall show in Part V, the ethic of responsibility underlying the writings of many postmodernists is linked to a critical ontology of the self. What I have termed "critical pluralism" is the precise condition that simultaneously acknowledges the ethic of responsibility toward otherness and provides the condition for the critical examination of the self that an affirmative attitude toward otherness will require. The diversity inherent in critical pluralism makes a gesture toward the postmodernist concern for the affirmation of difference, while retaining the critical ontology of the self. The two are linked in a continuous process of dialogue, what Michel Foucault has called a "logic of discourse" that ties the ques-

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34. *Metro Broadcasting*, 497 U.S. at 547.

tioner and the replier.<sup>35</sup> But both an affirmation of difference and a critical ontology of the self require not an ahistorical conversation between the dominator and the dominated, for that will simply perform the present with an imagined past. That can hardly be transformative. Rather, as I argue in Part V, the sort of dialogue that is needed is one that takes critical genealogies seriously. The only way we can successfully check the tendencies of the dominant discourse in this country to define African Americans as the Other and to exclude them from various spheres of existence is to understand how the discourse about the Other has historically constituted itself. The reconstitution of genealogy will allow us to provide the space in which the subjectivity of the African American Other will emerge by revealing the suppressed alterities that have made possible the dominant historical narrative.

The Article will conclude with a backward glance in Part VI. These concluding remarks will attempt to respond briefly to some of the familiar objections that critics of affirmative inclusion of minorities typically advance. In some sense these brief responses will be merely a revisitation of arguments made earlier in the Article, but they will also emphasize the importance of taking seriously communicative representations. Only when we realize fully that we continually produce ourselves and others in the very process of presenting and representing ourselves and others will we be able to understand the importance of providing institutional structures that enable minorities and majorities to interrogate each other's narratives, and in the process develop a more defensible scheme of association.

## II. THE CONTEXT

The 1980s were not good for minorities,<sup>36</sup> and saying good-bye

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35. See Michel Foucault, *Politics, Polemics and Problemizations: An Interview*, in *THE FOUCAULT READER* 381, 381-82 (P. Rabinow ed., 1983).

In the serious play of questions and answers, in the work of reciprocal elucidation, the rights of each person are in some sense imminent in the discussion. They depend only on the dialogue situation. The person asking the questions is merely exercising the right that has been given him: to remain unconvinced, to perceive a contradiction, to require more information, to emphasize different postulates, to point out faulty reasoning, etc. As for the person answering the questions, he too exercises a right that does not go beyond the discussion itself; by the logic of his own discourse he is tied to what he has said earlier, and by the acceptance of dialogue he is tied to the questioning of the other. Questions and answers depend on a game—a game that is at once pleasant and difficult—in which each of the two partners takes pains to use only the rights given him by the other and by the accepted form of the dialogue.

*Id.*

36. See generally Michael Lerner, *Looking Forward to the Nineties*, 4 *TIKKUN*, Nov.-Dec. 1989, at 37, 37. In fact it was not only minorities who found the 1980s difficult.

to them was not too difficult. The anti-minority, or to be precise, anti-black, mood of the era expressed itself in many different ways and in a variety of institutions. From racial violence and tension in some of the national universities<sup>37</sup> to the election of a former Grand Wizard of the Ku Klux Klan to a state legislature,<sup>38</sup> from the resistance to the brink of bankruptcy of a northeastern city to an integrated neighborhood<sup>39</sup> to the racially motivated murders in New York City,<sup>40</sup> people seemed to act out their racism with little

Women, the poor, and other groups who did not enjoy meaningful access to power and its processes also lost ground. While their needs and aspirations were defined by those in power as "special interests," the desires and wishes of the powerful were declared to be the "general interest." *Id.*

37. The University of Michigan, Brown University, Wesleyan University, the University of Massachusetts, and Dartmouth College are some of the institutions where there have been serious incidents of harassment, including racial slurs, fire-bombings, and physical attacks on minority students, committed by white students and by campus police officers. For an account of race relations at the nation's universities, see Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990). According to the National Institute Against Prejudice and Violence, violence and harassment against minority students has been reported at more than 300 colleges and universities. See Wilkerson, *supra* note 22, at A1, B10.

38. David Duke, former national Grand Wizard of the Knights of the Ku Klux Klan, was elected to the Louisiana House of Representatives in February 1989 on an undisguisedly racist platform. See Tony Freemantle, *Duke Advances One-Issue Platform—The White Race*, HOUS. CHRON., Jan. 19, 1992, at A1. In 1991, running as the Republican candidate for governor of Louisiana in a runoff election against former Governor Edwin Edwards, Duke received nearly 40% of the total vote, and a majority of the white vote. See Peter Applebome, *Duke: The Ex-Nazi Who Would Be Governor*, N.Y. TIMES, Nov. 10, 1991, § 1, at 26.

In 1985, Duke declared that, "[w]e don't have a program to send [African-Americans] back to Africa [but] an ideal . . . would be geographic separation of the races, either within this country or on an extra-continental basis . . ." *Id.* In 1986 he declared, "the Jews have developed a disease and given it to us. It's called race mixing." *Id.* As recently as 1989 he stated that "[f]here is only one country anymore that's all white, and that's Iceland, [and that] is not enough." *Id.* He was nevertheless elected to the Louisiana legislature in 1989 and came close to being elected governor in 1991. See *id.*

39. In the early 1980s the Department of Justice sued the City of Yonkers, New York under Title VIII of the Civil Rights Act, charging that the city had engaged for 40 years in a pattern of intentional segregation in the siting of subsidized public housing units. *U.S. v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). The city was found liable, *id.*, and was directed by the court in a remedial decree to site 200 units of public housing in East Yonkers, a predominantly white area of the city. *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577, 1580-81 (S.D.N.Y. 1986). The Yonkers City Council voted to disregard the court's decree, and the court imposed a series of fines on the city that began at \$100 and doubled each day that the city failed to comply with the court's decree. The fines reached a total of \$320,000, nearly bankrupting the city, before the City Council relented and implemented the court's plan. See Marianne Arneberg, *Cuomo Gets Tough With Yonkers*, NEWSDAY, Aug. 30, 1988, at 5; Neil A. Lewis, *High Court's Support Asked on Yonkers Housing Fines*, N.Y. TIMES, Oct. 3, 1989, at B4.

40. The Howard Beach murder and the Bensonhurst incident are perhaps the two most well known cases. For a discussion of the Howard Beach incident, see James Barron,

inhibition.<sup>41</sup>

A number of reasons have been advanced to account for this resurgence of racism and racial violence.<sup>42</sup> An obvious and often invoked reason has been the attitude of the federal government, particularly the administrations led by Ronald Reagan and George Bush.<sup>43</sup> Those who make this argument contend that the Reagan

*Police Search Queens for Attackers*, N.Y. TIMES, Dec. 22, 1986, at B2. For an account of the Bensonhurst case, see Clem Richardson, *Racial Tensions Usher in New Year*, NEWSDAY, Jan. 2, 1988, at 2; see also JOHN DESANTIS, *FOR THE COLOR OF HIS SKIN: THE MURDER OF YUSUF HAWKINS AND THE TRIAL OF BENSONHURST* (1991). In the Bensonhurst incident, Yusuf Hawkins, a 16-year-old African American, was murdered by a mob of young white males in the Bensonhurst section of Brooklyn, New York as he and three of his friends were on their way to look at a used car that had been advertised for sale. Hawkins's assailant, Joseph Fama, is reported to have said before pulling the trigger, "To hell with beating them up. I'm gonna' shoot the nigger." See David K. Shipler, 'A Gentle Young Man Who Would Be 16 Forever,' N.Y. TIMES, Nov. 10, 1991, § 7 (Book Review), at 11 (reviewing DESANTIS, *supra*).

41. Race relations in the 1990s are not noticeably better. Racism continues to manifest itself in various ways, sometimes quite openly and at other times in the routine ways institutions treat African Americans. The brutal beating of Rodney King, an African American, by white members of the Los Angeles Police Department in 1992, and the officers' subsequent acquittal by a jury with no African American members, are only the most brutal examples of how the white majority and institutions in this country continue to devalue the lives of African Americans.

A 1990 survey by the National Opinion Research Center found that 78% of whites believed that blacks were more likely than whites to prefer living on welfare, and 74% thought the same of Hispanics. The survey also found that 62% of whites thought that blacks were less likely to be hard-working (56% for Hispanics); 56% believed that blacks were more violence-prone (50% for Hispanics); 53% thought blacks to be less intelligent (55% for Hispanics); and 51% believed that blacks were less patriotic (61% for Hispanics) than whites. Paradoxically, the survey also found that most whites believe in and support racial equality and a fair society. See *Survey: White Racism Alive and Well*, THE TIMES-PICAYUNE (New Orleans), Jan. 9, 1991, at A4 (citing NATIONAL OPINION RESEARCH CENTER, GENERAL SOCIAL SURVEY (1990)).

42. I use the term "racism" throughout the course of this article to refer to those negative beliefs and attitudes that people from one race hold about members of another race. Such beliefs and attitudes can, and quite often do, lead to discriminatory and exclusionary behaviors against members of the group about whom those attitudes and beliefs are held. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 48 (1966); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Racist attitudes and beliefs may be consciously held, or they may simply be part of a belief system upon which those that hold them never reflect, part of what Charles Lawrence has called "the unconscious." Lawrence, *supra* at 330 ("Racism is in large part a product of the unconscious. . . . [It] is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities."). For the victims of racism, it does not make a great deal of difference whether the racist attitude is of conscious or unconscious origin. They both inflict pain and death on the victim.

43. The Bush campaign's use of Willie Horton as a campaign issue in the 1988



and Bush Administrations lacked a commitment to civil rights and to the institutions through which such rights may be realized. They conclude that this lack of commitment sent signals to white America that there would be no collective sanction against racial violence and racial discrimination. Indeed, it might even be argued that in relation to the Reagan administration, these signals were significantly more permissive of racial intolerance. One need only consider the kinds of appointments the Reagan Administration made<sup>44</sup> and the vigor with which the administration advocated before the Supreme Court for the reversal of many long-standing civil rights laws.<sup>45</sup>

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presidential election, and the manner in which it used him, was a thinly disguised strategy to exploit racial tension in order to procure the white vote. Horton, an African American criminal who raped a white woman while on furlough from prison, was not chosen at random to make the point about the problem of crime and the supposed inefficiency of the criminal justice system, nor because he was the only criminal who had engaged in such brutal acts. Rather, Horton was chosen for his value as a symbol to remind white voters about the African American Other. Willie Horton served as a useful reminder to white voters that to preserve the normal and moral order threatened by the African American Other, the choice was clear: vote for George Bush and the Republican Party.

Bush's attack on the 1991 Civil Rights Bill as a "quota bill" before he signed it was another way of making the black community a target of resentment by the white community. See, e.g., Michael K. Frisby, *Danforth Urges Bush to Abandon His Opposition to Civil Rights Bill*, BOSTON GLOBE, July 26, 1991, at 5. See also *supra* note 32. This effect was recognized in a 1991 report of the bipartisan Citizens' Commission on Civil Rights, which contended that President Bush "escalated racial tensions in the nation" and that "the actions of the administration continue to be shaped less by principle than by calculation of the political advantage to be derived from using the 'quota' label." Linda P. Campbell & Linda M. Harrington, *Report: Bush 'Escalated' Racial Tension*, CHI. TRIB., Apr. 18, 1991, § 1, at 5 (quoting CITIZENS' COMMISSION ON CIVIL RIGHTS, LOST OPPORTUNITIES (1991)). Arthur Flemming, the Commission's Chairman and the Secretary of Health, Education, and Welfare in the Eisenhower Administration, stated that the President's use of the term "quota" when talking about the Civil Rights Bill was "a code word designed to inflame relationships between groups in our nation." *Id.* at 5.

44. See Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785. President Reagan, for example, appointed as Assistant Attorney General for Civil Rights, William Bradford Reynolds, who was hostile to existing civil rights laws and policies and who was actively engaged in dismantling what members of the Administration saw as the civil rights status quo. See William B. Reynolds, *Individual vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984).

45. In one case, for example, the Reagan Administration moved to dismiss a suit initiated by the Carter Justice Department seeking to maintain an Internal Revenue Service policy of denying tax-exempt status to private schools which practice racial discrimination. *Bob Jones University v. United States*, 461 U.S. 574 (1983). In another it reversed a prior Justice Department stance to oppose a suit challenging a state anti-busing statute. *Washington v. Seattle Sch. Dist. No. 9*, 458 U.S. 457 (1982). See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Justice Thurgood Marshall spoke for many African Americans when he ranked Ronald Reagan at the bottom of his list of presidents supportive of civil rights, "down with Hoover and that group—Wilson—when we [African Americans] really didn't have a chance." ALTON HORNSBY JR., CHRONOLOGY OF AFRICAN-AMERICAN HISTORY: SIGNIFICANT EVENTS AND PEOPLE FROM

Undoubtedly, the Reagan Administration's, and arguably the Bush Administration's, hostile posture towards civil rights laws did encourage much of the racist activity and discourse that have been seen and experienced in recent years. When President Reagan referred repeatedly to "the welfare queen,"<sup>46</sup> his audience knew what the message was: a message of the undeserving black on the shoulders of the hardworking white. The Reagan and Bush Administrations lent legitimacy to the rhetoric of the innocent white victim of black transgression. But it would be naive to attribute the increasing racial violence and hostility of the 1980s and early 1990s solely to the lack of commitment by the federal government to civil rights and the concerns of minorities. The Reagan and Bush Administrations were able to act as they did precisely because they felt that there was substantial support from their white constituencies for their hostile policies and rhetoric. In some sense it could be argued that what the Reagan and Bush Administrations did was merely reflect publicly the many private conversations that exist among many white Americans. Of course, that public constitution of many private discourses accomplished two things: (1) it gave legitimacy to those private convictions and conversations,<sup>47</sup> and (2) it unified them into a coherent voice, into discourses with a theme, telling a story to disenfranchised whites that their disenfranchisement was a result of "the new privilege" granted to African Americans and other minorities. This act of giving public legitimacy to private perceptions and stereotypes played a major role in the current resurgence of racism and racial violence and intolerance, but it would be erroneous to think of it as the sole cause.

Other commentators, such as neo-conservative black scholars,<sup>48</sup>

1619 TO THE PRESENT 350 (1991).

46. See, e.g., Steven V. Roberts, *Food Stamps Program: How it Grew and How Reagan Wants to Cut it Back*, N.Y. TIMES, Apr. 7, 1981, § 1, at 11.

47. See PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY 27 (1991); James E. Blackwell, *Dynamics of Minority Education: An Index to the Status of Race and Ethnic Relations in the United States*, 2 TROTTER INST. REV. 5, 11 (1988).

48. Two of the more prominent neo-conservative black intellectuals are Glenn Loury and Thomas Sowell. Both are economists by training, but their extensive writings have been concerned mainly with political economy, including issues that directly concern African Americans. For a discussion of the works and thoughts of contemporary African American neo-conservatives, and particularly Loury and Sowell, see Symposium, *Special Section on Black Neoconservatives in the USA*, 7 PRAXIS INT'L 133 (1987).

For a sample of Loury's and Sowell's writings on the issue of race and race relations in America, see Glenn C. Loury, *The Moral Quandary of the Black Community*, 79 IN PUB. INTEREST 9 (1985); Glenn C. Loury, *Internally Directed Action for Black Community Development: The Next Frontier for "the Movement,"* 13 REV. BLACK POL. ECON. 31 (1984); THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); THOMAS SOWELL, ETHNIC AMERICA: A HISTORY (1981); THOMAS SOWELL, MARKETS AND MINORITIES (1981); THOMAS

regard the current racial tension primarily in terms of what they regard to be the failure of the "civil rights agenda." These intellectuals argue that the affirmative action policies pursued by the nation during the last few decades have failed to improve the condition of the majority of blacks, and that the civil rights establishment has been unable to justify to whites why these policies should be maintained. Therefore, they argue, the current racial tension is primarily the result of the liberal civil rights agenda, which punishes innocent whites while failing to come to grips with the real problems which hold back blacks from entering the mainstream of American society.

For these neo-conservative scholars, the problems of African Americans are primarily to be understood as cultural problems that have emerged as a result of the crisis of values within the black community.<sup>49</sup> These cultural problems are seen to be a cause, rather than a result, of the exclusion of blacks from the social and economic life of the community. For neo-conservative blacks the solution to racism is, as Robert Gooding-Williams has put it, two-fold: blacks must "overcome their cultural deficiencies" and must engage in self-help enterprises.<sup>50</sup> According to this view, respect and recogni-

SOWELL, RACE AND ECONOMICS (1975).

Shelby Steele, an English professor from San Jose State University, has recently emerged as the most visible conservative critic and commentator on affirmative action, appearing frequently in the national media. See Shelby Steele, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990); Peter Applebome, *Stirring a Debate on Breaking Racism's Shackles*, N.Y. TIMES, May 30, 1990, at A18; Shelby Steele, *I'm Black, You are White, Who is Innocent: Race and Power in an Era of Blame*, HARPER'S, June 1988, at 453.

49. See THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983); Glenn C. Loury, *Who Speaks for American Blacks?*, COMMENTARY, Jan. 1987, at 34. That a lack of self-discipline and personal responsibility are, for example, said to create a culture where teenage pregnancy, dropping out of school, and criminal behavior are prevalent.

In a speech following the 1992 Los Angeles uprisings, Vice President Dan Quayle worked to develop the theme of "family values" as an election slogan by attempting to convince the residents of South Central Los Angeles that their plight was primarily a result of their lack of appropriate values. See William Raspberry, *Dr. Dan's Diagnosis is Much Better than His Prescription*, CHIC. TRIB., May 25, 1992, at 9. His speech was but another episode of "blaming the victim."

Some prominent white politicians who call themselves conservatives have spoken in recent years in terms that suggest that blacks are inherently deficient, and that whites are thus free of responsibility for the plight of blacks. Patrick Buchanan, the well-known newspaper columnist and television commentator who challenged George Bush for the Republican nomination for president in 1992, in a discussion of race and poverty, claimed that "[w]hat the poor need more than anything today is a dose of the truth. Slums are the products of the people who live there. Dignity and respect are not handed out like food stamps; they are earned and won . . ." Thomas B. Edsall & Mary D. Edsall, *When the Official Subject is Presidential Politics, Taxes, Welfare, Crime, Rights or Values . . . the Real Subject is Race*, THE ATLANTIC, May 1991, at 53, 80.

50. Robert Gooding-Williams, *Black Neoconservatism: A Critical Introduction*, 7

tion by the majority will then follow. But both of these explanations for the resurgence and persistence of racism, the "blame the Republican federal government" and the "blame the victim" perspectives, are too narrow. Each concerns itself only with individual acts, and each is therefore oblivious to the institutional and structural situations which make those individual acts possible, indeed inescapable.

There are other explanations for the resurgence of racism.<sup>51</sup> The purpose of this Article, however, is not to detail the numerous possible reasons for the persistence of racism in this country. This Article instead considers one social process, the communication process, to see how racism reproduces itself and whether the communication process may be used for transformative politics.

Thus, the context that has given rise to the reflections in this paper is one in which racism and racial violence increasingly define social and political life in this country, and in which the traditional explanations for the causes of the resurgence of racism and racial violence seem to be increasingly unconvincing. This Article does not claim that the role of the communication industry in the constitution of the identity of African Americans can account for every ill that defines race relations in the United States; indeed, no one social process or factor can provide a complete explanation for social ills such as racism, because the identities of the racist and the victim of racism are defined by complex and interwoven social processes. Rather, the contention of the Article is that in so far as most, if not all, of the explanations for the persistence and resurgence of racism omit an important social process, the communication process, which explicitly defines the identities that link the racist and the victim of racism, then those explanations are necessarily incomplete and any remedies that emerge from them will be ineffective.

### III. RACISM AND THE COMMUNICATION PROCESS

*If they can define you, they can confine you.*<sup>52</sup>

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PRAXIS INT'L 133, 134 (1987); see also Cornel West, *Demystifying the New Black Conservatism*, 7 PRAXIS INT'L 143, 144 (1987).

51. See ALLPORT, *supra* note 42, at 367-71 (discussing the connection between economic insufficiency and racial anxiety); BRUNO BETTELHEIM & MORRIS JANOWITZ, *DYNAMICS OF PREJUDICE* 80-81 (1950) (discussing the relationship between economic apprehension and intolerance); Oscar Handlin, *Prejudice and Capitalist Exploitation*, 6 COMMENTARY 79 (1948) (discussing theory of prejudice as an exploitative tool of capitalism); see also Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

52. J.H. O'Dell, *Preface* to CARL GINSBURG, *RACE AND MEDIA: THE ENDURING LIFE OF THE MOYNIHAN REPORT* xiii (1989) (quoting Jesse Jackson).

### A. Racism<sup>53</sup> in the Communication Industry

*The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Sights and indignities are part of the Negro's daily life, and many of them come from what he now calls "the white press"—a press that repeatedly, if unconsciously reflects the biases, the paternalism, the indifference of white America.*<sup>54</sup>

No institution in this country is or can be free of the culture of racism that has so thoroughly defined America,<sup>55</sup> so the fact that the communication industry is infected with racism can be of no great revelation to anyone. Indeed, the communications industry has been one of the most effective institutions in perpetuating a particular image of African Americans in the consciousness of European Americans. Given the highly segregated nature of social life and the workplace,<sup>56</sup> the media is often the only means through which blacks and whites have sustained contact with each other. The media, however, often fails to bridge the social space between the two groups, and in many ways it has continued to institutionalize that gap.<sup>57</sup>

Unconscious, or structural, racism in the media has had three consequences for African Americans. First, African Americans are largely excluded as mass media communicators. Second, subjects of interest to African Americans have been systematically omitted from the mainstream media. Third, even when African Americans enter the discourse as subjects, they are usually cast in an unfavorable light.

1. *Racism I: Exclusion of Minority Communicators.* The latest available statistics indicate that the presence of minorities as communicators in the electronic media is depressingly low.<sup>58</sup> There are two ways in which people can be active participants in the communication industry: as owners and as employees. The number of minorities is very low in both areas. Minorities own and control only

53. See *supra* note 42.

54. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 366 (1968) [hereinafter KERNER REPORT].

55. As Justice Marshall wrote in his *Croson* dissent, "[T]he tragic and indelible fact [is] that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting).

56. See *supra* notes 21-23 and accompanying text.

57. It would be unrealistic to believe that there are no instances of intentional discrimination in the communication industry. What is undoubtedly more pervasive, however, and more harmful, is what has been referred to as "unconscious" racism, what can usefully be referred to as "structural" racism. See *supra* note 41.

58. See *supra* note 12 and accompanying text.

3.5 percent of the television and radio broadcast stations in the continental United States,<sup>59</sup> and African Americans own and control less than 2 percent.<sup>60</sup> The situation has not been improving.<sup>61</sup> Even when minorities enter broadcasting, the nature of that entry is generally unsatisfactory. For example, the overwhelming majority of the television stations owned by minorities—about 78 percent—are in the Ultra High Frequency (UHF) bands, rather than the more desirable Very High Frequency (VHF) bands.<sup>62</sup>

The minority employment situation is no better. The FCC Equal Employment Opportunity Trend Report for the period between 1986 and 1990 indicates that during that period African Americans held less than 6 percent of broadcast management jobs, and the figures have remained virtually stagnant for the five-year

59. *Metro Broadcasting v. FCC*, 497 U.S. 547, 610-11 (1990) (O'Connor, J., dissenting) ("It is undisputed that minority participation in the broadcasting industry falls markedly below the demographic representation of those groups. . . . [M]inority owners . . . [have] a controlling interest in 3.5 percent of stations and this shortfall may be traced in part to the discrimination and the patterns of exclusion that have widely affected our society.") (citations omitted). The 3.5% ownership level cited by Justice O'Connor includes ownership interests held by all minorities, not just by African Americans. *Metro Broadcasting*, 497 U.S. at 553 (Brennan, J.). The FCC defines "minority" to mean "those of Black, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 n.8 (1978); see also *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 849 n.1 (1982) (citing 47 U.S.C. § 309(i)(3)(C) (1982)). Compare the 3.5% figure with statistics from the 1990 census, which indicate that whites comprise 80.3% of the United States population. Of the remaining 19.7%, Blacks comprise 12.1% of the population (as opposed to 11.7% in 1980), Hispanics comprise 9.0% (6.4%), Asian and Pacific Islanders comprise 2.9% (1.5%), and American Indians, Eskimos and Aleut comprise 0.8% (0.6%). Other non-whites comprise 3.9% (3.0%) of the population. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STAT. ABSTRACT OF THE UNITED STATES: 1992, at 17 t.16 (112th ed. 1992).

The level of minority ownership of cable television outlets is less than 1%, lower even than minority ownership of over-the-air broadcast outlets. Thomas H. Billingslea Jr., *Monday Memo: A Tax Certificate Commentary*, BROADCASTING, May 28, 1990, at 25.

60. There are approximately 12,000 radio station licenses and approximately 1,200 television station licenses outstanding in the United States. Of that number, only 182 radio stations (1.5%) and 17 television stations (1.4%) are licensed to black-owned companies. See Jeremy Gerard, *For Minority Broadcasters, A Role in What Is Seen and Heard*, N.Y. TIMES, July 7, 1990, at 11; see also Jeremy Gerard, *Minority Role in Broadcasting Yields Far Bigger Effect on Radio Than T.V.*, N.Y. TIMES, Aug. 1, 1990, at B6; HOWARD UNIVERSITY SMALL BUSINESS DEVELOPMENT CENTER, COMMUNICATIONS AND MINORITY ENTERPRISE IN THE 1990S, App. 5 at 1-2 (1990).

61. See *infra* part IV.B.1.

62. See William Mahoney, *Obstacles Remain for Blacks in TV*, ELECTRONIC MEDIA, May 19, 1986 at 1. VHF bands are more desirable than UHF bands because they are less expensive to operate and transmit higher quality video and audio signals. See T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 50 (2d ed. 1989).

period.<sup>63</sup> The situation is one the Court of Appeals for the District of Columbia Circuit characterized in a 1984 decision as "extreme underrepresentation."<sup>64</sup>

Access to the print media remains limited as well. A 1988 survey conducted by the American Society of Newspaper Editors reported that "[t]he majority of U.S. dailies still have no minority professionals on their staffs."<sup>65</sup> For newspapers with circulations under 10,000, "the percentage . . . with minorities on staff dropped from 24 percent two years ago to 20 percent this year."<sup>66</sup> In the crucial category of management personnel, only four percent were minorities.<sup>67</sup> In 1988 the president of the National Association of Black Journalists characterized the minority employment situation as depressing.<sup>68</sup> Given the fact that there is relatively little regulatory structure directed at the print media, prospects for improvement in the print media appear even less encouraging than in the broadcast media.

The fact that there is extreme underrepresentation of minorities generally, and African Americans specifically, in the communication industry does not necessarily prove the existence of discrimination. Statistical evidence of underrepresentation may be attributable to factors other than discrimination against the underrepresented. Indeed, this seems to be Justice O'Connor's point in her

63. See *infra* note 216.

64. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 609 (D.C. Cir. 1984) ("Because of the extreme underrepresentation of minorities among the nation's broadcasters, minority perspectives are conspicuously absent from the broadcast media.")

65. American Society of Newspaper Editors, Press Release 1 (April 13, 1988) (on file with author); see also Dick Haws, *Tracking Progress Toward an Elusive Goal*, COLUM. JOURNALISM REV., Jan./Feb. 1992, at 24 ("[T]he overall newsroom picture . . . remains bleak.")

66. American Society of Newspaper Editors, *supra* note 65, at 1.

67. *Id.*

68. DeWayne Wickham, president of the association, said, "we came to the [Association's annual] convention somewhat depressed by the state of change that has occurred in the industry." *Black Journalists*, *supra* note 12, at 7. The American Society of Newspaper Editors' 1989 employment survey showed only a negligible increase in the number of minority newspaper reporters, editors, and photographers. Jay Mallin, *Newspapers Still Reflect Predominance of Males*, WASH. TIMES, Apr. 4, 1990, at A4. Commenting on these figures, the chairman of the Society's Minorities Committee declared that they were "not only unfortunate, but embarrassing for our industry . . ." Eleanor Randolph, *The Newspaper Editors, At a Loss for Words*, WASH. POST, Apr. 4, 1990, at B1. The observation of the Kerner Commission more than twenty years ago seems to be as relevant today as it was when it was made: "The journalistic profession has been shockingly backward in seeking out, hiring, training, and promoting Negroes . . . The plaint is, 'We can't find qualified Negroes.' But this rings hollow from an industry where, only yesterday, jobs were scarce and promotion unthinkable for a man whose skin was black." KERNER REPORT, *supra* note 54, at 384-85.

opinion in *City of Richmond v. J.A. Croson Co.*<sup>69</sup>

In *Croson*, the Court addressed the constitutionality of a Richmond, Virginia ordinance that required prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of the contract to minority business enterprises. The City Council justified the plan as remedial in nature, designed to eradicate the effects of past discrimination in the construction industry and promote "wider participation by minority business enterprises in the construction of public projects."<sup>70</sup> Writing for the majority, Justice O'Connor struck down the ordinance as inconsistent with the requirements of the Equal Protection Clause of the Fourteenth Amendment, finding "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."<sup>71</sup>

Justice O'Connor argued that a number of possible causes other than discrimination existed for the underrepresentation of minorities, and that until these alternative reasons were eliminated, discrimination could not be adopted as the sole plausible explanation. "It is sheer speculation how many minority firms there would be in Richmond absent societal discrimination,"<sup>72</sup> and the extremely low representation of minorities standing alone "is not probative of any discrimination in the local construction industry."<sup>73</sup> Why? Because "[t]here are numerous explanations for this dearth of minority participation . . . ."<sup>74</sup> According to Justice O'Connor's reasoning, there-

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69. 488 U.S. 469, 470 (1989).

70. *Id.* at 872 (citing RICHMOND, VA., CITY CODE § 12-158(a) (1985)). Justice Marshall in his dissent referred to the objective of the statute as the furtherance of the interest of "governmental non-perpetuation." *Id.* at 537, 539 (Marshall, J., dissenting). By the term "governmental non-perpetuation" Justice Marshall meant the government's interest in "preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination." *Id.* at 537. For a discussion of the non-perpetuation doctrine, see Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983).

71. *Croson*, 488 U.S. at 480. The requirement of direct evidence of discrimination is irrelevant for purposes of affirmative action if the justification for affirmative action is something other than the remedy of past discrimination. Such evidence is necessary only if one assumes, as Justice O'Connor assumed, that the only legitimate justification for affirmative action is the remedy of past discrimination. A better justification, however, is diversity. For a further discussion of the justifications for affirmative action, see *infra* Part V.

72. 488 U.S. at 498-99.

73. *Id.* at 503.

74. *Id.*; see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (O'Connor, J.) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.")



fore, it is impermissible to infer discrimination in the communication industry from statistical evidence of "depressingly low" minority representation.

Justice O'Connor suggested two alternatives that might explain the "dearth of minority participation"<sup>75</sup> in the construction industry, alternatives that might also apply to the broadcast industry. The first alternative is the existence of "past societal discrimination in education and economic opportunities."<sup>76</sup> The second is that "blacks might be disproportionately attracted to industries other than construction."<sup>77</sup> Suppose the first explanation were true; would that invalidate a program such as the one adopted by the City of Richmond, whose purpose was to remedy past discrimination? For Justice O'Connor, the answer is "yes." This answer is plausible to her because she sees clearly separated and autonomous spheres of existence (e.g., education, economic life, the construction industry) within which acts of individuals and groups are to be confined and evaluated. If there has been discrimination in the education field, for example, the construction industry may not be made to carry the burden of remedy. When spheres are seen to be autonomously constituted, then it makes sense not to make one sphere accountable for the acts and sins of another. The concept of the autonomy of spheres is analogous to that of the autonomy of offspring, the often made claim that people ought not be made accountable for the wrongdoing of their ancestors.

The problem with the argument of autonomy is that it misconceives the complex relationship between both parent and progeny and among spheres. To say that the construction industry is separate from the education system is at some elementary level correct. The two have different short-term objectives: one is engaged in the general training of people, the other in the specific business of construction. In a deeper sense, however, the two spheres assume each other. The education system affects the way the construction industry is constituted, as Justice O'Connor is prepared to accept, and it may be plausibly argued that the way in which economic life in the construction industry is constituted will to some degree determine the way in which the education system deals with various members of the community. Those who have better access to jobs in the construction industry and other industries are better able to provide their children with better access to education. Thus, in some significant sense the construction industry is not a passive recipient of products of the education system but *is*, at least partly, determina-

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75. *Croson*, 488 U.S. at 503.

76. *Id.*

77. *Id.*

tive of who goes through that system. The relationship between the education sphere and the economic sphere, such as the construction industry, is not one of mutual demarcation and seclusion, but rather one of mutual reinforcement and redefinition.

What we have in this country is a *system*, not just various spheres of existence. The various spheres achieve their distinctiveness by virtue of the fact that they are constituent parts of the system and are connected in a complex web of relationships.<sup>78</sup> To reform and improve the system requires that these various spheres be treated as a unit and be dealt with as a whole.<sup>79</sup> Once the problem of discrimination is seen as system-wide, then the argument that it ought to be dealt with in another sphere becomes unavailable. There is no natural place where to start re-arranging the system; that starting place is anywhere and everywhere.

The second possible explanation offered by Justice O'Connor raises more questions than it settles. Suppose it were true that African Americans are disproportionately attracted to industries other than construction, as she suggested was at least possible. The question then becomes one of why it is that African Americans as a group are disinclined, relative to European Americans, to enter the construction industry, or, analogously, why it is that there are more African Americans than European Americans in many of the major sports? There may be two possible responses.

The first response might suggest that there is something about being African or African American, culturally or otherwise, that somehow dissuades them from entering the construction industry, just as there may be something about them that attracts them to athletics. While one may assume this, the assumption must be explained, as it is at odds with both our intuitive feelings and the ideological commitment of American society. The official ideology in the United States teaches that people ought to be treated as individuals rather than as representatives of groups, and that people's choices must be regarded as individual decisions rather than the inevitable outcomes of their membership in particular groups.<sup>80</sup> The

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78. Commentators have noted the inherent interdependence of the various spheres of society. See, e.g., WILLIAMS, *supra* note 20, at 215 ("There is none of these sectors [economic, cultural, political] that does not immediately involve the others . . . . Whenever there's a move to concentrate on just one sector, it's often understandable in the context of the time, but it's always theoretically wrong.")

79. The alternative will lock us into a vicious cycle of deferment. By this I mean that problems that manifest themselves in one sphere will be treated as having their genesis in another sphere, and hence be dealt with in that sphere. But one sphere may in turn blame another sphere, and so on.

80. Ironically, this conception of individualism was Justice O'Connor's central theme in *Croson*.

individualist account of the self tells us that choices are not inherently constrained by the group in which one is a member. It is ironic that the current Supreme Court, which has been hostile to the notion of group rights, finds it appropriate to assume group attributes when it denies remedies to a particular group. Perhaps it is not so ironic, for the history of this country amply demonstrates that group treatment has been embraced when African Americans are to be summarily excluded and disadvantaged, while the notion of group rights is vilified when it is seen to benefit African Americans. Indeed, despite the official ideology that people are to be treated as individuals rather than as members of a group or of a race, the actual practice in the United States in relation to African Americans has been very similar to the attitude of the colonial power towards the colonized that Albert Memmi so powerfully described. Memmi observed that one of the means by which the colonized is depersonalized is through "the mark of the plural," by which he meant that "[t]he colonized is never characterized in an individual manner; he is entitled only to drown in an anonymous collectivity ('They are this.' 'They are all the same.')." <sup>81</sup> One of the ways by which a dominant group humanizes itself while simultaneously robbing the dominated of its humanity is by concretizing its own members as individuals, with their differences, virtues, and vices, while members of the dominated groups are seen merely as representatives of the group, rather than as individuals. <sup>82</sup>

The second response to the assertion that the cause of underrepresentation is a "disproportionately low attraction" of blacks to the industry is to argue that even if that disinterest were true, the cause of it is to be found not in the rather irrelevant attribute of

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81. ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 85 (Howard Greenfeld trans., 1965).

82. It is interesting to note that when it was discovered that the Milwaukee serial killer, Jeffrey Dahmer, had killed and performed gruesome acts on his numerous victims, the media and the general public treated the acts of the serial killer as the acts of a deranged individual. See, e.g., Christian B. Gagnon, *There Are No Monsters—Not Even Jeffrey Dahmer*, OTTAWA CITIZEN, Aug. 14, 1991, at A8; Rogers Worthington & Colin McMahon, *A Gruesome Pattern Emerges: Money Was the Lure, Spiked Drink Sprang the Trap*, CHI. TRIB., July 26, 1991, at C1. Any attempt to characterize his acts as representative of what white people are capable of doing or are likely to do would have been seen as preposterous. Even though most serial killers are white, the idea of defining the identity of the white community by the acts of a few individuals would be to deny the individuality of members of the white community. But imagine if the Milwaukee murderer was instead a black man. My hunch is that both the media and the white community would not have seen his acts as merely those of an individual; instead his acts might have been generalized as representative of the larger community. When an African American acts in a particular way, his act is quite often regarded as generalizable and an indicator of the proclivities of African Americans. African Americans exist as an abstract group, not as individuals. This is one way to dehumanize a people.

color, but in the social and political processes which shaped the experiences and expectations of a group of people in a particular way. Once the issue is reformulated this way, then the argument I have advanced against Justice O'Connor's first speculation applies.

Therefore, unless one is prepared to assume that there is something inherently defective about African Americans, statistical disparities such as those found in the communications industry lead to only one conclusion: systemic exclusion does exist. In an era when exclusionary practices have become subtle and sophisticated, where the system continually legitimizes its disenfranchising practices as part of the normal course of doing business, statistical evidence may be the only available means to demonstrate illegitimate exclusion. As in the construction industry, the extreme underrepresentation of African Americans in the communications industry cannot be understood in terms other than the systemic exclusion of African Americans. Racism is not merely a conscious individual or group attitude towards other individuals or groups;<sup>83</sup> it is also a culture which continues to provide the matrix within which people act daily. If we fail to understand, as Justice O'Connor clearly does, that this cultural consciousness continues to structure the circumstances and conditions within which actors operate, quite often with those actors being unaware of them, then we will never come to grips with the issue of racism and otherness in late twentieth-century America. Statistical evidence *will* quite often be the only means which will enable us to both understand and deal with this cultural consciousness.

Consider, for example, the comments of Al Campanis with which I introduced the Article.<sup>84</sup> Here was a man who appeared on national television to celebrate the achievements of his friend, an African American. I doubt that he saw himself as a racist, and evidence suggests that Campanis is a decent man who never intended any racial slur with his comments.<sup>85</sup> In any case it seems unlikely that given the sensitive nature of racial remarks in American society Campanis would have made remarks he believed to be racist when

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83. See *supra* note 42.

84. See *supra* note 4 and accompanying text.

85. Not long after he was dismissed by the Dodgers, Campanis was enlisted by Professor Harry Edwards, an African American sociologist at the University of California and consultant to the Commissioner of Baseball, to assist him in devising means of improving minority representation at baseball's administrative and coaching levels. Murray Chass, *Edwards Enlists Campanis's Help*, N.Y. TIMES, Aug. 7, 1987, at A25; see also Robert Lipsyte, *An Outsider Joins the Team*, N.Y. TIMES, May 22, 1988, § 6, at 34 (quoting Edwards as having said of Al Campanis, "He's an educator, like me, and he's a very nice man."); Dennis Wyss, *Fighting From the Inside; Former Jock and Campus Radical Harry Edwards Now Works to Put Minorities into the Front Offices of Professional Baseball*, TIME, Mar. 6, 1989, at 62.

he certainly would know that such remarks would jeopardize his job. He would have instead expressed his racist views privately, while making nonoffensive remarks in public. Campanis's comments indicate how stereotypical attitudes can structure and inform people's daily decisions, with those people being unaware that they in fact hold stereotypical and racist views.<sup>86</sup> Once racism is viewed in this way, statistical disparities might be considered more probative than courts and other public officials are presently prepared to accept.<sup>87</sup> From the excluded's point of view, it makes little difference whether the discrimination is of conscious or unconscious origin.<sup>88</sup>

## 2. *Racism II: Omission of Issues Which Are of Concern to Minorities.*

*There is only one thing in the world worse than being talked about, and that is not being talked about.*<sup>89</sup>

Just over two decades ago, in the wake of a series of racial disturbances and riots which swept the United States, a national commission was formed by the federal government to inquire into the causes of the disturbances. The National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission,<sup>90</sup> issued its report in 1968 in which it stated that a lack of presentation of minority issues contributed partially to those disturbances.<sup>91</sup> The Commission observed that:

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86. As Charles Lawrence observed, "we all harbor prejudiced attitudes that are kept from our consciousness." Lawrence, *supra* note 42, at 339.

87. Some have recognized that many of today's decisions are based on yesterday's perceptions. Judge Spottswood Robinson III of the Court of Appeals for the District of Columbia Circuit has noted, for example, that "[B]ehind today's failure to think of minority interests is yesterday's deliberate decision to discriminate." *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621, 637 n.14 (D.C. Cir. 1978) (Robinson, J., dissenting).

Justice John Paul Stevens has expressed that idea even more bluntly. "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white." *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting); *see also* Lawrence, *supra* note 42.

88. *See, e.g.,* *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *modified sub nom.* *Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969) (en banc) ("[T]he arbitrary quality of thoughtlessness can be as disastrous and as unfair to private rights and public interests as the perversity of a willful scheme.").

89. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY 2* (Isobel Murray ed., 1974) (1891).

90. The Commission took its popular name from its Chairman, Otto Kerner, then the Governor of Illinois. *See* KERNER REPORT, *supra* note 54, at xvii.

91. *See id.* at 366 ("[T]he news media have failed to analyze and report adequately on racial problems in the United States, and, as a related matter, to meet the Negro's legitimate expectations in journalism.").

[The media] have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of living in the ghetto. They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought, or history.<sup>92</sup>

In the intervening twenty-five years very little seems to have changed. As the Los Angeles disturbances of 1991 clearly demonstrated, the despair of African Americans, especially the young, and the failure of the mainstream media to communicate to the general polity that despair and misery, seem to be remarkably similar to the conditions noted by the Kerner Commission.<sup>93</sup> The media's neglect is not limited to the conditions of the inner cities and the issues that most concern poor African American residents of the ghettos, although those are the most glaring omissions. African Americans seem generally invisible in the mainstream media unless they are resurrected as the problem. Although in most large urban areas, minorities, especially African Americans, now constitute the majority or make up a significant minority, and although this strong presence has manifested itself in the election of many African American mayors and council members,<sup>94</sup> it is painfully obvious that blacks are almost invisible when it comes to the mainstream media taking up issues of significant concern to blacks. In major cities with large African American populations, the majority of social items in the daily papers are still about whites.<sup>95</sup> Recent evidence shows that in

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92. *Id.* at 383.

93. For example, the *Los Angeles Times* publishes community sections devoted to such areas of Southern California as the suburbs of Los Angeles County, Orange County, and Ventura County, but none devoted to South Central Los Angeles or other predominantly African American communities. See Carol B. Shirley, *Where Have You Been?*, *COLUM. JOURNALISM REV.*, July/Aug. 1992, at 25.

94. At the end of 1991 African Americans had been elected the mayors of seventeen American cities with populations of 100,000 or more, including many of the largest cities, such as Los Angeles, New York, Atlanta, New Orleans, and Cleveland. R. BENJAMIN JOHNSON & JACQUELINE L. JOHNSON, *THE BLACK RESOURCE GUIDE* 279-84 (10th ed., 1990-91)

95. *The Washington Post*, a newspaper published in a city that is over 70 percent African American, has been criticized and even boycotted by African Americans for its lack of coverage of the city's African American community. In 1986, for example, a coalition of Washington community groups staged a three month protest over the *Post's* coverage of the black community. David Shaw, *Circulation Surprises Critics; Washington Times Works to Attract Black Readers*, *L.A. TIMES*, Apr. 28, 1987, Pt. 1, at 1. Ronald Walters, chairman of the political science department at Howard University, noted that in terms of the *Post's* coverage, "It is almost as if there is no vibrant black culture in the city. [The *Washington Post*] does not cover life at the community level. Washington, D.C., has the largest black middle class in the world, and you would never know it from reading *The Post*." David E. Rosenbaum, *An Editor Is Retiring, Leaving His Mark*, *N.Y. TIMES*,

the broadcast media, programming on issues of concern for minorities is virtually non-existent.<sup>96</sup>

This omission can possibly be attributed to factors other than racism. It can be said that the omission of minority-focused programming is simply a sound business decision, rather than a decision influenced by conscious or unconscious racial animus. The media, which is financed by advertisers, is necessarily conscious of which segments of its audience do the most consumer spending, and what programming sells to those segments. It is undeniable, the argument goes, that advertisers target the white consumer because of its purchasing power. In fact, minorities, especially residents of inner cities, are referred to by many in the communication industry as "bad demographics."<sup>97</sup>

This reliance on the demands of advertisers to defend selective coverage is curious. First, this reliance directly contradicts the image which the media seeks to project: that the media is an institution that serves the public interest, not just another business enterprise driven by profit motive. In the case of the electronic media, the "public interest" requirement is a statutory mandate.<sup>98</sup> There is no necessary convergence between the economic interest of a particular media and the public interest which the media is required, or professes, to serve.<sup>99</sup> Second, and more to the point, the economic argument does not explain the fact that in most instances it is not only issues that are of interest to poor African Americans that are absent, but also issues that are of concern to more well-off African Americans who have the disposable income to purchase the advertised items.

To be sure, it is not entirely correct to say that the mainstream media does not concern itself with issues that are of concern to minorities. It does.<sup>100</sup> Quite often an issue, such as drugs, becomes important for the media when the problem is seen to be one with a wider reach and with an effect on the dominant racial group of the society. Even in this specific sense, however, blacks enter the discourse not so much as victims but as part of the problem, even as

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June 22, 1991, § 1, at 6.

96. A 1983 study shows that "network affiliates produce an average of less than 30 seconds of minority-oriented programming a day." Kurt A. Wimmer, *The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to Urge Policy Change*, 41 FED. COMM. L.J. 133, 140 n.23 (1989) (citing HOUSE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE, PRELIMINARY RESULTS OF TELEVISION DATA SURVEY (1983)).

97. Shirley, *supra* note 93, at 26.

98. See *infra* note 149 and accompanying text.

99. See text accompanying *infra* notes 243-44.

100. See text accompanying *infra* notes 112-18.

"The Problem." When the media focuses on Washington, D.C. as "the murder capital of the nation," for example,<sup>101</sup> the tone of the discourse is usually one of contemptuous accusation of the black community rather than an acknowledgment of the pain of the community.

### 3. *Racism III: Enter the Stereotypical Black.*

*By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.*<sup>102</sup>

*We wish to plead our own cause. . . . Too long has the publick been deceived by misrepresentation, in things which concern us dearly. . . . From the press and the pulpit we have suffered much by being incorrectly represented.*<sup>103</sup>

The American media has in recent years played a dual, paradoxical role in the presentation of African Americans to the general society. While the daily account of the life of the typical black person is still one of stereotype and extreme negativism, the image of the fictional black person has fared relatively well. Media accounts of the daily lives of African Americans are filled with negative imagery, images that clearly define the African American as the transgressor Other.<sup>104</sup> There has been, however, a change in the image of blacks in fictional accounts. Since the mid-1980s television has produced situation comedies such as *The Cosby Show*, *227*, *Frank's Place*, and *A Different World* which have shifted black characters from low-income settings to more middle class and up-scale ones. These programs present images of the fully accepted and assimilated middle class black, whose sense of self is defined not by his daily encounters with racism but by the same aspirations and values

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101. See Sam V. Meddis, *Tables Turn on U.S. Attorney*, USA TODAY, Feb. 4, 1993, at A4; Mary McGrory, *The Quadrennial Makeover: City Primps for the Moment*, WASH. POST, Jan. 20, 1993, at F25; Adrienne T. Washington, *No Issue Matters More*, WASH. TIMES, Feb. 2, 1993, at B1. Each story refers to Washington as the "murder capital" of the United States.

102. KERNER REPORT, *supra* note 54, at 383.

103. *To Our Patrons*, FREEDOM'S JOURNAL (New York), Mar. 16, 1827, at 1, reprinted in CLINT C. WILSON II & FÉLIX GUTIÉRREZ, *MINORITIES AND MEDIA: DIVERSITY AND THE END OF MASS COMMUNICATION* 197 (1985). *Freedom's Journal* was the first newspaper published in the United States by African Americans. WILSON & GUTIERREZ, *supra* at 179. The quoted statement was published in the newspaper's first issue in 1827. *Id.* at 180-81. More than 165 years later, the same observation about the media's misrepresentation of African Americans may still be made with a considerable degree of accuracy.

104. News stories featuring blacks and Hispanics are typically more negative than stories featuring whites, and focus mostly on crime and other negative topics. See ALETHA C. HOUSTON ET AL., *BIG WORLD, SMALL SCREEN: THE ROLE OF TELEVISION IN AMERICAN SOCIETY* 25 (1992) (citing Bradley S. Greenberg, *Minorities and the Mass Media*, in *PERSPECTIVES ON MEDIA EFFECT* 165 (Jennings Bryant & Dolf Zillmann eds., 1986)).



that define middle class white families.<sup>105</sup>

At first blush the two images, the fictional account and the "real" account, seem to be at odds with each other. The account of the real person is typified by themes of difference and negation, while the account of the fictional person is typified by themes of sameness and assimilation. There is, however, some consistency and coherence between the two narratives. The narrative of the daily lives of real blacks is the narrative of sin, of black collective fall. This is the familiar majority story of blacks as transgressors. The narrative of fictional blacks, on the other hand, is the redemptive story, the story of hope and the redemptive power of the majority and its institutions. It is the story of the image which white America holds of itself and of its institutions, where mobility and success are open to any person who possesses the requisite ambition and talent. The narrative of the fictional black frees the majority of the responsibility for the condition of the real black.<sup>106</sup>

But what of examples of the daily depiction of blacks in the media? When the depiction is not of blacks as criminals, it is of blacks as people who lack the most important ingredient of personhood, the capacity to think. Al Campanis summed up this attitude when he declared that blacks lack "the necessities" to be responsible citizens. African Americans are depicted in the media as a threat to the physical and cultural health of the majority community.

A 1991 report in *The New York Times*<sup>107</sup> demonstrates the point well. Dubuque, a small city in Iowa with a population of about 60,000, has in recent years experienced racial tension, the emergence of hate groups such as the Ku Klux Klan and the National

105. See Herman Gray, *Television and the New Black Man: Black Male Images in Prime-Time Situation Comedy*, 8 MEDIA, CULTURE AND SOCIETY 223, 223-24 (1986) ("[These images] emphasize black Americans who have achieved middle class success, confirming in the process the belief that in the context of the current political, economic and cultural arrangements, individuals, regardless of colour, can achieve the American dream. However, these images also exist in the absence of significant change in the overall position of black Americans as a social group.").

106. A 1992 report conducted by researchers at the University of Massachusetts, and financed by Bill Cosby himself, found that *The Cosby Show*, by featuring an affluent black family, desensitized whites to the nation's racial inequalities. Sut Jhally, one of the report's authors, suggested that,

[I]f black people fail, then white people can look at the successful black people on 'The Cosby Show' and say they only have themselves to blame. . . . Most white people accepted that America has had a kind of racist past, but the presence of the Huxtables and their spinoffs really seems to send a message to white people that black people can make it if they try.

Jeff Donn, *Study Knocks 'Cosby' for Loop*, THE TIMES-PICAYUNE (New Orleans), Apr. 27, 1992, at A11.

107. Isabel Wilkerson, *Seeking A Racial Mix, Dubuque Finds Tension*, N.Y. TIMES, Nov. 3, 1991, § 1, at 1.

Association for the Advancement of White People, and a plague of racial graffiti scrawled on school and church buildings, some of it proclaiming "the new KKK."<sup>108</sup> What is surprising about the Dubuque situation is not that racism exists in the Midwest as it does in the South and other parts of the country; no part of the country is immune from the culture of racism. Rather, what *is* surprising is that racism exists even where there are virtually no African Americans in the community. Racial minorities comprise only 2 percent of Dubuque's population, and the city in late 1991 had only 331 black residents "scattered across the city."<sup>109</sup> Yet the presence of a handful of African Americans was apparently enough to trigger racism and racial attacks. The image upon which racist members of the community acted could hardly have been derived from actual contact with African Americans, for very few African Americans live in the community. Furthermore, no member of the African American community in Dubuque is reported to have committed any of the acts for which the mainstream media condemns the entire African American community. What the situation in Dubuque demonstrates is that white America quite often acts in response to the image of African Americans constructed in large measure by the media. When a puzzled counselor in a high school in Dubuque wondered, "How can we have a race problem when we don't even have minorities?"<sup>110</sup> the answer is that the source of the problem is not the presence of minorities, but rather the presence of a profoundly negative national identity of African Americans sustained and reproduced by the cultural institutions of this country, such as the media.<sup>111</sup>

As a means of exploring the image of African Americans presented by the media, I will now look at the description and coverage of three specific groups of African Americans: young black males, black athletes, and black politicians.

**a. Young Black Males.** The image of young black males conveyed by the mainstream media is one associated with drugs, crime, and violence. To be a young black male is to be thought of as the paradigmatic Other. It is an image that instills fear and terror among whites. Stephen Carter was right when he observed, "[b]lackness . . . can threaten simply by appearing unexpectedly, in a

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108. *Id.*

109. *Id.*

110. *Id.* (quoting Kim Clayton, a counselor at Dubuque Senior High School).

111. One Dubuque high school student remarked that "[blacks are] always the mean guy in the movies." *Id.*; see also Isabel Wilkerson, *The Tallest Fence: Feelings on Race in a White Neighborhood*, N.Y. TIMES, June 21, 1992, § 1, at 18. Wilkerson compared two mostly segregated Chicago neighborhoods, one black and one white. She reported that, "[p]articularly for whites, it seems, what they learn about the other race comes from television news or stereotypes passed down through the generations." *Id.*

wealthy white suburb in the middle of the day, on a darkened sidewalk in the middle of the night, on the other side of the peephole in the door when no one is expected."<sup>112</sup> "Criminal" has become the noun often used to describe young black men. The electronic media often uses pictures of young black men to illustrate a point or to facilitate a discussion about crime,<sup>113</sup> and it is the image of the young black male as the paradigmatic criminal that made it possible for Charles Stuart to pass his involvement in a hideous crime off on a fictional black and be believed by both the media and the police.<sup>114</sup> It

112. Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 428 (1988).

113. See, e.g., Don Aucoin, *Street Stereotypes: Images of Gangs, Violence Add to Burden of Young Blacks Trying to Break Free*, BOSTON GLOBE, May 18, 1990, Metro Section, at 1 (recounting the visibly fearful reaction of a white pedestrian upon encountering a black youth in the street).

The media's routine use of irrelevant images of young black males to set the context for discussions of crime was demonstrated to me one morning in April 1992 as I watched *Good Morning America* on ABC television. As the show's host introduced a panel discussion on parental legal responsibility for the criminal actions of children, the screen broadcast the image of a handcuffed young black male. Although this handcuffed young man was neither related nor relevant to the discussion that followed, with his silent presence he established the context for the discussion about crime.

114. The notorious case of Charles Stuart illustrates the presumption of black criminality. In October 1989, in Boston, Charles Stuart shot and killed his wife, inflicted a minor gunshot wound upon himself, and reported to the police that he and his wife had been the victims of a black assailant after having wandered into the "wrong" neighborhood. See Mike Barnicle, *Stuart Case Defies Ending*, BOSTON GLOBE, Nov. 3, 1992, Metro Section, at 21. His story was immediately and unquestionably accepted by the police and the media, and a huge manhunt for a black suspect was commenced. *Id.* Weeks later suspicion finally fell upon Stuart himself and he killed himself by jumping to his death from a bridge over Boston harbor, *id.*, but the episode was telling. Stuart knew that his story would be believed if he provided the details of a story of innocent whites victimized by a black assailant in a black neighborhood, and it was, with little question by the police, the media, and the public. The columnist William Raspberry observed that the stereotype of the criminal black is so entrenched that the Stuart story was embraced even by some blacks, who later regretted doing so. See William Raspberry, *The Boston Case: Anger, Yes—But Toward Whom?*, WASH. POST, Jan. 8, 1990, at A15 (quoting Veronica Byrd, who remarked, "The black community was forced to withstand abrupt and unnecessary suspicion and police searches, but some of us felt it was rightly so. We had brought this on ourselves. Now some of us feel the stinging sensation of having believed the hype. Racial attitudes are becoming so pervasive and persuasive that even we are beginning to believe too easily the accusations, doubts and headlines ourselves."); see also Michael Rezendes and Scot Lehigh, *Black Leaders Ask Review of Stuart Probe*, BOSTON GLOBE, Jan. 8, 1990, Metro Section, at 1.

A similar scenario occurred in Milwaukee in 1992. Jesse Anderson stabbed his wife to death and inflicted a minor stab wound on himself, then told the police a story of how he and his wife were robbed and assaulted by two black men. Anderson's account was largely accepted by the media although discounted by the police, and he was eventually arrested and charged with homicide. See Isabel Wilkerson, *Police Charge Man Who Said Blacks Stabbed Wife*, N.Y. TIMES, Apr. 29, 1992, at A14; Rogers Worthington, *Once A Victim, Now Suspect: Husband Held as Cops Question Account of Wife Slaying*, CHI.

is partly this image of African Americans which made David Duke's story about blacks compelling to many of the white Louisiana voters who supported him.<sup>115</sup>

It is true that more crimes are committed in poor African American communities than anywhere else, and that young black males are responsible for most of those criminal acts. But the image that the mainstream media paints, in which crime is a metaphor for young black males and the white community its victim, is false; the overwhelming majority of crimes are in fact committed intraracially.<sup>116</sup> Whites are usually victims of white offenders and blacks are usually victims of black offenders. The image painted by the media, in which young black males commit most of the crimes<sup>117</sup> and the white community is threatened by black crime, is at odds with the facts.

The nation's drug problem is another issue by which blacks, especially young blacks, are continuously portrayed by the media as transgressors. Although most of America's drug abusers are white, the majority of the media reporting and commentary about the problem of drugs tends to focus on the black community.<sup>118</sup> Drugs are indeed a problem in the black community. Drug abuse has seriously

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TRIB., Apr. 28, 1992, § 1, at 1.

I relate the Stuart and Anderson incidents for two reasons. First, they demonstrate that the image of black criminality is so pervasive in this culture that some whites believe that they can easily blame their crimes on blacks and be believed. Second, they illustrate the media's eagerness to tell the story of the "white victim" as long as the accused is a black man.

115. See Bill Lembrecht, *Duke Announces Presidential Bid as Republican*, ST. LOUIS POST DISPATCH, Dec. 5, 1991, at A1; see also *supra* note 37.

116. In 1991, for example, 85% of white murder victims were killed by white assailants, and 93% of black victims were killed by black assailants. U. S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1991: CRIME IN THE UNITED STATES 17 (1992) [hereinafter 1991 UNIFORM CRIME REPORTS].

117. White youths committed 71.4% of all juvenile crimes in the United States in 1991, *id.* at 232, yet "the major networks focused most of their attention on black street gangs and vandals." Legrand H. Clegg II, Letter to the Editor, *Hollywood and Black Americans*, L. A. TIMES, Jan. 10, 1990, at B6. Although 69% of all crimes are committed by whites, see 1991 UNIFORM CRIME REPORTS, *supra* note 116, at 231, the typical media report about crime focuses on a black person as the paradigmatic criminal.

118. Some sources have claimed that among all drug abusers in the United States, up to 80% are white. See Clegg, *supra* note 117, at B6 ("Robert Dupont, former director of the National Institute of Drug Abuse, has publicly declared that 80 percent of America's drug abusers are white and only 14 percent are black, [and yet] virtually all news reports on drugs center on the black community."); see also Beth Frerking, *Children Get Racial Bias From Parents, Friends, TV*, THE TIMES-PICAYUNE (New Orleans), May 24, 1992, at A8 ("Racism persists through exaggerated media portraits. Joe Feagin, a sociology professor at the University of Florida and author of several books on racism, said most drug-related crimes on television involve black people, although 70 percent of drug use is by white people.").

undermined black communities and families, especially those living in the inner cities. Many of the murders that take place in those communities are drug-related. As such, recognition and concern about the destructive role which drugs play in those communities can only be a good thing, for such recognition may lead to efforts to confront the problem. My point, however, is that when the news reports about drugs focus on the black community, the image conveyed is one of black people as The Problem.

**b. Black Sportsmen.** Another area of media stereotype and racist imagery is in media sports reporting. Phillip Hoose<sup>119</sup> has given a detailed account of how mainstream media commentators describe black athletes in stereotypical terms similar, if less explicit, to the ones used by Al Campanis and Jimmy (the Greek) Snyder.<sup>120</sup> Hoose observed that "[t]he black athletes who today make up most of the NBA and NFL labor forces, and who have begun to penetrate country-club and even Nordic sports, have heard their success explained in terms of their hands, tendons, muscles, joints, nerves, blood, thighs, African ancestry, and even eye color. But not their minds."<sup>121</sup> Studies have shown that sports commentators tend to describe the success of black athletes on the field in terms of physical attributes, such as their size and their running, jumping, and leaping abilities, while the success of white athletes engaged in the same sport tends to be described in terms of their thinking capacity.<sup>122</sup>

Many sports commentators are white former coaches whose sense of connection with the black athletes may be the control they once had over other black athletes.<sup>123</sup> It also happens that almost all

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119. HOOSE, *supra* note 4.

120. *Id.* An informal study of professional football and college basketball broadcasts conducted in 1989 by the sportswriter Derrick Z. Jackson of the Boston Globe found that black athletes were more often described in terms of physical attributes and innate athletic abilities, while white athletes were more often described in terms of intelligence, leadership, and motivation. Derrick Z. Jackson, *Calling the Plays in Black and White: Will Today's Superbowl be Black Bowl vs. White Bowl?*, BOSTON GLOBE, Jan. 22, 1989, at A25.

121. *Id.* at 4.

122. *Id.* at 12, 19.

123. It is interesting to note a comment made by Mark Shields, a regular on the *MacNeil-Lehrer News Hour*. On May 8, 1992 program, the *News Hour* had on its regular duo of Shields and David Gergen, and the discussion was about the recent riots in Los Angeles and what could be done to address the desperate situation in South Central Los Angeles. Shields noted that the two white politicians who show genuine concern about the desperate state of the inner cities and are at the forefront of addressing the problem are Jack Kemp and Bill Bradley. Both of these men were professional athletes before they became politicians, and thus knew black people as teammates and equals. *MacNeil-Lehrer News Hour* (PBS television broadcast, May 8, 1992). Perhaps Shields is right that there is a qualitatively different perception of black athletes depending on whether the sportscaster was an ex-player or an ex-coach. However, as one of my research assistants

the executive officers and producers in the sports departments of network television are white males.<sup>124</sup> Indeed, as Hoose put it, "[t]oday, almost all of the information you receive about a black athlete through any medium is owned, financed, selected, edited and delivered by white people."<sup>125</sup> The invisibility of blacks as communicators seems to continually lead to another invisibility, the invisibility of the black athlete as a thinking human being.

**c. Black Politicians.** The mainstream media portrays minority politicians and political candidates, and especially African American male politicians and candidates, in a manner replete with stereotypical imagery. One of the most common questions the media implicitly asks itself when it covers an African American political candidate is whether that candidate is threatening or non-threatening to whites. Jesse Jackson is characterized as being very threatening,<sup>126</sup> while Virginia Governor Douglas Wilder and New

observed, almost every coach is an ex-player, and hence Shields' observation might not be as illuminating as it appears.

Minorities still hold only a tiny fraction of the high level coaching and administrative positions in professional sports. For example, during the 1993 major league baseball season there were six minority field managers among the twenty-eight teams. Jerome Holtzman, *Lady Cear? Don't Hold Your Breath*, CHI. TRIB., Apr. 25, 1993, at 9. Officials of Major League Baseball claim that 8% of the executives and department heads of major league clubs are African American, Hispanic, or Asian, with only one or two among them Asian. Paul Valentine, *Jackson, Protesters Call for More Women, Minorities*, WASH. POST, Apr. 6, 1993, at C7. That figure is disputed by Jesse Jackson, who claims that African Americans and Hispanics hold only 4% of those positions. *Id.* See also Robert Hilson Jr. & Melody Simmons, *More Than 200 Protesters Make Their Pitch*, THE BALTIMORE SUN, Apr. 6, 1993, at 7C. During the prior baseball season there were only seven black field managers in the minor leagues, the critical training ground for major league managers and coaches. *Silent Racism Keeps Managers in Minors*, THE TIMES-PIYAYUNE (New Orleans), July 19, 1992, at C3. During the 1992-93 National Football League season there were two African American head coaches among the twenty-eight teams. Thomas George, *On Pro Football: Two Head Coaches Make History*, N.Y. TIMES, Sept. 6, 1992, § 8, at 14. A recent survey found that "[e]thnic minorities comprise less than 5% of five key positions [president, general manager, top financial officer, head of scouting, and manager/head coach] among major professional sports teams." Mike Dood, *Survey Finds Minorities Rare in 'Power' Positions*, USA TODAY, Jan. 11, 1993, at 6C.

124. A 1992 television broadcast on racism in sports reported that there are no black network television executives with administrative or managerial control in sports broadcasting, no black newspaper managing editors, and only three black sports editors at 1,550 daily newspapers in the United States. *Outside the Lines: Portraits in Black & White* (ESPN television broadcast, Dec. 17, 1992) (transcript on file with author). As reporter Robin Roberts noted, "In print media it is the editors who have the power to hire and fire." *Id.* at 7.

125. HOOSE, *supra* note 119, at 21.

126. For example, Walter Goodman, television critic for the New York Times, wrote that while other politicians admire Jackson, "none want him too close during elections, lest he put off white voters who feel threatened by what they see as his emphasis on race." Walter Goodman, *New Breed of Blacks on Politics and Power*, N.Y. TIMES, Aug. 29, 1990, at C18 (television review).

York Mayor David Dinkins' political successes are portrayed as having depended on their "non-threatening" postures. Even Nelson Mandela's successful tour of the United States is explained by his allegedly "non-threatening style, somewhat like a Jesse Jackson speech delivered by New York Mayor David Dinkins," as one commentator put it.<sup>127</sup>

The notion of a "threatening" black politician was puzzling to me when I first came across it. What exactly is the concept meant to convey? It may refer to the fear among whites of the threat of redistribution of power and resources from whites to blacks that might be effectuated by black political candidates who talk about social justice and equality. Perhaps when the media uses the adjective "threatening" to describe black politicians, it is saying that whites are threatened by black politicians who espouse egalitarian and distributive policies, as whites perceive themselves to be the potential losers in such a redistributive scheme. It appears to me, however, that the concept of the "threatening" black politician is not entirely used to describe the possible adverse effects that policies of black politicians would have on the white electorate. If that were the case, one would expect the media to use the same phrase to describe white politicians who espouse similar, or even more egalitarian, policies as those "threatening" black politicians. Yet one does not hear that whites feel "threatened" by Senator Edward Kennedy, or that Governor Mario Cuomo's relative popularity is tied to his "non-threatening" posture. The adjectives "threatening" or "non-threatening" are reserved for use as descriptions for black politicians. These descriptions rarely have anything to do with the policies espoused. Indeed, if that were not the case, it would be very difficult to make sense of the media's insistence on explaining the success of Mandela's tour in this country in terms of his supposedly "non-threatening" manner.<sup>128</sup>

What then does the media mean when it employs those adjectives? I think the "threat" to which the media refers is a literal and physical one, and one consistent with the media's description of the typical black male. The typical black male is perceived by the mainstream media as a potential threat to the physical security of whites,<sup>129</sup> and the imagery the media uses to describe black politi-

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127. Michael K. Frisby, *Mandela's Ways Defy Politics as Usual*, BOSTON GLOBE, June 30, 1990, at 7.

128. *Id.* If the threat of redistribution of power and resources could explaining the notion of a "threatening" black, surely it would not make any sense to describe a foreign leader like Nelson Mandela, who has neither the capacity nor the interest to pursue policies in this country, as being "threatening" or "non-threatening" to whites in this country.

129. See Aucoin, *supra* note 113; see also Gray, *supra* note 102, at 223 ("Now we're in the eighties and we're back to the passive look, one that says, 'Oh, he's pleasing to look

cians merely extends that perceived threat to the political realm. Both when they are "praised" as non-threatening or condemned as threatening, black politicians are used as metaphors to describe the kinds of black males with whom the majority would not feel comfortable.<sup>130</sup>

Consider another common description of black politicians. If a black politician assumes prominence, he or she is likely to be regularly referred to as "the most powerful black,"<sup>131</sup> or his or her job title is commonly modified with the word "black" even when the identi-

at'. I know when I'm on the screen, some lady in Minnesota or Montana is not going to rush to turn off her screen because she's fearful that I may come in and do whatever.") (quoting Michael Warren of *Hill Street Blues*, NBC television broadcast).

For an interesting correlation between the historical fear of the black man and the fear of retribution, see Thomas Ross, *The Richmond Narrative*, 68 TEX. L. REV. 381, 403 (1989).

130. During his 1990 visit to the United States, Nelson Mandela was invited to speak before a joint session of Congress. William Dannemeyer, a member of the House of Representatives, called the invitation a "national disgrace." Donald Lambro, *Congressmen Boycott Mandela*, WASH. TIMES, June 27, 1990, at B7 ("Nelson Mandela is no Martin Luther King . . . He is more like . . . Willie Horton.") (emphasis added). What is puzzling about the Congressman's observation is not that he was outraged by the invitation, even though the man invited to speak is one who has dedicated his entire life to changing an evil system called apartheid, a man who had spent twenty seven years of his life in the most brutal of jails, the prison of apartheid. The puzzle is not even that the Congressman condemns a man who talks about dialogue and reconciliation with his former jailers and torturers, rather than retribution. One may understand the Congressman's complaint given his conservative politics that a person who is not prepared to condemn people who the Congressman thinks to be terrorists, people such as Yassir Arafat and Fidel Castro, might from his point of view not have earned the privilege to address the Congress. Rather, the puzzle is that from all the people with whom the Congressman could have compared Mandela, he chose to compare him with Willie Horton. Perhaps one should not be puzzled, for what the Congressman did was to use a rhetorical device that would tap the prevailing image of a transgressing black man regardless of what the supposed transgression is.

See also Ross, *supra* note 129, at 403.

131. Such prominent politicians as William Gray, Jesse Jackson, Tom Bradley, Coleman Young, and Maxine Waters have been described in newspaper accounts as being the most powerful, or as being among the most powerful, black politicians in the nation. See, e.g., Michael Specter, *Gray Named to Head United Negro College Fund*, WASH. POST, June 20, 1991, at A3 ("[Gray] the most powerful black member of Congress"); Vincent McCraw, *Jackson Casts His Shadow Over Democrats*, WASH. TIMES, July 13, 1989, at B1 ("[Jackson] the most powerful black politician in the nation"); Scott Armstrong, *L.A.'s Bradley Losing 'Teflon'*, CHRISTIAN SCIENCE MONITOR, July 28, 1989, at 1 ("[Bradley] one of America's most powerful black politicians"); James Risen, *Detroit's Problems Imperil Mayor Young's Long Reign*, L.A. TIMES, Feb. 17, 1989, Pt. 1 at 15 ("[Young] one of the most powerful black politicians anywhere in America"); Lee Harris, *Waters Confident Despite Primary Foe's Attack on Jackson-Brown Ties*, L.A. TIMES, May 22, 1988, Pt. 9 at 4 ("[Waters] one of the most powerful black politicians in the country"). What is interesting about the description "the most powerful black" is that it conveys the message that blacks can only aspire to be "the most powerful" of their own kind.



cation of the race of the individual is of no relevance to the story.<sup>132</sup> If the identification of the politician's race was not required by the context of the story, why then does the media qualify the position and power of African American politicians with the word "black?" Imagine how absurd it would look and sound if the race of a white politician were used as a qualifier to his or her position and power when the context of the story did not call for it.<sup>133</sup>

It seems quite clear that the media's practice of using race as a qualifier of power and position when the reference is to African American politicians and public figures affirms the image the majority holds of African Americans. They can rise to the top, but only to a separate top.<sup>134</sup> They can be leaders, but only of their own people.

132. Consider, for instance, a 1985 newspaper reference to William Gray, formerly a member of the House of Representatives, Chairman of the House Budget Committee, and Democratic House Whip, and currently president of the United Negro College Fund. Dan Balz, *House Studies Deficit Options*, WASH. POST, Mar. 18, 1985, at A7 ("Gray, the first *black* chairman of the influential budget panel, said a substantial deficit-reduction package . . . could be achieved with first-year cuts ranging from 'the high \$30s [billions] to the \$60s,' depending on the mix of policies.") (emphasis added). Gray's race is irrelevant to the substance of the story.

133. If, for example, successive newspaper references to Representative Thomas Foley's leadership position in the House of Representatives were in the form "the *white* Speaker of the House of Representatives," readers would presumably think that the identification of Foley's race is relevant to the story, and would attempt to figure out its relevance. If the reader were unfamiliar with the workings of Congress, they might be tempted to conclude that the House of Representatives has a speaker for every racial group.

134. A recent article in *The New York Times* about Congresswoman Maxine Waters, who represents South Central Los Angeles, makes the point well. The article ended its feature article on the Congresswoman with the following observation: "Some of her supporters believe she will go far politically, and that *she deserves success more than any other black leader on the political scene.*" Maria Newman, *Lawmaker From Riot Zone Insists On a New Role for Black Politicians*, N. Y. TIMES, May 19, 1992, at A18 (emphasis added).

It is also interesting to observe that the mainstream media usually invites African American politicians to comment on an issue, if it invites them at all, only when the issue has some relation to African Americans. Regardless of the qualifications and images of African Americans, there seems to be a limited range of issues upon which they are regarded as qualified to comment.

Consider also the following. Individual African Americans, politicians and non-politicians alike, are often referred to as "articulate." For example, the *Boston Globe* in a 1990 story referred to Shelby Steele as "part of a small but articulate group of black intellectuals who oppose race preference policies." Ethan Bronner, *High Court's Split on Affirmative Action Echoes Nation's Division*, BOST. GLOBE, June 29, 1990, at 1, 9. The word "articulate" is rarely used in relation to whites. The adjective is obviously a positive one and is used to compliment those blacks whom the media believe have stated their positions clearly. What is damaging, however, is what is implied by the use of the adjective, that on the whole "articulateness" is apparently not a characteristic of blacks. Thus, the media finds it necessary to use the adjective even when referring to a group of black intellectuals. Just think for a moment how strange it would sound if an article stated that a

Some may see this rhetorical segregation as harmless and inconsequential, but I see it differently. In my view, this is instead a symptom of a deep-seated, albeit unconscious, resistance among the mainstream media and the general public to the notion that the African American Other can be a leader to all segments of the society. Indeed, this resistance becomes clear when one reads reports and discussions about nationally prominent African American figures. For example, although Jesse Jackson viewed himself as speaking for the progressive wing of the Democratic Party, and although his Rainbow Coalition is comprised of a coalition of various groups, including labor and farmers, the media continues to portray him as the spokesman for black Americans.<sup>135</sup>

Not only are African American public figures regarded by the mainstream as speaking solely to and for African Americans, but the African American community which they are perceived to lead is regarded as monolithic and hence unable to accommodate more than one leader at a time. This assumption becomes apparent when one sees the media's attempt to regard every black politician who aspires to national office as a rival and potential replacement of Jesse Jackson. When Douglas Wilder, the Governor of Virginia and a conservative Democrat, showed some interest in running for national office, he was portrayed by the media as one likely to displace Jesse Jackson, a liberal Democrat, from the national arena.<sup>136</sup> When Ron Brown, the Chairman of the Democratic Party, presided over the successful Democratic National Convention in 1992, some media

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group of articulate white scholars opposed affirmative action.

135. After Jesse Jackson addressed the 1992 Democratic Convention, there was a discussion on a PBS/NBC program about the various speakers and speeches. *Report on the Democratic Convention*, (NBC/PBS television broadcast, July 14, 1992). Jim Lehrer, one of the hosts of the program, talked only about Jackson as speaking for blacks and as being the leader of blacks, despite the wide-ranging nature of the issues Jackson covered in his address and his attempt to position himself as a leader of the left wing of the party, black and white. It took a white union leader on the panel to remind Lehrer that Jackson spoke for a much wider audience than blacks and that the media's attempt to limit his reach to blacks was puzzling and bizarre.

136. See, e.g., Ralph Z. Hallow, *Republicans View a Democratic Star 'With Trepidation'*, WASH. TIMES, June 25, 1990, at A1 ("Former Reagan administration official Donald J. Devine links the Wilder style to 'his real importance, which is his potential to save the Democrats from their Jackson problem.'"). When Wilder sought the Democratic nomination for President, B. Drummond Ayers, Jr., of *The New York Times*, observed: "[T]aking a position more centrist than is usually put forth by . . . Mr. Wilder's main black rival in the party, the Rev. Jesse Jackson, Mr. Wilder promised to spend less and to concentrate much of what he did spend on the needy." B. Drummond Ayers, Jr., *Wilder Announces Bid for President*, N.Y. TIMES, Sept. 14, 1991, at 1 (emphasis added). See also B. Drummond Ayers, *In the End, Wilder Realizes the Numbers All Fell Short*, N.Y. TIMES, Jan. 11, 1992, § 1 at 7 (characterizing Jesse Jackson as "a powerful and influential Wilder rival" even though the two men were not seeking the same positions).

commentators spoke of Brown "eclipsing" Jesse Jackson, as if the two were performing the same job or running for the same office.<sup>137</sup> The diversity of leadership and ideas that are assumed to be present in every other group is somehow presumed to be missing among African Americans.<sup>138</sup>

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137. Tom Brokaw of NBC News remarked during the 1992 Democratic National Convention that Jesse Jackson was being eclipsed within the Democratic Party by Ron Brown, the party's chairman and an African American. *Report on the Democratic National Convention* (NBC/PBS television broadcast, July 14, 1992). Brokaw's remark raises the question of why he found it useful or relevant to measure the success of the party chairman in terms of its impact on another African American politician, given that the two men were not rivals for the same office or position. The two played different roles in the same way that Mario Cuomo and Ron Brown, or Paul Tsongas and Ron Brown, played different roles. Imagine a successful Italian American chairman of the Democratic Party having his success described in terms of how he is eclipsing the power and prestige of another prominent Italian American, say Mario Cuomo. This is likely to sound odd, and so it should. It would sound strange mainly because neither believe that Italian American politicians speak only for Italian Americans, nor do we believe that Italian Americans have only one leader.

138. The notion that African American leaders must be seen in terms of their potential to displace each other is premised on the rather strange, though often unarticulated, assumption in this culture that African Americans are monolithic in views and attitudes and that they will be loyal to whomever has been designated as their leader by the media or by one of many African American organizations. This culture, which professes to take the individual seriously has never really come to understand African Americans as individuals. It is only when one realizes this that one can begin to understand why African American public figures are often asked, even demanded, to condemn or disavow every racist or anti-semitic comment of any visible African American. Because African Americans are seen only as members of a group, rather than as individuals, and are regarded as monolithic in views and attitude, any comment by a black individual is regarded as representative of the view and attitude of all blacks. It is this de-individuation of blacks that makes it possible for the mainstream media and white officials to make black "leaders" accountable for the conduct of other blacks, while white officials are not required to be responsible for the racist acts of other individuals.

Jesse Jackson, for example, has been pressed to strongly condemn Louis Farrakhan, the leader of the Nation of Islam notorious for anti-semitic and anti-white rhetoric, even though Jackson, a Christian minister, has never been allied politically with Farrakhan nor ever endorsed his views. See Paul M. Montgomery, *The 1992 Campaign: On the Sidelines*, N.Y. TIMES, July 8, 1992, at A1; E. J. Dionne Jr., *Ex-Aide Describes Jackson Campaign*, N.Y. TIMES, May 11, 1992, at D28; see also Brent Staples, *On Denouncing Racism: Why are Some Blacks Accountable for All?*, N.Y. TIMES, Oct. 19, 1991, § 1, at 22 ("It has become common to impugn the honor of people who are accused of *failing to denounce* the objectionable conduct of others. . . . Why are African-Americans held accountable en masse? Probably because the culture views African-Americans in simplistic terms - as conspiratorial, monolithic in attitude and loyal to whomever the media regard as the Head Negro of the Moment. There is plenty of evidence of how wrong that view is. The black demonstrators in Crown Heights who chanted menacingly and threw bottles at Mayor David Dinkins are just one example of how wide the spectrum of black opinion has become. The range of black views on Clarence Thomas's confirmation to the Supreme Court, from ultraconservative to liberal, is another.").

The complaint about blacks being regarded in monolithic terms is not limited to the political realm. Recently a black artist from Britain made a similar complaint:

Put simply, the media's description of African American politicians, whether black politicians are referred to as "threatening," or when their power and prestige is qualified by reference to race, or when the community they are regarded as leading is considered unable to accommodate more than one leader at a time, sends a coherent message. That message is that African Americans are the different Other.

**d. The Media Coverage of African Americans: A Summary.** One of the most important pictures that emerges from the media's description of black youths, black athletes, and black politicians is how very similar are the various images of African Americans regardless of the group to which they belong. The African American Other, whether he is described as the young black criminal, or the threatening black politician, or the unthinking black sportsman, is seen as the negation of the normal and moral order. The consequences of perceiving African Americans this way is that it enables the majority to engage in activities and practices that exclude African Americans from various spheres of social and political existence, and hence continue to devalue their lives, without any sense of cognitive dissonance. To put it differently, European Americans are able to continue to hold a virtuous image of themselves and of their institutions while both they and those institutions engage in the daily devaluation of the lives of African Americans. They are able to do this precisely because the image of the African American that is painted every day, which frames the context within which European Americans act, is one that regards African Americans as the negation of normalcy and the moral order.

The media, particularly the electronic media, is the major contributor to that portrait and context,<sup>139</sup> as African Americans are

When [Spike Lee is] taken up as the embodiment of black filmmakers, what happens is that one is enough. And so too in the art world. One is enough. Somehow that doesn't happen with other groups of people.

....

I am not saying that I'm not trying to address common experiences [of black people]. But having done that does not put me in the position of being a representative. That's always been a real problem: "one black represents all blacks."

Manthia Diawara, *The Art of Identity*, 55 *TRANSITION* 192, 193-94 (1992) (quoting black British artist Sonia Boyce in a discussion of her work with critic Manthia Diawara).

139. Research indicates that television in the United States typically frames issues of crime and poverty in ways that profoundly affect viewers' attribution of responsibility for these problems to individuals or to society. IYENGAR, *supra* note 30, at 11 ("The manner in which a problem of choice is 'framed' is a contextual cue that may profoundly influence decision outcomes."). Iyengar notes further that,

In the case of poverty, for example, news reports about a black person tended to elicit more individualistic attributions of responsibility than reports of a white poor person. Similarly, compared with news coverage of criminal acts carried out by blacks, news stories depicting white perpetrators elicited more frequent

generally made the subject of media coverage only as part of a problem, part of the challenge to normalcy.<sup>140</sup> This challenge to normalcy can be seen either as an affirmative threat to normal and moral life, in the form of criminal behavior, or as the absence of the means necessary for a full and normal being, in the form of intellectual inadequacies.<sup>141</sup>

**e. Responses to the Media's Portrayal of African Americans.** What are the ways in which minorities, especially African Americans, respond to the unfavorable portrayal of themselves? How do they respond to the attempt of the majority to maintain a virtuous image of itself by defining them as the negation of the normal and moral order? There are three kinds of responses: individual, group, and institutional (public and private).

On the individual level, members of minority groups can cope with the media's image of their group in a number of ways. Some might simply accept the picture as being by and large true, but might nevertheless see themselves as exceptions to the general picture. This group of individuals, the "exceptionalists," as I shall call them, save themselves from dissonance and psychological destruction by reconciling the favorable image they have of themselves with the unfavorable public image of the group to which they belong by regarding themselves as exceptions. Others might accept the public picture as true in the same way that the exceptionalists do, but may not see themselves as exceptions to the general rule,<sup>142</sup> I shall refer

societal attributions of responsibility for the crime.

*Id.* at 3.

140. The treatment of multiculturalism and cultural studies by the media in the last few years is a good example of how anything that is connected with the Other is regarded as the negation of normalcy. Newspapers and magazines of various political leanings have been writing in such a way as to show that "multiculturalism and cultural studies [are] a two-pronged drive to instill political correctness." Chicago Cultural Studies Group, *Critical Multiculturalism*, 18 *CRITICAL INQUIRY* 530, 531 (1992); see, e.g., Diane Ravitch, *Multiculturalism*, 59 *AMERICAN SCHOLAR* 337 (1990); John Searle, *The Storm Over the University*, *N.Y. REV. OF BOOKS*, Dec. 6, 1990, at 19.

141. Salman Rushdie, the well-known Indian-born British author, expressed the situation this way:

The worst, most insidious st ereotype . . . is the characterization of black people as a Problem. You talk about the Race Problem, the Immigration Problem, all sorts of problems. If you are liberal, you say that black people have problems. If you are not, you say they are the problem. But the members of the new colony [black people in Britain] have only one real problem. The problem is white people. Racism of course is not our problem. It is yours.

PETER JACKSON, *MAPS OF MEANING: AN INTRODUCTION TO CULTURAL GEOGRAPHY* 142 (1989) (ellipses in original) (quoting Kum Kum & Reena Bhavnani, *Racism and Resistance in Britain*, in *A SOCIALIST ANATOMY OF BRITAIN* 146, 146 (David Coates et al. eds., 1985) (quoting Salman Rushdie)).

142. A 1990 National Opinion Research Center survey found that 29.6% of blacks, and 35.1% of Hispanics, surveyed considered themselves less intelligent than whites. See

to this group of individuals as "adherents." Adherents structure their daily lives according to that general portrait and avoid dissonance by purchasing servility. Finally, individual members of minority groups might respond, as most members of minority groups are likely to do, by simply denying the accuracy of the picture; I shall refer to this group as the "resisters." Resisters avoid dissonance and psychological destruction by viewing the negative picture in political and historical terms, as part of the dominant culture's continual attempt to exclude them from participating in the political and social life of the polity by defining them as the negation of the normal and moral order.

Whatever form the individual responses take, they cannot be transformative. They are simply ways of coping with a hostile environment. This Article does not concern itself with these individual responses. I mention them only to indicate that people are forced to deal with the psychological threats of racism in their everyday existence.

There have been a few minority group responses to the unfavorable media images of minorities. African Americans have, for example, taken measures that run the gamut from boycotts of offending media institutions<sup>143</sup> and the organization of monitoring and advocacy associations<sup>144</sup> to young black artists developing powerful

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*Survey: White Racism Alive and Well*, supra note 40, at A4. These statistics demonstrate the effects of negative portrayals of minorities on the self-image of those minorities. The American Psychological Association has reported that "[u]nderrepresentation and negative portrayals may influence the self-concepts and images of their own group for members of the affected categories . . ." Report of the American Psychological Association 22 (1986) (on file with author). This inference is based on "[a] small but growing body of literature [which] has documented the potential role of television in reversing negative self-perception . . ." *Id.* at 26.

143. In 1990, the *New York Post* was boycotted by African American groups who accused the newspaper of stereotypical and racist reporting. Michael Powell, *The Pulpit Versus the Post; Dozens of Ministers in Black Communities Have Endorsed a Boycott of the Post, and Dozens More Have Pledged to Join In*, *NEWSDAY*, Apr. 10, 1990, § II, at 8. The *Washington Post*, *Baltimore Evening Sun*, and *Philadelphia Daily News* have also been boycotted for similar reasons. *Id.* The media's negative portrayal of African Americans goes hand in hand with the dearth of African Americans as reporters and editors. The *Post*, for example, had only one African American reporter on its staff during the period of the boycott. *Id.* The complaint of African Americans has been that to a large extent this stereotypical image that is constructed by the mainstream media is made possible because of the fact that they have been excluded from this process of identity construction.

144. The National Black Media Coalition, the National Association of Black Journalists, the National Association of Black Owned Broadcasters, and the Black Women in Publishing are a few of the organizations that address issues of concern to African Americans in the communication industry. The Committee to Eliminate Media Offensive to African People (CEMOTAP), established in 1987, directly monitors media reporting about African Americans.

alternative narratives.<sup>145</sup> While these responses are useful and have transformative potential, they cannot be sufficient in themselves to alter the institutionally entrenched image. Institutional transformation requires institutional intervention. The next part of this Article will deal with the FCC's attempt to respond as an institution to transform the media's negative portrayal of minorities.

Public institutional intervention in the communications industry has been limited to the electronic media. Because of what is regarded as the dictates of the First Amendment, public intervention in the workings of the print media is largely considered impermissible, so the institutional response with which I shall concern myself in the next part will be limited to the public intervention in the electronic media.<sup>146</sup>

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145. A number of black filmmakers, such as Spike Lee, John Singleton, Mario Van Peebles, Matty Rich, Charles Lane, and Bill Duke, have in recent years begun to produce films which tell stories about African Americans that have not been told by the dominant narrative coming out of Hollywood. See Karen G. Bates, *They've Gotta Have Us: Hollywood Directors*, N.Y. TIMES, July 14, 1991, § 6 (magazine), at 15. "I just think about telling a good story about my people, because in the last 75 years of American cinema, we have been dogged out." *Id.* at 44 (quoting John Singleton).

146. Although the next section of this Article discusses only the electronic media and the regulatory schemes that define it, I must point out here, as I did earlier, that the inclusion of minorities in the print media is as urgent as their inclusion in the electronic media, if not more so. Even though I shall not develop the point here, the argument could be made that the conditions that make public intervention necessary in the electronic media also define the print media, and that it is not inconsistent with the First Amendment for governmental intervention to make a content-neutral effort to diversify the print media.

If it is true that in the context of the electronic media the rights of viewers and listeners are more important than the rights of broadcasters, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"), then it may be argued analogously that a similar hierarchy of rights exists between print readers and publishers. This is particularly true given that the key difference once considered to distinguish the electronic media from the print media—the scarcity of physical resources—no longer exists in the current era of abundant cable television capacity and other broadcast technologies.

Some, including members of the FCC itself, have alternatively argued that since physical scarcity no longer defines the electronic media, the broadcast model of media regulation ought to be abandoned and the print model of First Amendment protection should be applied to the electronic media. See, e.g., LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987). As I shall argue in the next section, however, if the market systematically excludes certain information and certain groups from the discursive domain in both the print and electronic media, and if the current argument for public intervention in the electronic media is premised largely on the need to include voices and information that the market does or is likely to exclude, then the argument for the adoption of the print model simply misses the point.

For a novel and interesting, but ultimately unpersuasive, argument in favor of the maintenance of a dual regulatory system for the media, see LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 90-132 (1991); Lee C. Bollinger, *Freedom of the Press and Public Access:*

#### IV. THE FCC AND MINORITY PARTICIPATION IN THE ELECTRONIC MEDIA: INSTITUTIONAL ADMISSION OF MINORITY NARRATIVES

##### A. *Existing FCC Rules Regarding Minorities*

The Federal Communications Commission (FCC)<sup>147</sup> is the primary governmental agency presiding over the distribution and utilization of the electromagnetic spectrum. Operating on the assumption that the electromagnetic spectrum is a limited resource, and that its operation could thus not be left to the operation of the market, Congress empowered the FCC to allocate the spectrum, to institute general standards of operations, and to grant licenses to prospective users of the spectrum.<sup>148</sup>

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*Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976). Bollinger's favor of a partial regulatory scheme is informed by what he regards as the paradox of access regulation. On the one hand, access legislation could ensure the admission of voices and views that are excluded by the market. On the other hand, access regulation could have a chilling effect on the media. Bollinger sees partial regulation as the answer to the paradox. He argues:

In the light of the double-edged character of access regulations, and the special circumstances of the mass media, it may make sense to affirm congressional authority to implement a regulatory scheme, but only partially within the media. With this approach, with a major branch of the press remaining free of regulation, the costs and risks of regulation may be held at an acceptable level. Expressed another way, only under such a system can we afford to allow the degree of governmental regulation that is necessary to realize the objectives of public access.

*Id.* at 113-14.

As interesting as Bollinger's argument for justifying the status quo may be, I remain unconvinced. First, Bollinger obviously realizes, but does not fully consider, the fact that the communications technologies that make obsolete the rationale for the dual system are also leading to the convergence of the various media to an extent that in the near future it might not be easy to distinguish one media from another. Second, as he acknowledges, the increasing cross ownership of electronic and print media outlets makes more likely the prospect that any chilling effect caused by regulation of the electronic media will be felt in the cross-owned print media as well. Finally, Bollinger's partial regulation will not be reassuring to minorities whose complaints are that the media paints a negative image of them daily and that the market systematically excludes them from the process of communication. Nor will it be reassuring to them to be told that it will only be one segment of the media that will now be able to define them as the problem Other without any fear of regulation.

147. 47 U.S.C. § 154 (1988). The FCC was established in 1927 as the five-member Federal Radio Commission, and was given its present name in 1934. *Id.*

148. Communications Act of 1934, 47 U.S.C. §§ 151-613 (1988). The Supreme Court first recognized the scarcity theory in *NBC v. United States*, 319 U.S. 190, 213 (1943) ("[The] facilities [of radio] are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody.").

The debate is one of whether or not scarcity exists. See POWE, *supra* note 146, at 200-09; Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy—A Review Essay of Lucas Powe's American Broadcasting and the First Amendment*, 56 GEO. WASH. L. REV. 187, 198-200 (1987) (book review). Challenges to the



The power of the Commission to regulate has been held to be technical as well as non-technical, guided by requirements of the "public interest, convenience, or necessity."<sup>149</sup> As the Supreme Court noted in *NBC v. United States*,<sup>150</sup> the Act does not reduce the Commission to that of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other. . . . It puts upon [it] the burden of determining the composition of that traffic."<sup>151</sup> The FCC is required to be guided by the "public interest" in determining the composition as well as the behavior of the users of the spectrum.<sup>152</sup>

Guided by what it sees to be the "public interest," the FCC over the years has developed a number of regulatory schemes to diversify the voices and perspectives that utilize the electronic media. In the 1940s, for example, it developed the "fairness doctrine," whose constitutionality was upheld in *Red Lion Broadcasting Co. v. F.C.C.*<sup>153</sup> In the 1970s the FCC developed a regulatory scheme which limited license holders to ownership of one broadcast station in any given market, without regard for the kinds of broadcast services involved.<sup>154</sup> In addition, since 1975 the FCC has maintained a policy

scarcity argument are informed by three concerns and doubts. First, there is skepticism about the claim of scarcity in the midst of an era of cable and technological abundance. Second, some doubt the utility of administrative supervision or regulation in general, and view the FCC's regulatory scheme as skeptically as they do other state regulatory regimes. Here the challenge is part of a general suspicion about state interventions and a preference for a market-dictated allocation and exchange process. See Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 171, 236 (1978). The preference for the market is partly informed by a belief that it will allocate the spectrum more efficiently, and partly by an ideological commitment to a private property-right system. See HARVEY J. LEVIN, *THE INVISIBLE RESOURCE: USE AND REGULATION OF THE RADIO SPECTRUM* 52-56 (1971); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12-17 (1959). The third concern is over the possible negative effect of regulation on free speech.

149. 47 U.S.C.A. §§ 307(a), 309(a) (West Supp. 1992).

150. 319 U.S. 190 (1943).

151. *Id.* at 215-16.

152. *Id.* at 216; see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969) ("[the] mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive'") (quoting *NBC v. United States*, 319 U.S. at 219)).

153. *Id.* at 375. The Fairness Doctrine imposed two obligations on broadcasters. The first obligation required that licensees provide coverage of issues of public importance in the community they serve. The second obligation required that once a licensee has covered an issue of public importance, it must provide a reasonable opportunity for the presentation of contrasting points of view on the issue. In 1989, the Fairness Doctrine became one more victim of the deregulation fervor unleashed by the Reagan Administration. In *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), the FCC eliminated the doctrine, and the D.C. Circuit affirmed the elimination. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

154. *In re* Amendments of Sections 73.35, 73.240 and 73.636 of the Commission

that bars cross-ownership of media outlets in a given market,<sup>155</sup> and it has also imposed a limit on the number of electronic media outlets a party may own nationally.<sup>156</sup> All of these policies were guided by the idea that maximum diversity in ownership was in the public interest, and that diversity of ownership will likely lead to the diversification of program viewpoints and ideas.<sup>157</sup>

As I noted earlier, the FCC's regulatory schemes are premised on the assumption that diversity of ownership is likely to lead to a diversity of views and programs, and that such diversity is in the public interest. The "public" envisioned as the beneficiary of these schemes, however, is an undifferentiated public, and the diversity desired is consequently class-, gender- and race-neutral. It is no longer controversial to claim that there is not an undifferentiated public, and in fact what is referred to as the "public" is a collection of social groups whose corporate identity is defined more by their con-

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Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, 311 (1970).

155. The cross-ownership policy prohibited a licensee from owning a television station and a print media outlet in one market. Although the Commission has lately had second thoughts about both the policy and the rationale that informed its emergence, Congress recently codified it into law hoping that the policy will advance the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

156. *In re* Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 17, 18, 42-43 (1984); 47 C.F.R. § 73.3555(d) (1992). Until 1991, a licensee could not simultaneously own, directly or indirectly, more than twelve AM radio stations, twelve FM radio stations, and twelve television stations, and a licensee's audience reach could not exceed 25% of the national audience. 100 F.C.C.2d 17.

In 1991, the Commission adopted higher radio ownership caps, allowing licensees to hold simultaneous interests in up to 30 AM stations and 30 FM stations. *In re* Revision of Radio Rules and Policies, 6 F.C.C.R. 3275 (1991); Joe Flint, *Radio's Magic Numbers: 30-30*, BROADCASTING, Mar. 16, 1992, at 4. There has been Congressional resistance to these higher caps, and there is a likelihood that the FCC will revert to its earlier policy of allowing ownership of no more than twelve AM radio stations, twelve FM radio stations, and twelve television stations, with an audience reach of no more than 25% of the national audience. For rules regarding ownership of cable and broadcast television networks, see generally *In re* Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 91 F.C.C.2d 76 (1982).

157. The Commission declared in 1970:

We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50 [because] . . . [i]f a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis.

This view was endorsed by the Supreme Court eight years later. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 784 (1978).

flicting and contradictory views and interests than it is by the identity of these interests. As I have argued throughout, in relation to African Americans, it is the fact that they are regarded as the negation of the normal and moral order, rather than as part of the corporate body, that defines their presence. A mere expansion of individual ownership interests among those groups who have been traditionally well represented and who see other groups, such as minorities, as having problems or as being The Problem, will not result in diversified views and programs.

Before the current fervor of deregulation, the FCC apparently recognized this fact. In 1978 the Minority Ownership Conference Task Force of the FCC, established partly as the result of pressure and persuasion by minority groups, issued a report suggesting that there is a need for coherent and consistent policies to enhance minority ownership of broadcast stations.<sup>158</sup> In that same year the FCC issued a policy statement by which it intended to enhance minority access to the electronic media.<sup>159</sup> In that policy statement the Commission adopted two initiatives: distress sales and tax certificates.<sup>160</sup> These ownership policies joined existing Commission employment policies to form the FCC's program to enhance minority participation in the communications industry. The two following subsections analyze the FCC's program in greater detail.

1. *Ownership Policies.* Under the FCC's distress sale policy, a party whose license application is designated for a hearing on basic qualification issues, such as misrepresentation, or whose license is designated for a revocation hearing, may sell its station at a premium over the value of the unlicensed equipment if the station's buyer has a significant minority ownership interest or if the interest is controlled by minorities.<sup>161</sup> Thus, a licensee whose license renewal

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158. FCC, REPORT ON MINORITY OWNERSHIP IN BROADCASTING (1978).

159. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978) [hereinafter 1978 Policy Statement]. FCC rules define the term "minority" to include "American Indians or Alaskan Natives, Asians and Pacific Islanders, Blacks and Hispanics." *In re* Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 n.1 (1982) [hereinafter 1982 Policy Statement].

160. 1978 Policy Statement, *supra* note 159, at 983 & n.21.

161. *Id.* at 983. Minority ownership of a station is considered "significant" if the interest exceeds 50%. See generally *In re* Grayson Enterprises, Inc., 77 F.C.C.2d 156, 164-65 (1980); see also 47 C.F.R. § 73.4140 (1992).

If a licensee decides to elect a distress sale over a hearing, the station will be put on a "distress sale elect" list maintained by the FCC and made available to the public. The Commission also maintains a list of minorities interested in purchasing stations. Minority Buyers Listing Public Notice, 69 F.C.C.2d 1553 (1978); see also 47 C.F.R. § 73.4140 (1992). In a distress sale the parties negotiate the terms of the sale, but as in every other sale the

might be in jeopardy is allowed to transfer or assign the station to a minority interest before the revocation hearing begins, gaining a better price than the licensee would have received had the license been revoked.<sup>162</sup> The price a licensee may charge in such transfers cannot exceed seventy-five percent of the fair market value of the viable business. The distress sale policy is premised on the assumption that a licensee who is designated for a hearing will likely elect to avoid the costly and time-consuming hearing process, which may lead to revocation of the license, and keep his losses to a minimum by selling to a minority enterprise. This transfer, the FCC believed, would stimulate the sale of broadcast properties to minorities, thereby diversifying the views and voices heard over the electronic media.

Under the tax certificate policy the FCC may grant tax certificates,<sup>163</sup> permitting the seller of a broadcast station to defer payment of capital gains taxes<sup>164</sup> if the station is sold to a minority owned or controlled firm.<sup>165</sup> Tax certificates may also be issued to shareholders

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FCC must still give its approval. 1982 Policy Statement, *supra* note 159, at 858-59.

162. Typically, once a license is designated for a hearing, a licensee is prohibited from selling the station until the issue is resolved in the licensee's favor. See Bartell Broadcasting of Florida, Inc., 45 R.R.2d 1329, 1331 (1979). Thus, the distress sale policy is an exception to the general rule.

To calculate fair market value, buyer and seller each submit appraisals of the station's fair market value. The values are averaged, and the average is deemed fair market value. If the difference between the appraisals exceeds 5% of the average of the appraisals, the two parties must then submit a third appraisal. The three values are averaged, and that average is deemed fair market value. *Grayson*, 77 F.C.C.2d at 163-64.

163. The FCC relies on § 1071(a) of the Internal Revenue Code to award such certificates. 26 U.S.C. § 1071(a) (1982). Enacted in 1974, § 1071 was originally intended to provide the FCC with the means to generally diversify ownership. See Richard C. Blake & Matthew M. McKenna, *Section 1071: Deferral of Tax on FCC Sanctioned Dispositions of Communications Properties*, 36 TAX L. REV. 101, 105-06 (1980). In 1979 the FCC extended its use as a means of promoting minority ownership of broadcast stations. Congress approved this use of § 1071 by resolution in 1987. H.R.J. 395, 100th Cong., 1st Sess. (1987).

The grant of a tax certificate enhances the bargaining power of the minority purchaser by allowing the seller to defer the payment of taxes on the sale. Obtaining the tax certificate will allow the seller to defer paying tax so long as it reinvests the proceeds in other cable or broadcast stations. The tax is deferred until the replacement property is sold. Often, the seller's capital gains tax saving will exceed the difference between the purchase price offered by a non-minority and by the minority purchaser.

164. The tax deferral is permitted as long as the seller reinvests the money in another communications property within two years following the tax year in which the sale closes. 26 U.S.C. § 1071(a) (1982). Payment of the tax is then deferred until such time as the property in which the seller reinvested the proceeds of the original sale is sold.

165. A station is considered minority owned or controlled if the minority interest in the station exceeds 50%. See *supra* note 161. "Minority control" does not require control by a single minority interest; it is sufficient that the aggregate of the minority shareholders constitute a majority. Bruce Wilde, *FCC Tax Certificates for Minority Ownership of Broadcast Facilities: A Critical Reexamination of Policy*, 138 U. PA. L. REV.

in a minority controlled broadcasting entity when the shareholders sell their shares, provided that their interests were instrumental in financing the acquisition of the facility<sup>166</sup> and that the disposition of their shares will not reduce minority ownership below 51 percent.<sup>167</sup> Minority tax certificates therefore provide two kinds of tax benefits: benefits to the sellers of a property and benefits to investors in minority start-up ventures.

The FCC has also attempted to use its "multiple ownership rule" to encourage minority ownership. The "multiple ownership rule" restricts the number of radio and TV stations an entity or individual may own nationally.<sup>168</sup> Owners, however, are permitted to increase by two the number of stations they own if two or more of the stations in which they hold cognizable interests are minority controlled, and by one if there is a cognizable interest in at least one minority controlled station.<sup>169</sup> In addition, the audience reach allowed to such interests is increased by 5 percent, provided that at least five percent of the aggregate reach of its station is contributed by minority controlled stations.<sup>170</sup>

The FCC also utilizes its comparative hearing policy to increase

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979, 989 (1990). Tax certificates may also be granted to a seller even though the buyer has less than 50% minority ownership if the buyer is a limited partnership and the general partner is minority individual. *Minority Ownership of Broadcast Stations; Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 79 (1989) [hereinafter *Minority Ownership Hearings*]. An interest of greater than 20% by the minority general partner is sufficient for a tax certificate to be granted in the limited partnership situation. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 48 Fed. Reg. 5943, 5945 (1983) [hereinafter *Advancement of Minority Ownership*].

The FCC also grants tax certificates for the sale of cable TV facilities to minority buyers. It might also be important to note here that selling to minorities is not the only condition for which a seller is entitled to a tax certificate. Recently, the FCC decided to use the tax certificate policy to encourage AM radio station owners "to sell their stations in instances in which there is a sufficient reduction in interference on the AM band." *Communications and Minority Enterprise in the 1990s*, at 44 (Sept. 26-27, 1990) (Report of Conference sponsored by the FCC, National Telecommunications and Information Administration (NTIA), and Howard University Small Business Development Center, on file with author).

166. *Advancement of Minority Ownership*, *supra* note 165, at 5946.

167. Tax certificates will not be issued to any seller of an interest in a station, minority or not, if disposal of their shares will reduce minority ownership and control of the station below 51%. See Letter of the FCC to R. Clark Wadlow, Esq., 4 F.C.C.R. 5262 (1989). On the other hand, if the disposition of such an interest does not reduce minority ownership and control below 51%, the certificates may be granted regardless of whether the seller is a minority or not. *Id.*

168. *In re* Amendments of 73.35, 73.240 and 73.636, *supra* note 153.

169. *In re* Amendment of Section 73.3555, *supra* note 155, at 94-95. In 1992, the FCC abolished the minority exception in relation to AM and FM stations. *In re* Revision of Radio Rules and Policies, 7 FCC Rec. 2755, 2761 (1992).

170. 7 FCC Rec. at 2761.

minority ownership and participation in the electronic media. When presented with two or more mutually exclusive applications<sup>171</sup> for a broadcast station license, the FCC conducts a comparative hearing to determine which applicant will best serve the public.<sup>172</sup> The FCC considers two principal objectives in the comparative process:<sup>173</sup> (1) maximum diffusion of the electronic media, and (2) best practicable service to the public. The Commission has considered the first objective of "primary significance," and the second of "substantial importance."<sup>174</sup> Under the first objective, applicants who do not own any interest in existing media concerns are given a preference over those who do own such interests. Under the second objective a number of factors are considered, the most important of which is the integration of ownership and management, which is the extent to which owners are involved in the day-to-day management of the station. To measure the level of integration of ownership and management for comparative purposes, the FCC employs a two-step process. First, it weighs "quantitative factors," determining the extent to which the owners themselves intend to work in management positions such as general manager, station manager, program director, or sales manager. If an applicant has a clear quantitative advantage, that applicant wins.<sup>175</sup> In the event that no applicant has a quantitative advantage, the Commission weighs a number of "qualitative" factors to measure to what extent the integration of ownership and management may be *enhanced* by these qualitative factors. One of those "enhancement" factors is "the degree to which minority . . . owners will be integrated in station management."<sup>176</sup>

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171. Mutually exclusive applications are two or more applications filed in a timely manner for the same frequency or frequencies whose simultaneous use would cause electronic interference with each other. A leading case on the subject of mutually exclusive applications is *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 328 (1945).

172. 47 U.S.C. §§ 307(a), 309(a), (e) (1988).

173. See 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) [hereinafter 1965 Policy Statement].

174. *Id.* at 394-95.

175. See, e.g., *In re Applications of WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 817-19 (Rev. Bd. 1982), *rev. denied*, 92 F.C.C.2d 1501 (1983), *aff'd in part and rev'd in part on other grounds sub nom.* *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985), *cited in* *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 350 (D.C. Cir. 1989), *aff'd and remanded sub nom.* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (where one license applicant has clear quantitative advantage, that applicant is awarded the license, assuming that the applicant is otherwise qualified and does not own other media interests).

176. The other enhancing factors are (1) local residence, (2) participation in civic activities, and (3) past broadcast experience of the integrated principals. See 1965 Policy Statement, *supra* note 173. For a general discussion of minority application enhancement factors, see *In re WPIX, Inc.* 68 F.C.C.2d 381, 411-12 (1978).

Although local residence and minority ownership are said to be the most important

Since 1974 the FCC has considered minority ownership of, and participation in, broadcasting as a factor to be considered in the comparative hearing context. In *T.V. 9, Inc. v. FCC*,<sup>177</sup> the Court of Appeals for the District of Columbia Circuit declared that in a comparative hearing the FCC erred in having failed to give credit to a license applicant which had two minority stockholders who were to be corporate directors. For the first time, minority ownership and participation were recognized as factors to be considered in a comparative hearing. The *T.V. 9* court reasoned as follows:

It is consistent with the primary object of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.<sup>178</sup>

The FCC subsequently adopted the court's initiative as its own policy.<sup>179</sup>

In a comparative hearing, therefore, minority ownership plays a role only as one of a number of enhancers, at the end of the process, and only in relation to the less important of the two main objectives the FCC considers in the process. In most circumstances, the decision to award the license will have been made before minority status is considered.

*2. Equal Employment Opportunity.* Minority ownership has not been the only means by which the FCC has attempted to enhance minority participation in the electronic media. The first FCC regula-

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qualitative factors, the FCC has ruled that in some circumstances past broadcast experience will be given the same weight as these factors. *See In re Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 101 F.C.C.2d 638, 645 (1985), *recon. granted in part*, 59 R.R.2d 1221, *aff'd sub nom.* National Black Media Coalition v. FCC, 822 F.2d 277 (2d Cir. 1987).

177. *T.V. 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

178. *Id.* at 937-38 (footnote omitted).

179. *See* 1978 Policy Statement, *supra* note 159, at 982. The FCC may also award licenses by lottery when there are a number of equally qualified applicants, but when it does so it is required by statute to give "significant preference" to applicants or groups of applicants who would increase diversification of ownership of the media. 47 U.S.C. § 309(i)(3)(A) (1988). The FCC is also required to grant additional significant preference to any applicant controlled by a minority group. *Id.* The Commission has complied with the statute by amending its selection rules to give such preferences. *See In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 F.C.C. 2d 952 (1983) (second report and order).

tions directed specifically at minority communicators were the FCC's equal employment opportunity regulations, issued in 1968, a decade before it adopted its policy statement on minorities in the broadcasting industry. Those regulations were adopted to promote nondiscriminatory employment practices among broadcast licensees.<sup>180</sup> Declaring that it was impossible for the FCC to "make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination,"<sup>181</sup> the FCC announced that it would take action when a "substantial issue of discrimination" was raised. Such action consists of a referral of the issue to the Equal Employment Opportunity Commission for investigation, or an investigation conducted by the FCC itself. If after investigation substantial discrimination is found to exist, the FCC formally designates the application for a full evidentiary hearing, which could result in sanctions.<sup>182</sup> Under the policy, however, statistical disparities are not considered sufficiently indicative of discrimination and thus cannot on their own lead to investigation.<sup>183</sup>

In 1969 and subsequent years, however, the FCC adopted rules and regulations that allowed it to inquire more extensively into the employment activities of licensees,<sup>184</sup> and in 1976 it began to require broadcast licensees to do more than simply refrain from discrimination against minorities. It required them to establish and maintain affirmative action programs.<sup>185</sup>

Currently, all licensees who employ five or more persons are

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180. *In re* Petition for Rulemaking to Require Broadcast Licenses to Show Nondiscrimination in their Employment Practices, 13 F.C.C.2d 766 (1968). It is not accidental that the FCC adopted the policies in 1968, the year of the Kerner Commission report. See *supra* notes 90-92 and accompanying text.

181. *Id.* at 766.

182. 47 U.S.C. § 309(e) (1988). The FCC often designates renewal applications for hearing upon the initiative of third parties who object to license renewal. Two organizations, the National Black Media Coalition, Inc. and the Office of Communication of the United Church of Christ, have been active as third-party intervenors on behalf of minority interests in license renewal proceedings. William Kennard et al., *Minority Business Development and Equal Employment Opportunity in the Telecommunications Industry*, in ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S, at 324, 328 (Reginald C. Govan & William L. Taylor eds., 1989).

183. *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C.2d 766, 771 (1968).

184. See *In re* Equal Employment Opportunity Inquiry, 36 F.C.C.2d 515 (1972); *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 23 F.C.C.2d 430 (1970); *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 18 F.C.C.2d 240, 243 (1969).

185. *In re* Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976). See FCC Equal Employment Opportunities Rules, 47 C.F.R. § 73.2080 (1991).



required to file an annual employment report and an equal employment opportunity report at the time of license renewal.<sup>186</sup> In the Annual Employment Report, licensees are required to show the ethnic and racial composition of their work force in nine job categories.<sup>187</sup> The Equal Employment Opportunity Program Report requires licensees to provide information regarding their EEO policies and practices, such as the dissemination of EEO policies, recruiting efforts, hiring, and promotions.<sup>188</sup> These two reports are considered by the FCC to be adequate means by which to monitor the behavior of a licensee, both in terms of its employment profile and its EEO efforts.<sup>189</sup>

When a licensee comes up for a renewal, the Commission initially evaluates the licensee's EEO efforts by examining its Annual Employment Report, EEO Program Report, and any complaints filed against it. In examining the composition of the station's work force the Commission compares the licensee's minority workforce with the area's available labor force,<sup>190</sup> although the Commission has held

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186. All stations are required to file an annual report, although stations with less than five employees do not have to provide a profile of their workforce and are not required to institute affirmative action programs. See *In re* Amendments to Part 73 of the Commission's Rules Concerning Equal Opportunity in the Broadcast, Radio and Television Services, 2 F.C.C.R. 3967, 3992 (1987).

187. FCC, 1989 BROADCAST AND EMPLOYMENT TREND REPORT, 1990 FCC LEXIS 3050 (June 4, 1990). The licensee is also required to maintain separate data for full-time and part-time employees. Part-time employees constitute a significant portion of the total work force at most broadcast stations. See, e.g., *In re* Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 F.C.C.R. 3967, 3970 (1987). If employment data on full-time and part-time employees were consolidated, licensees could boost their minority employment profile by employing more minorities in part-time positions. *Id.* at 3988-89.

188. Licensees are not required to complete the EEO Program Report if minority group representation in the available local work force is less than five percent. *Id.* at 3992.

189. First-time license applicants must complete an equal employment opportunity model program report, which requires them to set forth their proposed EEO policies and practices. See 47 C.F.R. § 73.2080 (1991).

190. *In re* Applications of Certain Broadcast Stations Serving Communities in the State of Florida, 3 F.C.C.R. 1930 (1988), *aff'd sub nom.* Tallahassee Branch of the NAACP v. FCC, 870 F.2d 704 (D.C. Cir. 1989). The Commission uses "processing guidelines" to determine whether there should be an initial inquiry. Under the processing guidelines a licensee with five to ten full-time employees may be subject to review if its total minority employment rate is less than 50% of the percentage of minorities in the available local labor market, and less than 25% among the station's top four job categories: officials, managers, professionals, technicians, and sales personnel. A licensee with eleven or more full-time employees must show a total minority employment rate of at least 50% of the percentage of minorities in the available local labor market for all categories of employment to avoid initial review. See, e.g., *In re* Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, 79 F.C.C.2d 922, 923 (1980); *Stone v. FCC*, 466 F.2d 316, 332 (D.C. Cir. 1972).

that the use of the local work force as a comparative guideline does not mean that a licensee who meets that guideline "has reached a 'safe harbor.'" Nor will a failure to meet the guideline be determinative of whether the station has done an unsatisfactory job in hiring minority employees.<sup>191</sup> The Commission's evaluation of the licensee will largely turn not so much on percentages and figures, but rather on the broadcaster's "efforts."<sup>192</sup> If the Commission's initial review "indicates that a station's efforts may have been less than satisfactory, it will be subjected to a second-step investigation of those areas of responsibility where its efforts appear deficient."<sup>193</sup> If the second step of investigation shows that "factual questions persist and are substantial and material,"<sup>194</sup> then the application is designated for a hearing. If it is found that the licensee has not complied with the EEO rules and policies, the Commission may impose sanctions ranging from the issuance of warnings, to the requirement of submissions of periodic progress reports, to renewal of the license for less than a full term.<sup>195</sup> Unless the Commission's action is "arbitrary, capricious or unreasonable,"<sup>196</sup> the courts will not reverse the Commission's determination.

The Commission's power to sanction licensees is not based on a general mandate to promote nondiscrimination in the broadcast industry, such as the Equal Employment Opportunity Commission (EEOC) is empowered to do in a Title VII suit.<sup>197</sup> The Supreme Court

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191. *Florida Broadcasters*, 3 F.C.C.R. at 1933.

192. *Id.*; see also *In re* Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984, 102 F.C.C.2d 562, 591-92, 594 (1985) ("[I]t is important to emphasize that if the record indicates that the [industry] is making reasonable and good-faith efforts to recruit and employ minorities and women and place them in responsible positions, certification will be granted even though there may be [disparity] between the number of minorities and women employed and their respective proportions in the relevant labor market.").

193. *In re* Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 F.C.C.R. 3967, 3974 (1987).

194. *Florida Broadcasters*, 3 F.C.C.R. at 1934 n.7. The requirement that there be a "substantial and material question of fact" before a hearing is warranted was judicially sanctioned in *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 629 (D.C. Cir. 1978).

195. 47 U.S.C. § 309(a) (1988). The Commission's authority to impose those sanctions is derived from the Communications Act, which provides that the Commission may grant a license only if it "finds that public interest, convenience, and necessity would be served by the granting thereof." *Id.*

196. *Bilingual Bicultural Coalition*, 595 F.2d at 631 (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974)).

197. *In re* Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226, 229 (1976) ("We do not contend that this agency has a sweeping mandate to further this 'national policy' against discrimination.").

has held that the meaning of the phrase "public interest" in the Communications Act, on which the FCC's regulatory scheme is based and by which it is empowered, is limited by the purpose of the Act. The Court has held that the objective of the Act in relation to minorities is to ensure that "its licensees programming fairly reflects the tastes and viewpoints of minority groups,"<sup>198</sup> not to promote non-discrimination in a general way. A licensee's intentional discriminatory practice is therefore relevant only to the extent that it affects the licensee's capacity to discharge its obligation to reflect the tastes and views of minorities. The anti-discrimination principle here is not a goal but a means.

It is not difficult to argue, however, that even in the limited sense in which the Supreme Court has understood the phrase "public interest," explicitly discriminatory employment practices are inconsistent with the provisions of the Communications Act. A licensee who engages in discriminatory employment practices against members of a group is unlikely to be sympathetic to the interests, tastes and viewpoints of that group and to cater to its programming needs. It may be persuasively argued that intentional discriminatory employment practices by a licensee indicates that the licensee is unfit to occupy a position of public trusteeship.<sup>199</sup>

The crucial issue, however, is what to make of statistical disparity? Is discrimination evidenced only by blatantly intentional discrimination? How should the FCC deal with the question of structural exclusion? What probative value should statistical disparities be given in evaluating the record of a licensee's employment practice? It is in this area that the FCC's policy has been tentative and consequently ineffective.

### B. *How Effective Have The FCC Policies Been?*

Although the FCC's minority opportunity policies have now been in place for a number of years, their impact on the diversification of the communication industry has been mixed and very modest. I suggest that three factors might be responsible for the less than satisfactory results. First, in the last twelve years the FCC has been less than enthusiastic in enforcing its own policies, especially its ownership policies. Commissioners appointed by the Reagan and Bush Administrations regarded those inclusive policies as impediments to the normal functioning of the market, impediments to the normal diversifying power of the market. Indeed, had the

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198. *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (Stewart, J., dictum).

199. See *Bilingual Bicultural Coalition*, 595 F.2d at 628 ("[T]he public interest is not served by licensees who engage in intentional discrimination."); see also *supra* note 181 and accompanying text.

Reagan/Bush Commission had its way, most, if not all, minority ownership policies would have been abandoned.<sup>200</sup>

Second, the image of African Americans that informs and constitutes the discourse about African Americans in this polity generally, and within the media specifically, may have affected the perception of members of the Commission as to what constitutes unjust exclusion and what constitutes legitimate and worthwhile diversity. Given that between 1980 and 1992 members of the Commission were appointed by presidents who, to varying degrees, contributed to the discourse that casts African Americans as the negation of the normal and moral order, it would not be surprising to learn that members of the Commission believed that what has been excluded by the market is legitimately excluded. Third, there are structural and institutional limitations to the Commission's policies. My point is not so much to fault the Commission for those policies, but merely to indicate that, given their institutional limitations, it is not surprising that the reach and success of these policies have been modest.

Let us now look at the effectiveness of the Commission's policies in some detail, so as to indicate how both the attitude of the Commission as well as the structural limitations on the policies themselves have contributed to the modest nature of the resulting diversity.

1. *Ownership Policies.* Minority ownership of electronic media outlets in the United States is very low,<sup>201</sup> and in some cases it has declined in recent years. Take the distress sales policy, for example. Between the time the FCC adopted its "distress sale" policy in 1978 and the end of 1991, only 38 distress sales have been approved. Since the beginning of the Reagan/Bush era, the number of distress sales has dramatically declined. There have been only thirteen distress sales since 1980. In the last five years there has been only one such sale.<sup>202</sup> In the last three years, there has not been a single sale

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200. See *infra* note 213 and accompanying text. This article was researched and written prior to the November 1992 presidential elections, and therefore its analysis of the work of the Federal Communications Commission is limited to the FCC during the Reagan/Bush era. It is likely that as President Clinton makes appointments to the Commission, its ideology and policies will shift. This article cannot foresee the direction of these shifts and therefore does not attempt to predict how the policies discussed herein will change.

201. See text accompanying *supra* note 59-60.

202. FCC Consumer Assistance and Small Business Division, Office of Public Affairs, *Minority Ownership Lists* (updated March 2, 1992), reprinted in Commissioner Barrett Issues Statement on National and Local Radio Ownership Rules (MM Docket 91-140), 1992 FCC LEXIS 2081 app. 2 (April 15, 1992) [hereinafter *Minority Ownership Lists*]. Most of the distress sales took place in 1980, when twenty-two stations were approved.

under the distress sale policy. Since 1980, successive chairmen of the Commission have pursued deregulation and non-intervention as central concerns of their mandate. Consequently, few stations have been designated for hearing, and therefore, opportunities for distress sales have declined. Even on those rare occasions when licensees have been found to have violated FCC rules, the Commission has, contrary to its minority ownership policies, allowed those licensees to transfer their licenses to non-minorities for the full value of the property.<sup>203</sup> The FCC apparently believes that the market is best able to achieve the desired level of diversity and that the best way to undermine policies inconsistent with the workings of the market is to ignore them, if one is not politically able to revoke them.

Even if the FCC were fully committed to its distress sale policy, the deregulatory environment in which transactions among private parties go largely unscrutinized is likely to lead to some well-entrenched media owners realizing quick profit by quick and successive transfers and sales, rather than to racial diversity. This could happen in one of two ways. First, the seller may arrange the sale to a party which will ultimately reinforce and reinstate the seller's interests. Second, the buyer might buy the station without the intention of keeping it, intending rather to make a quick profit

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203. *See, e.g.*, Spanish Int'l Comm. Corp., 2 F.C.C.R. 3336 (1987). The Commission designated for evidentiary hearing the renewal applications of Spanish International Communications Corporation (SICC), after a preliminary investigation raised "serious questions" regarding whether the licensee was controlled by aliens or their representatives in violation of 47 U.S.C. § 310(b). The Administrative Law Judge concluded that "alien influence and direction . . . greatly exceeded that permitted by Section 310(b)." The normal practice in such a situation is to deny the licensee permission to transfer the license until completion of the renewal proceeding. *See Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981) ("radio station licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualifications issues [such as non-compliance with the requirements of § 310(b)] are forbidden to transfer control of these licenses"). Prior to the completion of the renewal proceeding, however, the Review Board approved a settlement agreement by which SICC was allowed to transfer its stations to a non-minority entity for their full values. The Commission affirmed the decision of the Review Board, claiming that such transfer would promptly remedy "any alien ownership problems with respect to the SICC . . . simplify the proceeding and result in substantial administrative savings," and also reduce the potential for deterioration of service to the public "during an extended period of uncertainty." 2 F.C.C.R. at 3340. But what is not clear from the above reasoning is why the FCC could not have required SICC to transfer its license only to a minority applicant, if the Commission thought the transfer of the license before the completion of the renewal proceeding was in the public interest.

In another notable case the FCC allowed a licensee deemed unfit to hold a license because of its filing of false financial reports and fraudulent advertising to transfer its licenses to a non-minority applicant for the full value of the property. *In re Applications of RKO General, Inc. (KHJ-TV)*, 3 F.C.C.R. 5057 (1988).

from successive transactions.<sup>204</sup>

In addition, the distress sale policy is inherently reactive rather than proactive. Its success depends wholly on the actions of third party licensees whose practices have run afoul of FCC requirements. It seems unsatisfactory that the important objective of giving minorities access to the communication industry is made to depend on the wrongdoings of third parties. To be sure, the distress sale policy is meant to act as a supplement to other policies, so in that regard it may be overly harsh to criticize it as being insufficiently active. But it is important to remind ourselves that there are structural and institutional limitations to such policies, so that we might inquire into alternative methods of diversity.

In sum, the distress sale policy does not seem to significantly foster diversity in the communication industry. The climate of deregulation that has thoroughly defined the working environment of the FCC in the last few years, as well as the wholly fortuitous nature of the policy, suggests that perhaps little ought to be expected from it.

Statistics for the tax certificate policy through December 1991 indicate that the FCC has issued 271 tax certificates.<sup>205</sup> Interestingly, while in the last five years there were virtually no distress sales, the number of tax certificates issued has increased by 59 percent.<sup>206</sup> At face value, the figures suggest that the tax certificate policy is working, at least relative to the distress sale policy, since nearly five times as many stations have passed to minority control through the tax certificate policy than through the distress sale policy. An FCC official in 1984 referred to the policy as "a door opener that has obviously increased minority ownership," and declared it to be "successful."<sup>207</sup>

The effectiveness of the tax certificate policy has been challenged by some critics. One of the criticisms has been similar to the one against the distress sale policy, that non-minority groups have abused the process by using minority individuals as a front for an entity which is effectively non-minority owned. This may be true, but the solution to the problem is not to abandon the policy, as some critics have concluded. What is needed instead to reduce this abuse is for the FCC to strengthen its supervisory role over these types of

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204. See, e.g., *FCC Revokes Licenses of Georgia AM-FM*, BROADCASTING, Nov. 7, 1988, at 53.

205. *Minority Ownership Lists*, *supra* note 199.

206. *Id.* From 1987 to 1992 the FCC issued 161 tax certificates, approximately 59% of all certificates issued since the program began. During that same period there was one distress sale, or approximately 2½% of all sales since that program began in 1978. *Id.*

207. Patrick J. Sheridan, *Minority Tax Certificates: Doing the Job*, BROADCASTING, Apr. 8, 1991, at 68, 69.

transactions. For example, the FCC ought to be suspicious of "buy out" agreements which entitle a non-minority partner to buy out a minority general partner shortly after the acquisition of the entity.<sup>208</sup> Unless the Commission is vigilant in regulating transfers of licenses when the transferor seeks to take advantage of tax deferral, it is likely that the transferor will use the system to enrich himself, and the transfer will not lead to genuine racial diversity. The role the Commission has played in the last twelve years, however, does not encourage one to believe that the Commission is truly committed to diversity beyond that which the market has ushered in.

Regarding the minority exception to the multiple ownership rule, there is no evidence to demonstrate that raising the limits on station ownership by one or two has encouraged white owners to invest in minority-owned enterprises. It is unlikely that white entrepreneurs will be enticed to invest in a minority controlled enterprise just so they can increase their national ownership by one or two stations. When one already owns 12 stations, for example, the potential to own one more station may not be a sufficient incentive to invest in a venture where one would not have invested in the first place. In any case, the Commission has indicated that it will abolish the minority exception to the multiple ownership rule beginning on August 1, 1992.<sup>209</sup>

Finally, consider the comparative hearing process. Admittedly, there *are* times when the comparative process will tip the balance in favor of a minority applicant, as in *Winter Park Communications, Inc. v. FCC*.<sup>210</sup> Such occasions, however, are rare. At both the quantitative and qualitative levels, numerous factors are considered<sup>211</sup>

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208. An example of such a questionable transaction occurred in 1987 when Gillett Broadcasting purchased WTVT-TV in Tampa, Florida. *Id.* at 69. Although the principals of Gillett Broadcasting were non-minorities, they formed a limited partnership with a minority limited investor who was made the general partner and majority voting shareholder. *Id.* By this arrangement the partnership was able to obtain a tax certificate and complete the transaction at a price significantly lower than market value. *Id.* The arrangement was criticized because the partnership arrangement included a clause that allowed Gillett Broadcasting to buy out its minority partner after two years, raising questions of whether the partnership arrangement was in fact a sham designed to induce the issuance of a tax certificate. *Id.* The Commission approved the sale despite the presence of the buy out clause. *Id.*

This possible abuse could have been minimized if the FCC had refused to permit the transfer unless the buyout clause was omitted.

209. Although the minority exception to the multiple ownership rule has been largely ineffective, the FCC's new policy will likely undermine its general policy of encouraging diversity by creating conditions by which smaller broadcasting companies will be driven out of the market by their larger and more financially powerful competitors. Under this new policy, minority owned stations are likely to be particularly vulnerable.

210. 873 F.2d 347 (D.C. Cir. 1989).

211. Factors considered at comparative hearings include diversification, integration

which will likely determine the issue before the factor of minority status is ever considered.<sup>212</sup> Many cases are decided at the quantitative level, which means that race and ethnicity play no role at all, and even when cases do reach the second round, where qualitative factors are considered, minority broadcasters will infrequently be granted the license. Given that membership in a minority group is only one of several factors to be considered, it is only in those circumstances where the applicants are comparable on all other qualitative factors that a minority applicant will win on account of minority status. Such circumstances are rare.

There is a further reason why comparative hearings may not be an effective means of diversifying the electronic media. Given the suspicion, and in fact the hostility, of the majority of commissioners toward affirmative action, comparisons which tip the balance in favor of minority applicants are rarer than they have been in the past. The FCC's disfavor of the comparative hearing process, where membership in a minority group is one of many factors to be considered, has been an open secret.<sup>213</sup> A reluctant adherent to the faith is unlikely to have a true communion.

Furthermore, the time and expense of the comparative process for awarding a new broadcasting license is bound to make it unattractive, and even unavailable, to many minorities. One of the most significant obstacles to minority entry into the communication market is the lack of support from financial institutions, which tend to be skeptical about minority entrepreneurship.<sup>214</sup> Therefore a process

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of ownership and management, local residence, civic participation, broadcast experience, and environmental impact. See Brief for Federal Communications Commission at 38, *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) (No. 89-453).

212. "Although the FCC has not scientifically surveyed all of its many comparative broadcast licensing proceedings, even of the cases cited by *Metro*, sixty percent were decided on grounds other than the minority enhancement credit." *Id.* at 39 (footnotes omitted).

213. In 1986 the Commission initiated a proceeding to re-examine the constitutionality and desirability of comparative hearings that consider race and gender as factors in the comparative process. The proceedings were not an innocent fact-finding mission, but were, as the Congress clearly saw them to be, elaborate rituals by the FCC intended to give legitimacy to what it had already decided. By the time the FCC commenced the proceeding it had already decided that the policy was both unconstitutional and unwise. It took Congressional intervention to force the FCC to discontinue the proceeding. See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). A rider was placed on an appropriations bill which prohibited the FCC from using appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" Commission policies intended to expand female and minority ownership in the electronic media. This prohibition has been renewed in subsequent fiscal years. See, e.g., Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (same language).

214. Mark Fowler, former Chairman of the FCC, was aware of the problems that minorities face in the area of venture capital. He observed, "The greater gains which



such as comparative hearings may be seen as financially prohibitive given that minorities have lesser access to financial resources than members of other groups.

What can be said of the effectiveness of the FCC's minority ownership policies? First, there are indications that the Commission has failed to vigorously enforce its minority ownership policies and has even been slightly hostile to these policies. This is especially true in relation to distress sales. Second, some of the Commission's minority ownership policies are structurally limited in their capacity to achieve significant diversification of ownership and viewpoint. The policies are inherently reactive rather than proactive, and do not address the crucial question of finances. In a financial market chronically skeptical of the entrepreneurial ability of minorities, it remains difficult for minorities to raise the necessary capital. There is therefore a need for an institutional structure which will lessen the hardship minorities face when they attempt to raise capital.

2. *The Equal Employment Opportunity Policy.* The FCC's EEO policy has made a positive impact on the employment of minorities.<sup>215</sup> In the top four categories, however, the figures for all minorities, and especially African Americans, are still very low. An examination of the figures for the period between 1986 and 1990 show that the percentage of African Americans in the top four categories has remained virtually stagnant.<sup>216</sup>

The top four job categories are significant because employees in these categories make the important decisions that have an impact on the communication process. If the ultimate objective of the FCC's policies is the transformation of the negative image of African

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could be made in minority ownership of telecommunications facilities are restrained by the reluctance of our country's financial institutions to back minority entrepreneurs." Mark S. Fowler, *The Federal Communications Commission 1981-1987: What the Chairman Said*, 10 HASTINGS COMM. & ENT. L.J. 409, 488-89 (1988) (quoting Chairman Fowler's address to the National Association of Black Owned Broadcasters, Inc., Sept. 24, 1981).

215. 1990 Broadcast and Cable Employment Trend Report, 1991 FCC LEXIS 3310 (June 11, 1991).

216. The 1990 Broadcast and Cable Employment Trend Report shows that in the crucial top four categories, the percentage of African Americans in each job category stood as follows:

<u>Job Category</u>	<u>1990</u>	<u>1989</u>	<u>1988</u>	<u>1987</u>	<u>1986</u>
Officials and Managers	5.7	5.6	5.4	5.2	5.3
Professionals	8.6	8.6	8.3	8.2	8.2
Technicians	11.2	11.2	11.0	10.7	10.6
Sales Workers	5.8	5.7	5.5	5.0	5.3

*Id.* at \*4-5.

Americans and the reconstitution of the image which the majority holds of itself which allows it to define African Americans as the negation of the normal and moral order, then strong minority presences in these categories will have a make an important difference. The concern about the dearth of minority employees in the communication industry is not simply a concern about employment discrimination, which may be remedied by the employment of more minorities at the lowest sectors of the industry, such as service workers and laborers. The objective is to check the proclivities of the majority to ensure self-certainty by defining African Americans as the problem Other through the communication process. Given the nature of the mission, only the employment of a substantial number of African Americans in the four critical categories will begin to address the issue.

The lack of improvement in the four categories may be attributable to the vagueness of the Commission's EEO rules, as well as to the lack of commitment by the Reagan/Bush Commission to the notion of affirmative action. In what sense are the rules vague? The Commission has stated that statistics are not as important as the "reasonable and good-faith efforts" of the licensee, and that it will derive its judgment from an examination of various indicia, including the composition of the available labor force in the station's area. The assessment of "feasibility" will be based on specific economic assumptions,<sup>217</sup> and a "narrative mapping" that is insensitive to and oblivious of "structural" or "unconscious" racism.<sup>218</sup> This flexible guideline could be used as justification for FCC non-intervention. Given its abundant faith in the workings of the market, the Commission is likely to err on the side of assuming "good faith effort" on the part of the licensee. The danger is that the flexibility inherent in the "good-faith effort" test will be used not to curtail the domain within which the excluder can freely move, but rather to give him an emergency exit even though all "objective" indicators

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217. Mark Fowler once proposed an alternative, market driven method. "Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace." Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-10 (1982). "[B]roadcasters best serve the public by responding to market forces rather than governmental directives." *Id.* at 256.

218. The Commission's actions suggest that it often operates on the assumption that discrimination will always be evidenced directly. Where no such direct evidence exists, the Commission finds the licensee's employment practices to be discrimination free. *Bilingual Bicultural Coalition*, 595 F.2d 621, 651 (D.C. Cir. 1978) (Robinson, J., dissenting in part). While the Commission is usually suspicious of statistics from the petitioners, it is often willing to accept statistical offerings of its licensees to protest the charge of the petitioner. *Id.*

seem to show that he is trapped.

There are two reasons for believing so. First, if recent decisions of the Commission are any indication, it is likely that the Commission will not impose harsh sanctions on those who have not complied with its EEO policy.<sup>219</sup> Second, and perhaps more importantly, a determination of "good-faith effort" cannot be made independent of the assumptions under which the regulator functions. Whether the FCC regards the behavior of a licensee to be "good-faith effort" will likely depend not only on what behavior the Commission thinks is desirable, but also on what it believes is feasible. While it is admirable that the Commission recognizes that the minimum statistical requirement can be taken to be the maximum, where statistical guidelines could be used as "safe harbor," the use of a much more flexible guideline might be a better check on the behavior of broadcasters. It is not sufficient to say that one knows a "good-faith effort" when one sees it, for there is no one single way to see, and it matters greatly who is actually doing the seeing. Given that the long line of discourse in this country has constructed a profile of the undeserving African American, and of black collective fall, the Commission's intuition as to whether minorities, especially African Americans, have been illegitimately excluded is likely to be informed by that background discourse. Put simply, the vagueness of its rules will allow the Commission to continue to rationalize the exclusion of minorities as a routine outcome of legitimate professional decisions. In that case, the negative image which minority employment in the top four categories is meant to alter will have been used to give bureaucratic sanction to the process of exclusion in employment.

If the FCC truly desires to improve the employment opportunities of minorities in the top four categories, it must become more active in inquiring into the records of licensees, and licensees must be made to realize that violations of the FCC's EEO rules will lead to serious sanctions. The FCC in its current practice relies on complaints and petitions from third parties, rather than initiating inquiries itself;<sup>220</sup> whether a licensee is sanctioned for a violation of FCC policy is dependent on whether a private third party has had

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219. Reporting requirements are a favored sanction of the Commission. See Kennard et al., *supra* note 182, at 324, 329 ("The Commission more commonly responds to inadequate EEO efforts with lesser penalties, such as sending a letter of admonishment, imposing additional reporting requirements, requiring the licensees to submit hiring goals and timetables, or renewing the license for less than the full term. . . . Between 1972 and 1987, the Commission designated only 11 licensees (representing 23 broadcast stations) for hearings on grounds of EEO deficiencies; only 3 of those licenses were denied on EEO grounds."); see also Florida Broadcasters, 3 F.C.C.R. 1930, 1934 (1988) (imposing merely a heightened reporting requirement as a sanction for violation of EEO rules).

220. Kennard et al., *supra* note 182, at 328.

the time, the energy, and the resources to file petitions against that licensee.

Even in the event that a license has been designated for a hearing and a violation has been established, the sanctions imposed on the licensee are rarely ones that provide sufficient incentive for other licensees to comply with the Commission's EEO rules. For the sanctioning process to carry any credibility, licensees must believe that revocation of their licenses may possibly result from noncompliance with the policy. Current FCC practice sends a different message, that the ultimate sanction of license revocation is unlikely to be used against a licensee for violation of EEO rules.

Not only has the FCC been reluctant to vigorously enforce its policy in areas where the EEO requirement is clearly applicable, it has also exempted some important employers from the application of the policy. The most prominent of those exempted are the television networks.<sup>221</sup> As William Kennard, Jennifer Smith and Byron Marchant have noted, given that the networks employ a substantial number of people,<sup>222</sup> and given their "substantially worse EEO records than [those of] broadcast licensees,"<sup>223</sup> the refusal of the Commission to apply its EEO policies to the networks will continue to undermine the effectiveness of the policy.

Put simply, the Commission's unenthusiastic enforcement practices and its reluctance to extend its policies to significant segment of the communications industry have seriously undercut the effectiveness of its EEO policies. The Commission's reluctance to vigorously enforce its policies and extend those policies to communication entities with significant employment, such as the networks, is informed by the Commission's unsupported assumption that the market is able and likely to usher in necessary and meaningful diversity.

3. *FCC's Minority Policies: Concluding Remarks.* Although it cannot be denied that the FCC's minority policies have resulted in some diversification of the broadcasting industry, the result, at least in relation to African Americans, has been mostly insignificant. There are a number of reasons for this. The first, and perhaps most significant, reason is the lack of commitment the Commission has shown towards these policies in the last twelve years. Expressing faith in the capacity of the market to diversify the broadcasting industry, the Commission has tended to be less than vigorous in

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221. *Id.*

222. The three major television networks employed approximately 12,000 people at their New York headquarters in 1985. *Id.*

223. *Id.*

enforcing its own rules. Indeed, had it not been for its belief that Congress would be displeased if it abolished its minority policies, it is more than likely that the Commission would long ago have abandoned most, if not all, of its minority ownership policies. It was, after all, the direct intervention of the Congress that saved the minority enhancement aspect of comparative hearings.<sup>224</sup> In many ways the FCC seems to regard its minority policies as politically necessary evils.

Second, the FCC's minority ownership policies have some structural defects. They are reactive rather than proactive, in that the entry of minorities into the broadcast industry is dependent on how poorly non-minorities act serve the public interest. In the past, the unavailability of new broadcast frequencies has necessarily tied the effectiveness of the FCC's ownership policies to the behavior of current frequency holders. But as technological capabilities enable the expansion of the broadcast spectrum,<sup>225</sup> there will be opportunities to award new frequencies. Under these circumstances, an FCC which is committed to diversifying the electronic media will need to develop schemes to award some of those frequencies to minorities within the limitations of *Metro Broadcasting*. To attain true diversity, an affirmative policy that is not simply tied to the misbehavior of non-minorities is needed. Such a method of allocation is desirable not only because an important policy of diversity is not made contingent on the number of non-minority policy violators, but also because it will address to some extent the problem of finance that many minorities face when they seek to acquire broadcasting facilities by allowing them to avoid expensive transfer costs. If the FCC is to effectively diversify the broadcasting industry, it must focus more than it has in the past on effectively and fairly allocating new spectra to minorities.<sup>226</sup>

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224. *Id.*

225. With the advancement of new radio technologies the AM band has been effectively expanded to accommodate more channels, 56 Fed. Reg. 64842, 64842-74 (1991), and the FCC has lifted its ban on accepting applications for new AM stations. See 47 C.F.R. § 73.37 (1991); see also *Fierce Background Debates; FCC Sets New Band and Protection for AM Service*, 11 Comm. Daily (Warren Publishing) No. 188, at 2 (Sept. 27, 1991) [hereinafter *Fierce Debates*].

The Commission has refused to reserve any of the new frequencies for minorities, however, and there have been reports that the Commission will allow "only existing broadcasters . . . to set up shop in new expanded territory." *Fierce Debates, supra*. This would be a rather curious method of diversifying the radio industry.

226. This fair and effective allocation of the electronic broadcast spectra is what the minority exception to the multiple ownership rule and minority enhancement scheme in the comparative hearing process were expected to accomplish. These policies have not, however, been particularly effective in doing so. See *supra* notes 209-14 and accompanying text.

The Commission must also directly address the perennial problem of financing. Current FCC policies fail to address the financial problems that minorities face. Financial markets are chronically skeptical of the entrepreneurial abilities of minorities and are reluctant to provide them necessary start-up and acquisition capital. Many minorities lack the experience that most financial lenders demand of loan applicants, and many have not mastered the procedural requirements and techniques for successful application for capital. While the FCC does not have a great deal of power in terms of start-up financing, it could play a modest role by organizing and funding workshops on how to secure loans and capital. This would send a signal to the financial market, as well as to the minority community, that diversifying the broadcast industry is a priority goal of the Commission. Additionally, minorities encounter difficulties in attracting advertising dollars sufficient to continue their operations. There is evidence that in both cases minorities are faced with blatantly discriminatory practices.<sup>227</sup>

At least in relation to discriminatory advertising practices, it is arguable that the Commission already has jurisdiction to develop rules and regulations to obviate the destructive impact of such advertising on minority owned and formatted media. The general power granted to the Commission under § 303(r) to "make such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act [and as] public convenience, interest, or necessity requires" would allow the Commission to ban advertisers from discriminating against minority-owned facilities. Since diversity is determined to be an important goal of both the Act and of the FCC, any user of the electromagnetic spectrum whose conduct and manner of use directly undermine that important goal may be sanctioned.<sup>228</sup> This is not a general assertion

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227. See Kennard et al., *supra* note 182, at 336-38. The authors cite a 1986 letter to the FCC from the National Black Media Coalition (NBMC) in which the NBMC recounted instances in which advertisers and advertising agencies "deliberately excluded advertising on minority-owned media despite the fact that minorities were major consumers of their products or services." *Id.* at 337. The letter further alleged that many advertising agencies allocate separate advertising budgets for minority-owned or minority-formatted radio stations, and that such budgets are significantly less than what the size of the minority audience and the level of its disposable income would support. *Id.*

228. See *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775 (1978). In *NCCB* the Supreme Court upheld the FCC's cross-ownership policy, which prohibited the granting of a television or radio station license to an applicant who owns or operates a daily newspaper serving the same market. *Id.* at 779. In so holding, the Court rejected the argument of newspaper industry representatives that the FCC lacked authority under either the Communications Act or the First Amendment to regulate the print media's ability to own broadcast stations. After dispensing with the statutory challenge by declaring that "the Commission clearly did not take an irrational view of the

of jurisdiction by the FCC on advertising, in the same way that the FCC's assertion of jurisdiction to develop its cross-ownership policy was not a claim of jurisdiction to regulate newspapers. Rather, it is a claim of jurisdiction to develop rules and regulations that are "based on permissible public-interest goals and . . . [that] are not an unreasonable means for seeking to achieve these goals . . . ." <sup>229</sup>

If the FCC continues to be ideologically disinclined to maintain and expand policies designed to include minorities in the communication industry, then Congress ought to intervene and legislatively provide for such affirmative action policies by codifying current FCC policies and providing a structure which will enable minorities to be admitted into the ownership of new communication technologies. Given the fact that the media has contributed greatly to the constitution of a profoundly negative national image of African Americans, diversifying the media so as to enable African Americans to engage in a corrective narrative will destabilize both the negative image of themselves and the innocent self-image of European Americans. This is an urgent national issue with which Congress should concern itself.

Throughout this Article, one concept has been prominent: diversity. The FCC has explicitly grounded its minority policies in the notion of diversity, and diversity is the most secure justification for inclusive policies. But why is racial diversity important? The theme of this Article has been that such diversity is likely to contribute to the destabilization and correction of the dominant discourse which has seen African Americans as the problem Other. When African Americans are allowed to interrogate the dominant story and define themselves rather than be continually defined by the majority, that ability may transform not only the image of African Americans but also the image the majority has of itself and of its institutions.

The next section will explore in detail why diversity is the most secure justification for the FCC's policies. In some sense, this is what

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public interest when it decided to impose a . . . ban on new licensing of co-located newspaper-broadcast combinations," the Court held that the regulation was also consistent with the First Amendment, for "[i]n the instant case, far from seeking to limit the flow of information, the Commission has acted . . . 'to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech.' The [FCC] regulations are a reasonable means of promoting the public interest in diversified mass communications . . ." *Id.* at 801-02 (quoting National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 954 (D.C. Cir. 1977)).

229. *NCCB*, 436 U.S. at 796. In the event that the FCC declines to assume such regulatory responsibility, Congress should take up the issue and provide the structure for regulating discriminatory advertising. See Kennard et al., *supra* note 219, at 337. Congress could do so by amending the Communications Act to give the Commission explicit authority to so act or by creating the legal structure for "the FTC and FCC to share enforcement responsibility." *Id.*

the Supreme Court held in *Metro Broadcasting*. The Court, however, never managed to explore the objectives which should animate the diversity policy. In many ways, the Court's diversity rationale was an intuitive assertion of the need for inclusive policies in the communication industry. The next part, therefore, will explore the reasons that make necessary the particular notion of diversity embraced by the Court. Before I introduce the notion of diversity that I believe better justifies inclusive policies in this area, however, I shall examine and reject another possible justification for affirmative action—remedying past discrimination. I shall also explore and reject other theories of diversity. After all, one may believe in diversity and still be hostile to the sort of inclusive governmental policies that I advocate, as some of the actions of the Reagan/Bush era market-oriented Commission indicated.

#### V. DIVERSITY: THE FORM OF JUSTIFICATION

The political culture in this country seems to be hostile to affirmative action and inclusiveness.<sup>230</sup> On one level the hostility to affirmative action may be seen as part of a general challenge to the activist state.<sup>231</sup> There is some validity to this observation. Themes of "privatization" and "deregulation" have in recent years become more prominent in the political discourse than have distributive concepts, and many of the programs ushered in by the activist state have been dismantled or limited.<sup>232</sup> Indeed, this is what the FCC has done to the electronic media regulatory scheme. If one sees the challenge to affirmative action as part of the attack by mainly the political right on the legitimacy and desirability of state intervention, then the justification for affirmative action is strongly tied to the justification of the activist state in general.

But I see it differently.<sup>233</sup> The current attack on affirmative

230. A 1988 survey indicated that 76-79% of all Americans opposed affirmative action. See *Poll Reports Majority Believe Race Prejudice is Still Strong*, N.Y. TIMES, Aug. 9, 1988, at A13. The hostile response to the notion of multiculturalism is another example. See *supra* note 140.

231. See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 790-94 (1987).

232. *Id.* at 781-82 ("An attack on 'big government' [has become] the organizing theme of our politics. . . . [A] myriad of programs [have been] proposed and sometimes instituted to limit domestic governmental activities, particularly those of the federal government . . . . [President Reagan] has managed to put the activist state on the defensive . . . ."); see also Crenshaw, *supra* note 45, at 1336-41.

233. Even on a general level, the common perception among liberals that the attack by the right is an attack on the activist state and a challenge to state intervention is, I think, generally mistaken. It does not explain why since the early 1980s successive conservative Republican federal governments have pushed strongly for state intervention in selected areas of social and political life. Take, for example, the push to criminalize abortion and to require public school teachers to lead children in prayer; these are not



action is not just part of a general suspicion of state intervention; that suspicion is "overdetermined," to use an Althusserian phrase,<sup>234</sup> by the historical specificities of race relations in this country. To be specific, the long line of discourse that has portrayed blacks as the negation of the normal and moral order makes resistance to such policies especially intense. There is in fact no one concept which divides those who call themselves liberals more than does the notion of affirmative action.<sup>235</sup>

Having made this preliminary observation, let me now inquire into the possible justifications for affirmative action in the communication industry. The first and perhaps the most prominent justification is the notion of remedying past discrimination. I will show that this notion is inadequate; a better justification for the FCC policies is diversity. I will examine three theories of diversity and show why critical pluralism provides the strongest basis for increasing the numbers of African Americans in the communications industry.

#### A. *Remedying Past Discrimination*

Put in general terms, the argument here is this: minorities generally, and African Americans specifically, have in the past been institutionally excluded from the communications industry, and are as a result at a competitive disadvantage. Affirmative action programs are therefore meant to slightly improve the competitive disadvantage. The major premise underlying the argument in favor of affirmative action is that white males today enjoy a competitive advantage precisely because minorities, and white women, were unjustly excluded in the past.

There are actually two versions of the remedial affirmative action argument. The first version assumes that the industry has itself consciously or unconsciously excluded minorities in the past, and that the competitive advantage white males currently enjoy is linked directly to that institutional exclusion. The second version claims that it is not essential to prove that a particular institution

actions of a movement which is generally suspicious of state intervention. I think the only way to understand the political right's attack on the state is to see it as motivated by the desire for a different kind of activist state. Seen this way, the right's quarrel is not that the state is activist, but rather with the values that define the domain of its activism.

234. LOUIS ALTHUSSER, *FOR MARX* 101 (Ben Brewster trans., 1969). Some have gone further and have argued that race shapes *most* of the institutions and agendas in American society. Howard Winant, for example, argues that "[r]acial conflict is the archetype of discord in North America, the primordial conflict which in many ways has structured all others." Howard Winant, *Postmodern Racial Politics in the United States: Difference and Inequality*, 20 *SOCIALIST REV.* 121, 121 (1990).

235. One could argue that in the past the "Soviet threat" was equally divisive.

has engaged in discriminatory practice in the past before a remedial procedure may be instituted in that institution or industry. This version requires only that there has been past discrimination in some spheres of the system, whether those spheres are directly related or not. The focus here is not on the impermissible practices carried on in a particular sphere, but rather on a *system*. The assumption is that all spheres are interconnected. Once spheres of existence are conceptualized this way, the necessary reform is system-wide. To reform the system requires the treatment of the various spheres of the system as one continuous unit.

To summarize, the first version rejects the autonomy of the offspring from its parents; the second rejects a parallel claim of autonomy of spheres. The first version is perhaps less controversial than the second. Courts embrace aspects of it, and most commentators are not openly hostile to it. The Supreme Court has, for example, recognized that the objective of remedying past discrimination is constitutionally permissible in some circumstances.<sup>236</sup> Neither the courts nor the FCC, however, have relied on this justification to support minority preference policies in the communications industry.<sup>237</sup> In my view this is a welcome development, for three reasons. First, the focus on past discrimination leads us to falsely assume that discrimination is a thing of the past, and that affirmative action serves as a means of making up for the sins of the past. The notion of remedying past discrimination is not essential to any successful justification of affirmative action, and in fact, unnecessarily complicates the discourse on affirmative action. Discrimination is not a thing of the past, as the daily discourse about African Americans demonstrates. The narrative of black collective fall continues to structure the relationship of African Americans with members of the

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236. The Court has held that remedying past discrimination is a compelling government interest, and that affirmative action may be employed to achieve that goal as long as the specific program is narrowly tailored to achieve it. Thus, at the state and local level a governmental entity "has the authority to eradicate the effects of [public or private] discrimination within its own legislative jurisdiction." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989). In relation to the authority of the Federal Government, Chief Justice Burger observed, "It is fundamental that in no organ of government . . . does there repose a more comprehensive remedial power than in the Congress." *Fullilove v. Klutznick*, 448 U.S. 448, 483-84 (1980) (plurality opinion). Justice Powell thought the 10% set-aside "was justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Id.* at 496 (Powell, J., dissenting).

237. Justice Stevens made the following observation: "Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for past wrong. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions." *Metro Broadcasting*, 497 U.S. at 601 (1990) (Stevens, J., concurring) (citation omitted).

dominant racial group.

Second, at least in the communications industry, the notion of past discrimination as a justification for remedial action prevents us from seeing the complete picture of exclusion. When one talks about remedying past discrimination one is likely to focus only on the exclusion of minorities as communicators, but the exclusion of African Americans as communicators is only one of three concerns here. Indeed, our concern about the exclusion of African Americans as communicators is informed by the two other aspects of exclusion: (1) the omission of social issues that concern African Americans, and (2) the continual reproduction of stereotypical images of African Americans. The focus on remedies for past discrimination tends to limit the issue to a simple employment discrimination concern.

Third, and most importantly, the focus on past discrimination does not deal with the issue that has been central to this Article: the role of the media in the constitution of the African American Other and the importance of providing institutional structures to counter the tendency of the majority to ensure the solidity of its identity by defining what is different as evil, or The Problem. This is in my view the most plausible justification for affirmative action in the communication industry. It can be achieved only by a forward-looking policy of diversity, not by a backward-looking notion of remedying past discrimination.

### B. *Diversity (Pluralism)*

Diversity refers to the existence of multiple perspectives and viewpoints in the discursive domain, an institutional environment which enables the multiple voices of individuals and social groups to contest each other. Why is such a multiplicity of perspectives and voices important? A number of alternative justifications can be given. The objectives of diversity, and the institutions assumed by it, that I embrace and shall explore in detail later are concerned with the need to constitute more defensible individual and collective identities. But before I do this, I shall explore, and reject, two other prominent theories of diversity. The first, and perhaps the most common, theory of diversity is the Millian<sup>238</sup> version, which I shall alternatively call "market individualism." It is that version of diversity to which the Reagan/Bush Commission became increasingly attracted. The second, and more robust, theory of diversity is what I have referred to as the "communitarian" view of diversity. I shall later explore briefly its tenets and conclude that it too has serious shortcomings.

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238. JOHN STUART MILL, ON LIBERTY (David Spitz ed., 1975).

1. *The Millian Version.* The starting point for Mill's theory of diversity is a belief that there exists a world of "truth," and that people's capacity to discover it is immeasurably enhanced if they admit all perspectives and viewpoints. For John Stuart Mill, diversity was crucial to the attainment of truth in three ways. First, the excluded voice might in fact be the voice of truth.<sup>239</sup> Second, even if that voice does not embody the entire truth, it might be partially descriptive of the truth.<sup>240</sup> Third, even if the excluded voice is the voice of falsity, it will still be important to allow it a space, for it might allow us to reflect on and understand better the truth we hold.<sup>241</sup>

The Millian justification has been invoked in various ways at various times,<sup>242</sup> and it might not be erroneous to suggest that it informs a dominant aspect of the free speech tradition in this country. Two propositions inform the Millian version of diversity. First, diversity is defined negatively, as the absence of state intervention in the discursive landscape, with the ultimate objective of clarifying or discovering the truth out there in the world. "Truth" may not always imply transcendental knowledge, but it does refer to the notion of a story out there waiting to be told; the objective of diversity is therefore to enhance the possibility for getting the story straight. Second, the potential for getting the story straight is assumed to be immensely enhanced if the market acts as the paradigm of diversity.

As some have argued persuasively,<sup>243</sup> and as our examination of the communication industry in relation to African Americans has demonstrated, the market filters out that which the dominant discourse considers abnormal or illegitimate.<sup>244</sup> The market is the

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239. See generally *id.* at 18-34.

240. See generally *id.* at 34-44.

241. See generally *id.* at 44-50.

242. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964-65, 968-74 (1978).

243. See Baker, *supra* note 242; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1414-15 (1986); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 ("Although *laissez-faire* economic theory asserts that desirable economic conditions are best promoted by the free market, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas . . . . Consequently, . . . state intervention [may be] necessary to correct communicative market failures."); see also CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

244. See Baker, *supra* note 242, at 980 ("[T]he marketplace of ideas theory is merely an ideological construct—the unregulated marketplace of ideas promotes the dominant group's interests and reflects its experiences of reality. The workings of the marketplace

means by which the majority stamps truth on itself.<sup>245</sup> This is possible because the market enables the majority to simultaneously conceal the assumptions that inform its outlooks and paint the picture of the market as a neutral arbiter, supposedly separate from the interests and perspectives of the majority.

The challenge to the Millian version of diversity is directed not only at its assumption that the market is the best institution to foster diversity, but also at the very justification given on its behalf. The challenge questions the notion that the telos of diversity is "truth" or "getting the story straight," for there is no story waiting to be told. As Hans Kellner has written, "The straightness of any story is a rhetorical invention."<sup>246</sup> There are multiple ways of organizing discrete events to tell a story, and hence there are multiple versions of every story. The telling of a story, the process of describing a phenomenon or an event, is to a great extent a creative act. Media discourse, like legal discourse, is "a creative speech which brings into existence that which it utters."<sup>247</sup>

The political consequence of the notion of "truth" as an independent representation of physical and social phenomena is that alternative forms of explaining are denormalized, and forms of construction inconsistent with the prevailing "regime of truth"<sup>248</sup> are marginalized and delegitimized. Rather than being a description of the world "out there," the notion of truth, or the idea of a "straight" story, quite often becomes an instrument of conquest, an effective means of silencing different voices or "normalizing" them by re-narrating the story in a different voice.

As the current state of African American representation in the communication industry and the image of African Americans in the media attest, the Millian version of diversity has had undesirable

confirm the dominant group's self-serving belief that in the marketplace of ideas 'the best ideas for the society will find the most takers.'").

245. There are two ways through which the market ensures that the majority perspective assumes the status of the normal and the true. First, the different is excluded outright as being abnormal, false, or evil. Second, even when groups defined as the Other obtain access, that access is so brief and infrequent that the Other will not be able to develop patterns of conduct that will appear plausible and legitimate.

246. HANS KELLNER, LANGUAGE AND HISTORICAL REPRESENTATION: GETTING THE STORY CROOKED xi (1989); see also Adeno Addis, *In Defense of Crookedness*, *supra* note 31.

247. PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 42 (John B. Thompson, ed., Gino Raymond & Matthew Adamson trans., 1991).

248. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977, at 133 (Colin Gordon ed. & Colin Gordon et al. trans., 1980) ("'Truth' is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A 'régime' of truth . . . The political question, to sum up, is not error, illusion, alienated consciousness or ideology; it is truth itself.").

consequences for African Americans. The assumption that there exists an objective world whose description does not vary according to the describer has led to the unreflective endorsement of the racial majority's view as objective and normal. As a consequence, the ways of the racial minority are viewed as the negation of normalcy, and hence as the negation of reality itself. The market has been used as the institution through which exclusions and injustices are naturalized. The argument is typically framed by the question, "why do they not compete in the market," and the reply, "if they are unable to compete in the market, then perhaps they deserve to be excluded." The irony of this argument is that the majority, which has traditionally seen the minority as its opposite not just in political terms but also in terms of the identities of each group, has used the market to "outbid or outvote[]"<sup>249</sup> the minority in terms of the communication resources needed to present its cultural and political narratives to the discursive domain. In this society the reality of outbidding and outvoting seems to be recognized, at least in relation to the society's political market, and thus electoral and other laws have been enacted to deal with this issue.<sup>250</sup> If we are suspicious about the political market and its capacity to exclude, then there seems no reason not to harbor similar misgivings about the economic market.

Put simply, the Millian theory of diversity fails to respond to the tendency of the majority in this country to see African Americans as the negation of normalcy. Rather, under the Millian response the market will continue to stamp truth upon the identity of the majority and consequently "convert differences into otherness and otherness into scapegoats created and maintained to secure the appearance of true [and virtuous] identity [and just institutions]."<sup>251</sup> Although the Millian version of diversity has gained favor with the FCC, its history and logic demonstrate that the diversity that flows from it will be a diversity of multiple versions among one kind, not a diversity of kinds.<sup>252</sup>

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249. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 183 (1991). Kymlicka, for example, defends affirmative governmental support for the culture of Canadian Aboriginal people by arguing that "the effect of market and political decisions made by the majority may well be that aboriginal groups are outbid or outvoted on matters crucial to their survival as a cultural community." *Id.*

250. 42 U.S.C.A. §§ 1971, 1973 (West 1981 & 1992 Supp.).

251. CONNOLLY, *supra* note 8, at 67.

252. Fiss, *supra* note 231, at 787 ("A fully competitive market might produce a diversity of programs, formats, and reportage, but, to borrow an image of Renata Adler's, it will be the diversity of 'a pack going essentially in one direction.'").

Although the FCC seems to be attracted to the market model of diversity, the Supreme Court, in *Metro Broadcasting* accepted the assumption of at least partial market failure. "[O]ne of the FCC's elementary regulatory assumptions is that broadcast content is not purely market-driven . . ." *Metro Broadcasting*, 497 U.S. at 571.

Adherents of Millian diversity also hold an erroneous view of the relationship between the market and the state. Under the Millian view of diversity, the market, as the paradigm of diversity and freedom, is contrasted with the coercive and exclusionary power of the state, but the reality is different. Not only does the market as an institution exclude, but it relies on the coercive power of the state to accomplish that exclusion. By coercively maintaining the existing allocation of resources, and in the specific case of the electronic media by making the initial allocation within which the market operates, the state brings its coercive power to bear upon the market.<sup>253</sup>

2. *Diversity in the Communitarian Scheme.* As is argued in the last section, market individualism is unsympathetic to the notion of a publicly sanctioned attempt to include marginalized minorities in the discursive domain because of the belief that all needed diversity will be ensured through the neutral market.<sup>254</sup> A version of communitarianism, however, may be more sympathetic and supportive of affirmative inclusion in the electronic media. If the market oriented FCC seems to be itching to abandon its inclusive policies by embracing the Millian notion of diversity, communitarians might not only embrace the current FCC policies and the endorsement of those policies by the *Metro Broadcasting* Court, but they are likely to call for an expansion of those policies to ensure a more substantive process of inclusion. It could thus be argued that while market individualism will allow otherness to continue by naturalizing differences and by treating those groups perceived to be different as the negation of the normal, some version of communitarianism may appear to deal with difference in a more positive way, and inclusive policies seem to be implied by its attitude to difference.

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253. See Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 647-48 (1988) ("Every entitlement implies a correlative vulnerability of others. . . . The image of absolute freedom and absolute security underlying the myth of the free market is a false description of social reality and of the rules in force.").

254. I think that the belief in the power of the open market to promote and ensure diversity in the media is largely what informed the dissenters' conclusion in *Metro Broadcasting*. Although the dispute between the majority and the dissent was primarily drawn on the question of the level of scrutiny to be applied, I think Professor Patricia Williams was right when she observed that "the split probably would have remained even had they agreed on this doctrinal issue." Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 526 (1990). This is so because the dissent believed that there existed no credible factual evidence to prove that the market did not include all voices that deserved to be included. The majority believed that there was sufficient evidence that the market has in fact excluded marginal groups. Had the dissenters been convinced that the market unjustly excluded the views and perspectives of minorities, then I think it might have regarded the promotion of diversity as a compelling government interest. See *Metro Broadcasting*, 497 U.S. at 618-21 (O'Connor, J., dissenting).

There are of course various conceptions of community, and some versions are as exclusionary, if not more exclusionary, of marginal social groups as is market individualism. For example, one version of community might simply adopt the well known majoritarian vision that the state or other public bodies can and must legislatively enforce the preferences and values of the majority. Under this scheme, the views and perspectives of minorities will be excluded in so far as they are seen to be contrary to the views of the majority. What the market accomplishes in the Millian vision, the state or its subdivisions do in this conception of community. Although majoritarianism still plays a role in the domain of ethicality,<sup>255</sup> the First Amendment<sup>256</sup> prevents the state from intervening to silence the minority Other. In most circumstances, however, the market will usher in outcomes that the state desires but might be reluctant to pursue for various political reasons. It is not official exclusion that has made the views and perspectives of racial minorities invisible, but rather the market acting as the supposedly neutral arbiter of competing views and visions.

The versions of communitarianism that I claim are hospitable to inclusive policies are those which view the genuine community as something more than the mere aggregation of the interests of its individual members. In the legal academy the most prominent communitarian vision is the recently revived "civic republicanism."<sup>257</sup> There are other theories, however, which may also be seen to be communitarian in important ways,<sup>258</sup> and still others have drawn from political theories which are communitarian in nature, though not specifically tied to the American past as is the civic republican version.<sup>259</sup>

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255. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

256. U.S. CONST. amend. I.

257. Professors Frank Michelman and Cass Sunstein are the two most prominent "revivers" of civic republicanism. See Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Foreword*]; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

258. The work of Professor Owen Fiss may be seen as communitarian. Although Professor Fiss does not explain what comprises a "public value," as opposed to a mere private interest, he nevertheless makes the concept of public values the organizing theme of his work. See, e.g., Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

259. The most prominent current political philosophers in the communitarian tradition are Alasdair MacIntyre, Michael Sandel, and Charles Taylor. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989) [hereinafter TAYLOR, *SOURCES OF THE SELF*]; CHARLES TAYLOR, *PHILOSOPHICAL PAPERS* (1985); CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* (1979) [hereinafter TAYLOR, *HEGEL*]; Charles Taylor, *Connolly*,



Although communitarians disagree on many points, three themes seem to be central to all communitarians: first, the emphasis on tradition as the context which gives our choices meaning; second, the importance of dialogue in developing a sense of that tradition; and third, the notion of public values, or the common good, as both the outcome and the regulative ideal. Given their commitment to the common good and deliberative politics, it is not surprising that the communitarian's view of the market is much more skeptical than the Millian liberal's tends to be. Communitarians see the development of the common good, not merely the response to private preferences, to be the proper role of law and politics, and that those public values are to be explicated through a dialogic and deliberative process.

What would be the implication of the communitarian vision of politics and law to the affirmative inclusion of minorities in the communications process? Communitarians will not be averse to affirmatively including marginalized social groups by giving them the resources necessary to take part in the deliberative process. Policies such as those adopted by the FCC and endorsed by the Supreme Court in *Metro Broadcasting* will earn the communitarian endorsement, even though the effect of such inclusive policies may be the exclusion of some others from the dialogic process who might consider themselves deserving of active participation. Since the market has traditionally excluded racial minorities, especially African Americans, from the deliberative process and hence from the constitution of the public good, making the deliberative process genuine and constituting the most defensible notion of the public good will require that those who are traditionally excluded by the market be provided with the necessary resources to intervene in the dialogic process. There cannot be a genuine community or a defensible scheme of the common good if a particular tradition and group within the polity are systematically repressed and excluded. Since communitarians see the individual as situated in a particular tradition and culture,<sup>260</sup> and since those cultures and traditions are the context within which choices are made, to allow the market to systematically exclude a particular tradition or culture from the discursive domain is not only to deny the excluded group the opportunity

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*Foucault, and Truth*, 13 POL. THEORY 385 (1985) [hereinafter Taylor, Connolly, *Foucault, and Truth*].

For a detailed overview of communitarianism, see Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 640-48 (1992).

260. See, e.g., MacIntyre, *supra* note 259, at 221 ("[T]he story of my life is always embedded in the story of those communities from which I derive my identity."); SANDEL, *supra* note 259, at 179; TAYLOR, HEGEL, *supra* note 259, at 157.

to take part in the deliberative process, but to also rob members of the excluded group of part of who they are. To be unable to have one's culture and story validated by admission to the discursive domain is in some significant way to be unable to have one's self validated.

A scheme of diversity that affirmatively includes members of traditionally excluded groups in the communication industry will have support among communitarians. The defensible community is one that is able to gather the various traditions and cultures so as to enable them to interrogate each other, and through such deliberation to reconstitute themselves into a harmonious union. Given such an outlook, communitarians are sensitive to the exclusionary potential of the market, especially in relation to marginalized groups, and are not averse to providing such groups the necessary resources to enable them to be part of the deliberative process. Deliberative politics cannot exist when some are excluded, either by systematic design or by virtue of lack of resources necessary to take part in the process.

While I am sympathetic to the communitarian vision and to the idea that affirmative action policies in the communication industry can be justified under the communitarian vision of social life, I am unsure of the communitarian attitude to difference. Since the telos of the deliberative process is the constitution of a rational community, a harmonious union which is to be defined by the common good, the object of diversity in the deliberative process is in fact the dissolution of difference, although admittedly after a deliberative process. Notions such as "harmonious union" and the "common good" in the communitarian scheme seem to me analogous to the notion of "truth" in the Millian version of diversity. While market individualism naturalizes otherness, communitarianism tends to dissolve it. While in theory minorities may engage the majority so that both the majority and minority will reform themselves into a "rational community," often in practice the rationality of the community constituted by that process depends on how faithful the outlook and the form of the association are to the dominant tradition. As such, the purpose of diversity in the communitarian vision appears to be to normalize the minority Other through what William Connolly has called "gentle assimilation."<sup>261</sup>

My quarrel with communitarians is not that their theories are incapable of including those who have been traditionally excluded from the discursive domain. Inclusive policies logically seem to be required by the process of constituting the rational community and the common good. Nor am I dissatisfied with the notion of dialogue

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261. CONNOLLY, *supra* note 8, at 88.

or the deliberative process. In my view, the notion of deliberation is a useful concept, for it implies taking others and their views seriously and engaging in a process of reflection both on one's own and others' views. What I am uncomfortable with, however, is the objective to inform diversity in the communitarian scheme, the idea that there is a substantive common good. The rhetoric of the "common good" and the notion of the "rational community" have been used as a means to ensure a process of assimilation. At other times they have been invoked to justify restricting challenges to forms of association by "obligating people and institutions to reform and consolidate themselves in ways that [are] arbitrary, cruel, destructive and dangerous [when] the pursuit of consensus and commonality are not [in fact] supported by a harmonious [union]."<sup>262</sup> These notions are quite often only rhetorical assertions. William Connolly was right when he observed that notions like the common good "close[] out other possibilities that would disturb, unsettle, fragment, ambiguate, politicize the achieved sense of unity . . . ."<sup>263</sup> In the communitarian vision, therefore, the place of difference is not very secure. At best, the fate of the different is to be gently assimilated. At worst, the concept of community acts in the same imperial way as the concept of truth in the Millian version of diversity.

Liberalism, both in its market individualism and communitarian versions, is uncomfortable with difference. The diversity assumed in the former tends to turn difference into otherness by stamping the majority's way of seeing with normalcy and regarding the minority Other as the negation of normalcy itself. Communitarianism, on the other hand, regards diversity as a means by which differences are abolished by normalizing the minority Other through the process of assimilation. Neither alternative is attractive to people on the margin. What is needed is a notion of diversity that simultaneously accepts and respects difference as being normal, rather than one that instead attempts to exclude it as the abnormal Other, as market individualism tends to do, or dissolving it in the name of constituting the rational community, as the communitarian is likely to do. Otherwise, difference is likely to be converted into otherness, either when it is regarded as not corresponding to the asserted truth or when it is seen as a challenge to the rhetorically asserted harmonious union.

### 3. *Critical pluralism*<sup>264</sup> and Diversity

*The true is the whole.*<sup>265</sup>

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262. *Id.* at 90.

263. *Id.* at 89.

264. For an overview of "critical pluralism," see Addis, *supra* note 259, at 648-58.

*The whole is the untrue.*<sup>266</sup>

As I argued above, market individualism views plurality and diversity in terms of the multiplicity of individuals whose admissions are sanctioned by the market. The individuals so admitted are more or less seen as having needs, perspectives, and interests that would be understood without reference to the social groups to which they belong. Each individual acts as an abstract individual. Market individualism also assumes that the market treats individuals without reference to the social groups to which they are members. If one views individuals as unencumbered by the tradition, culture, and social location of the groups to which they belong, and if one further assumes that the market is blind to those specific affiliations and commitments when it distributes dialogue-chances, then there seems to be some logic to the skepticism of the value of any public attempt to diversify the communications process by seeking to admit members of certain groups. But both assumptions are erroneous. The market does not distribute dialogue-chances equally to individuals without regard to the social group to which they belong. As communitarians argue, the notion of the unencumbered individual is a radical misrepresentation of real life.<sup>267</sup> Individuals do not simply act and speak, but do so from certain perspectives. Such perspectives do not simply descend upon individuals, but are the result of the attachments and affiliations that are cultivated by the social groups to which they belong; cultural membership provides the context within which individuals make choices, and make those choices in a certain order.<sup>268</sup> Communitarians acknowledge this context, and consequently view diversity as "social plurality,"<sup>269</sup> and are willing to affirmatively include those members of social groups who have been traditionally excluded from deliberative processes such as the communication process. The communitarians' rhetoric of social plurality seems ultimately to be put in the service of the ultimate goal, the rational community, the harmonious union, towards which the dia-

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265. GEORG W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT*, para. 20 (A. V. Miller trans., 1981), cited in Anthony J. Cascardi, *Narration and Totality*, 21 *PHIL. FORUM* 277, 277 (1990).

266. THEODOR W. ADORNO, *NEGATIVE DIALECTICS* (E. B. Ashton trans., 1979), quoted in Cascardi, *supra* note 265, at 277.

267. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6, 7 (1990).

268. See KYMLICKA, *supra* note 248, at 164-65 ("[T]he range of options [about how to lead our lives] is determined by our cultural heritage. . . . We decide how to lead our lives by situating ourselves in these cultural narratives . . ."). Kymlicka further observed that "[F]reedom . . . to be pursued for its own sake [is] empty. . . . [T]here has to be some project that is worth pursuing, some task that is worth fulfilling . . . [A] valuable life, for most of us, will be a life filled with commitments and relationships." *Id.* at 48-49.

269. Michelman, *Law's Republic*, *supra* note 257, at 1533.

logue among groups is to lead. Social groups are taken seriously only to be ultimately banished.

Critical pluralism recognizes the existence of social groups and the power that they have on the lives of individuals, but unlike communitarianism it does not view social groups as temporary and normatively undesirable. Social groups give people a sense of who they are and provide the context in which they make choices and make sense of their choices. The nature of a social group, and the manner in which it has constituted itself, might change over time as the result of a critical dialogue with other groups; there is a degree of contingency to social groups. But social groups will always have an important role in the lives and identities of individuals. To say that they are contingent is not to make the claim that they are dispensable; that is clearly not correct. People cannot dispense with their collective and individual identities; it is memberships, attachments, and commitments that give people a sense of who they are. That being the case, the purpose of diversity cannot be to prepare for the banishment of social groups, for such "banishment" will lead only to the suppression of the perspectives of less dominant groups while the dominant social group will represent itself as the neutral embodiment of the harmonious union. Rather, according to critical pluralism, the purpose of diversity is to provide the conditions by which social groups continually engage and critically interrogate each other, to check the tendency of the dominant group to see its perspective as the complete story, and to turn what it perceives to be different into the problem Other. Through interrogation by other perspectives and narratives, the dominant group may discover the contingent nature of its own story and its very identity. In this regard, critical pluralism is in sympathy with postmodernism.<sup>270</sup> Both

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270. Jean-Francois Lyotard has characterized postmodernism as the rejection of grand narratives and totalizing thoughts and the accentuation of diversity, locality, specificity, and contingency. JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984). Lyotard believes that because of technological and informational transformations, we have entered an era where knowledge is constantly changing, where our concept of ourselves and others is unstable and shifting, and where a teleological view of history can no longer anchor the meaning of our existence and our relationship with the social and physical world. Indeed, for Lyotard, the master narrative of the Enlightenment, a narrative of mastery and liberation, has been nothing less than a discourse of terror and forced consensus. *Id.*

Other scholars, including Fredric Jameson, take a different view of the postmodern. Jameson, uneasy with what he perceives to be a tendency towards nihilism in the Lyotardian reading of postmodernism, regards postmodernism to be the "cultural logic" of the latest stage of capitalism, a conception that allows him to retain his grand narrative, Marxism. While Lyotard seeks to resist those claims that hold themselves out as complete stories of the human condition and regards such stories as coercive and terroristic, Jameson argues that postmodernism simply requires the acceptance of Marxism, a

in its communitarian and individualist versions, modernism yearns for singularity and unity,<sup>271</sup> what Jean-Francois Lyotards calls "totalizing thoughts," grand narratives that simultaneously anticipate the questions and provide ready answers.<sup>272</sup>

Critical pluralism also embraces postmodernism's emphasis on the constitutive power of symbols and narratives. The social world is created and re-created by our daily narratives. This is not to say that there is not a material world, or that we can imagine or unthink our institutions and the relationships they mediate, because there are material bases to our institutions which we cannot banish simply by thinking differently about them. But it is also true that it is through the stories we tell that we are able to give meaning to them and see how they are connected with one another, and ultimately, what these institutions mean to us.<sup>273</sup> No institution is self-defining or self-connecting. It needs the daily narratives as a bridge to give it meaning and to connect it with other institutions.

Unlike postmodernism, however, or at least some postmodernists, critical pluralism takes seriously the historically specific way that identity-constituting narratives and commitments have developed and the historically specific functions which they have performed. In order to check the proclivities of the majority in this

totalizing theory of history and society, in a social and technological environment of new social formations and social space. FREDRIC JAMESON, *POSTMODERN, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* x-xii (1991). For the variety of other senses in which the term "postmodernism" is applied, see Dick Hebdige, *Postmodernism and 'the Other Side,'* 10 J. COMM. INQUIRY 78 (1986).

Some scholars of postmodernism are critical of the very idea of postmodernism. See, e.g., PAULINE M. ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS* 18 (1992) ("Even how one writes the word—'postmodern' or 'post-modern'—signals a position, a bias. The absence of the hyphen has come to imply a certain sympathy with and a recognition of its legitimacy, whereas the hyphen indicates a critical posture.").

271. See Addis, *supra* note 259, at 675:

In their different ways, both individualism and communitarianism yearn for a totalizing account; they have the itch, as Michael Walzer put it, 'for singularity and unity, as if these two might provide a relief from moral anxiety, an end to striving, and therefore a kind of completion.' Individualism does its totalizing and its completion through its image of the universal individual, who has certain needs and rights. That individual inscribes every other individual. For the communitarian, the complete narrative is one that tells the story of a final harmonious union between the individual [or group] and the political community.

272. See Lyotard, *supra* note 270.

273. I think Edward Said was right when he observed "All knowledge that is about human society . . . is historical knowledge, and therefore rests upon judgment and interpretation. This is not to say that facts or data are nonexistent, but the facts get their importance from what is made of them in interpretation." EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* 154 (1981).

society to convert racial difference into otherness, there is a need to understand the geneology of these tendencies. Paradoxically, while they rightly see differences as contingent, and hence unstable and transformable, many postmodernists view those differences and their instability in logical and even epistemological, rather than historical terms. The notion of difference is seen to inhere in the very notion of identity, which seems logical enough,<sup>274</sup> but when that difference is examined with a level of historical agnosticity, for all practical purposes all identities, and their tendencies to convert difference into otherness, are seen to raise the same issue.

The claim that identities are socially constructed will be meaningless if one does not take seriously the geneology of differences. It will also be more difficult to develop appropriate strategies to counter the specific tendency to convert certain differences into otherness. To understand the constitution of the African American Other in this country and to develop these strategies, it is crucial that we recognize the importance of being historical and engage in critical genealogies. Diversifying the media and the school curriculum, hence allowing minorities to tell their stories, will be the first step to such critical genealogy. As Connolly put it, "critical genealogies are indispensable to cultivation of the experience of contingency in identity/difference."<sup>275</sup> They provide the condition, to use a Foucauldian expression, for the "insurrection of subjugated knowledges."<sup>276</sup>

Narratives from dominant groups tend to prepare the conditions for forgetting the past, both in terms of the crimes committed against the excluded and the affirmative history of the excluded. In this country, for example, the dominant narrative in both the popular media and scholarly literature emphasizes the distant nature of

274. See CONNOLLY, *supra* note 8, at 8 ("The definition of difference is a requirement built into the logic of identity, and the construction of otherness is a temptation that readily insinuates itself into that logic.").

275. *Id.* at 181.

276. FOUCAULT, *supra* note 247, at 81. Foucault posits that the notion of "subjugated knowledge" refers to two things:

[O]n the one hand, I am referring to the historical contents that have been buried and disguised in a functionalist coherence or formal systemisation. . . . [These] historical contents allow us to rediscover the ruptural effects of conflict and struggle that the order imposed by functionalist or systematising thought is designed to mask. Subjugated knowledges are thus those blocs of historical knowledge which were present but disguised within the body of functionalist and systematising theory and which criticism . . . has been able to reveal. . . . On the other hand, I believe that by subjugated knowledges one should understand something else, something which in a sense is altogether different, namely, a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated . . . .

*Id.* at 81-82.

the period when crimes were committed against African Americans, and the importance of leaving the past behind. Also, it does not take seriously the positive and affirmative history of African Americans.

This narrative of double negation plays an important role in the abstraction of the marginalized. Not only are exclusion and disenfranchisement regarded by the majority as things of the distant past, having very little relevance to the current conditions of the Other, but the Other is treated as if it did not have a past other than that which the dominant group has given it. The Other is thus doubly abstracted. Its history and heritage are excluded from the dominant narrative, and the polity's constitutive myths are denied the benefits of the marginalized's past. Also, the very histories that linked the dominant and subordinated groups and that prepared the conditions for the current relationships are regarded as being in the past, unconnected to current conditions. This double abstraction allows the dominant group to continue to see itself as innocent of creating the unfavorable condition of the marginalized and to attribute sole responsibility to the marginalized itself. The struggle of African Americans for admission of their stories into the discursive domain is in many ways a struggle to save themselves from forced abstraction, from being a people without history and a people without injury. It is an attempt to concretize the Other that the majority has abstracted. It is only when the Other is concretized and historicized through its own narratives that we may be able to understand and resist current exclusionary circumstances. This is precisely Justice Marshall's story in *City of Richmond v. J.A. Croson Co.*<sup>277</sup> Justice Scalia's narrative in the same case, on the other hand, represents the dominant story, the story of abstraction.<sup>278</sup>

To summarize, critical pluralism, like market individualism and communitarianism, values diversity. But unlike market individualism, it worries about the tendency of the market to allow the majority to convert difference into otherness by stamping the perspective of the majority with virtue and truth and by excluding the

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277. 488 U.S. 469 (1989). In *Croson*, Justice Marshall considered it impossible to understand the propriety of Richmond's remedial program without understanding the history of the city and its historical treatment of minority citizens. Only by ignoring the fact that the history of Richmond is partially constitutive of present day Richmond could one make the mistake of equating "governmental action that themselves are racist and governmental actions that seek to remedy the effects of prior racism," as did the majority in *Croson. Id.* at 551-52.

278. For Justice Scalia, Richmond's history was irrelevant. Nor was it relevant that there was structural racism. He believed instead that the Equal Protection Clause demands that current circumstances be abstracted from their historical contexts that summoned them. Thus ignoring the past, he was able to see a symmetry between governmental actions to remedy and governmental actions as racist exclusions. *Id.* at 520-28.



voices of those on the margin as the negation of normalcy and virtue. In opposition to communitarianism, critical pluralism is suspicious of the notion of rational community or of the public good, where the telos is the dissolution of difference in the name of harmonious union, for such harmony is often bought at the price of assimilation, in which marginalized voices are recognized only when they are recast to resemble the majority. Along with the communitarian and the postmodernist, the critical pluralist acknowledges the constitutive and transformative power of narratives. To use a phrase popularized by Alasdair MacIntyre, humans are "story telling animals;"<sup>279</sup> through their narratives they give meaning to their institutions and to their lives. But unlike the communitarian, the critical pluralist does not see narrative diversity as a means of ushering in the demise of difference and the attainment of a harmonious union, a rational community. Rather, the critical pluralist sees diversity as a political medium by which to contest the tendency of the dominant discourse to associate its own perspective with normalcy and to assign responsibility for evil to those whom it has excluded. It is a means by which the very notions of normalcy and responsibility are contested and continually redefined.

The critical pluralist is in agreement with the postmodernist that the purpose of diversity is to affirm and celebrate differences. The critical pluralist, however, is uncomfortable with the postmodernist's inattention to the need to provide institutional structures that will provide the conditions both for a critical ontology of the self and an ethic toward otherness. The postmodernist often seems uninterested in constructive enterprises such as affirmative action, but is instead content merely to engage in the impertinence of parody and laughter, describing all attempts to engage in constructive enterprise as a carnival,<sup>280</sup> as if parody and laughter will be sufficient to

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279. MACINTYRE, *supra* note 259, at 201.

280. Connolly's work sometimes shows such a tendency. He writes:

One may live one's own identity in a more ironic, humorous way, laughing occasionally at one's more ridiculous predispositions and laughing too at the predisposition to universalize an impulse simply because it is one's own. Laughing because one senses that the drive to moralize difference is invested with the wish to reassure oneself that one is what any normal being should be. Laughing at us, too, for the same reasons. Laughing in a way that disrupts this persistent link between ethical conviction and self-reassurance while affirming the indispensability of ethical judgment in life. Such laughter pays homage to fugitive elements in life that exceed the organization of identity, otherness, rationality, and autonomy. It has effects. 'Learn to laugh at oneself as one must learn to laugh.' Such laughter counters and subverts a Hobbesian sense of humor, where I show myself to be ahead and you to be behind—though the fact that Hobbes advances this definition reveals that his own sense of humor exceeds the definition he offers of it.

provide the condition for the affirmation of differences. For the critical pluralist, it is not parody and laughter but institutions such as the communications process and the education process, that will enable us to resist the tendencies of identities to solidify, as well as to stamp those identities with enabling and transformative contingencies. To diversify the communication process is to diversify our constitutive myths.

What guarantee is there that critical pluralism will lead to the affirmation of differences and multiplicities? There is no guarantee. But there are reasons why enabling those on the margin to institutionally interrogate the dominant story with their own stories might offer us hope for a genuinely plural world where differences are accepted. First, forcing the dominant narrative to open itself up for interrogation by the narratives of marginal groups may lead the dominant group to understand the contingent and specific nature of its own story and identity. The assumption of solidity and universality contributes to the process of converting difference into otherness. The Millian notion of truth and the communitarian vision of the public good logically lead to the assumption of the solidity and universality of identity and forms of association. Second, through this process of institutional engagement, the dominant group will perhaps come to accept the marginal as a dialogue partner rather than as a negation or a poor imitation of itself. When social groups accept the contingent nature of their constitutive myths and the relational nature of their character, it is likely that they will accept, respect, and engage the different rather than define it as the abnormal other. And third, institutional dialogue between the dominant and marginal groups is likely to lead to a mutual recasting and correction of the very identities of the groups engaged in that dialogue. If it is right that identities are relationally constructed, then the process of dialogue is the means by which the groups themselves are rearranged and reconstituted by emphasizing one group of factors rather than another. By the process of dialogue the very notion of a European American story and an African American story might be recast, and difference itself reformulated. The consequence of that reformulation may be that a particular factor or trait such as race or gender will cease to be naturalized and hence determinative in most circumstances. Critical pluralism is therefore not only about the affirmation of differences, but also about their transformation, not their dissolution.

Two of the most obvious areas where the narratives of the marginalized could be institutionally empowered to critically engage the dominant story are the media and the school curriculum. As is obvi-

ous, my major concern here is clearly with the media, but it is no accident that the two areas in which the courts have seriously taken up the notion of diversity are communication and education, for in those areas we explicitly engage in the production and reproduction of our identities.

### C. *Critical Pluralism, the Courts, and Diversity*

Diversity is a concept which has been legitimated by the courts in the areas of education and communication. In the education field, perhaps the most explicit statement in favor of diversity, and certainly the most famous, is that enunciated by Justice Powell in *Regents of the Univ. of California v. Bakke*.<sup>281</sup> In *Bakke*, Justice Powell recognized that diversity was a compelling governmental interest, at least in relation to the composition of the student body in institutions of higher learning.<sup>282</sup> He pointed out that learning takes place in different settings, and that the interaction among the various groups of students is one important level through which students learn.<sup>283</sup>

Justice Powell seemed to recognize that diversity will not ensure the mastery of a particular body of knowledge, such as organic chemistry. Rather, the education process is at least partly a process through which we define who we are, as well as the identities of others. A defensible scheme of association, therefore, requires that identities be constituted interactively rather than unilaterally. Why might that be important? Three reasons suggest themselves. First, Powell might have been suggesting that to be an agent assumes, at the minimum, that the agent has a role in the constitution of its own identity. To be constituted in one's absence is to lose the claim of agency; it is to become a subject of deliberation rather than a deliberating subject. Second, if the majority continues to constitute the identity of the minority it has traditionally seen as its negation, then it is likely that the minority Other will continue to be seen as the negation of normalcy, while the outlook of the majority will be stamped with normalcy. In the absence of narratives of the marginalized to challenge the dominant discourse, the tendency is for the majority to not reflect on the contingent and contradictory nature of its own identity and the unattractive consequences of that identity. Third, institutions that are constructed on the assumption

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281. 438 U.S. 265 (1978).

282. *Id.* at 312 (Powell, J.) ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.") (footnote omitted).

283. *Id.* at 313 n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY, Sept. 26, 1977, at 7, 9).

of a certain communal identity, from whose constitution certain groups have been excluded are unlikely to respond to the needs of those who have been excluded. This seems to be what Justice Powell had in mind when he wrote "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."<sup>284</sup> Justice Powell seemed to say that the defensibility of our scheme of association is critically dependent on the degree to which we have institutionally included the constitutive narratives of the marginalized, the degree to which we have diversified our constitutive myths.

Read this way, Justice Powell's view of diversity seems not to be limited to institutions of higher education, as some have insisted.<sup>285</sup> Rather it appears applicable to all domains where the polity engages in the institutional production of its identity, including the communications process. Every day the media narrates stories which give significance and meaning to our institutions, to our relationships with those institutions, and consequently to our relationships with each other. The necessity of a diversity of narratives in this signification process then becomes clear. If we exclude some narratives, intentionally or structurally, from this process of naming the world and ourselves, that naming will likely convert those excluded into the different Other.

The importance of racial diversity in the communications field has been accepted by the FCC in the electronic media, and the courts have endorsed it. The Court of Appeals for the District of Columbia Circuit in *West Michigan Broadcasting Co. v. FCC*,<sup>286</sup> for example, held that the FCC's goal of diversification was a sufficiently compelling governmental interest analogous to the diversification of higher education institutions.<sup>287</sup> Although the D.C. Circuit

284. *Id.* at 313. Such exposure to a wide variety of ideas is important because it is only in such an environment that students will be able, "directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id.* at 313 n.48.

285. *See, e.g.*, *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 919 (D.C. Cir. 1989) (Silberman, J., concurring) ("The policy decision of schools are . . . entitled to special deference, especially when the school seeks to achieve a goal that is of paramount importance in the fulfillment of its mission. . . . In light of that, I doubt that the FCC may employ a racial preference in order to promote diverse programming."), *rev'd sub nom.* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); Charles Fried, Comment, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 112-13 (1990) ("[I]t should be clear that Justice Powell's rationale was intended to have only the narrowest range of application and has no bearing at all on the situation at issue in *Metro Broadcasting*.").

286. 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

287. *West Michigan Broadcasting*, 735 F.2d at 614 ("[T]he FCC's goal of bringing

in *Shurberg Broadcasting* attempted to revise its earlier endorsement of diversity in this area,<sup>288</sup> the Supreme Court in *Metro Broadcasting* reaffirmed the principle and two FCC policies.<sup>289</sup> Not only did the Court reaffirm the importance of diversity in this sphere, but it also rejected the assumption that all necessary diversity will occur as a result of the workings of the market.<sup>290</sup>

*Metro Broadcasting* involved two consolidated cases, both of which had been decided by the D.C. Circuit Court of Appeals. One involved the constitutionality of minority enhancement in comparative hearing,<sup>291</sup> and the other dealt with the issue of distress sales.<sup>292</sup>

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minority perspectives to the nation's listening audiences would reflect a substantial government interest . . . that could legitimize the use of race as a factor in evaluating permit applicants."); see also *Citizens Comm. Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

288. *Shurberg*, 876 F.2d at 924 ("[T]he FCC's attempt to justify the distress sale policy through analogy to the diversity goal recognized . . . in *Bakke* is inadequate.").

289. The *Metro Broadcasting* Court affirmed the FCC's distress sale and minority enhancement policies. *Metro Broadcasting*, 497 U.S. at 564-65. The Court applied an intermediate level of scrutiny in finding that the FCC's affirmative action programs served important governmental objectives within the power of Congress to effect, and that the programs were substantially related to the achievement of those objectives. *Id.* The Court indicated that the programs might even have stood the strictest scrutiny. It observed that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies." *Id.* at 567-68 (emphasis added); see also *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 796 (1978) (observing that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints"); *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (observing that the FCC's attempt to encourage licensees to employ more minorities is justified as a way of ensuring that licensees' "programming fairly reflects the tastes and viewpoints of minority groups").

290. *Metro Broadcasting*, 497 U.S. at 571 ("The Commission has never relied on the market alone to ensure that the needs of the audience are met. Indeed, one of the FCC's elementary regulatory assumptions is that broadcast content is not purely market-driven . . .").

291. *Winter Park Comm., Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). *Metro Broadcasting, Inc., Rainbow Broadcasting Co., and Winter Park Communications* filed mutually exclusive applications with the FCC to construct a new UHF television station in Orlando, Florida. The FCC Review Board awarded Rainbow Broadcasting a substantial minority enhancement credit on the basis of its minority hiring record and granted Rainbow Broadcasting the license over *Metro Broadcasting* despite a finding that the qualitative comparison between the two was close. The Commission affirmed the Board's decision. *In re Applications of Metro Broadcasting, Inc. et al.*, 3 F.C.C.R. 866 (1988). *Metro Broadcasting and Winter Park Communications* appealed to the D.C. Circuit, which reaffirmed the Commission's determination. *Winter Park Comm.*, 873 F.2d at 353 ("The issue regarding the legality of the FCC's use of qualitative enhancement for minority ownership is easily resolved because this case is controlled by our decision in *West Michigan* . . . . In considering exactly the same policy at issue here, the court in *West Michigan* ruled that 'the FCC's plan easily passes constitutional muster.'"). The *Winter Park* court relied on two factors for its decision. First, the FCC's enhancement program is not a quota system where a number of station licenses are reserved for minorities; minority status is instead one factor among many considered. *Id.* at 354. Second, the FCC's program was instituted in the wake of a Congressional finding that minorities and

The D.C. Circuit upheld the former as constitutionally permissible<sup>293</sup> while striking down the latter as violative of the Equal Protection Clause of the Fifth Amendment.<sup>294</sup> In *Metro Broadcasting* the Supreme Court upheld by the narrowest of margins the constitutionality of both of the FCC policies in question,<sup>295</sup> invoking diversity as the justification in each case.<sup>296</sup> The majority made the same sorts of analogies between the diversity in *Bakke* and diversity in the communications industry which were made in *West Michigan*, hence confirming the importantly similar role the education and communication processes play.<sup>297</sup>

In both *Bakke* and *Metro Broadcasting* the beneficiary was not only the particular individual admitted to the particular activity or program, but the entire polity. Diversifying narratives is not an act of individual charity, but rather is a process through which a polity engages in self-discovery to build a more defensible scheme of association. This defensible scheme of association will emerge only when

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their perspectives are underrepresented in the media. *Id.* at 355. By explicitly invoking the two factors—that the program is not a quota or set-aside program, and that the policy has Congressional support—the court distinguished the case from *Croson*. *Metro Broadcasting* appealed the decision to the Supreme Court.

292. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). The FCC designated the television station license renewal application of Faith Center, Inc. for hearing because of allegations that the licensee had misallocated funds. *Id.* at 904-05. The licensee subsequently petitioned the FCC for permission to transfer the license to a minority entity under the Commission's distress sale policy. *Id.* at 905. The Commission granted the petition, but before the licensee was able to find a minority buyer, Shurberg Broadcasting applied for a permit to build a television station which would be mutually exclusive with the licensee's pending renewal application. *Id.* Faith Center eventually negotiated a sale of its interest to a minority entity and applied to the Commission for approval to complete the transaction. *Id.* Shurberg Broadcasting challenged the sale, arguing that the FCC's distress sale policy violated the Equal Protection Clause of the Fifth Amendment. *Id.* at 906. The Commission rejected Shurberg's contentions and approved the transfer. *Id.* at 903. Shurberg appealed to the Court of Appeals for the District of Columbia Circuit, which by a divided court reversed the Commission on a finding that the distress sale policy was violative of the Equal Protection Clause. *Shurberg*, 876 F.2d 902. Astroline Communications, the minority entity which had negotiated the purchase of Faith Center's interest, then appealed to the Supreme Court.

293. *Winter Park Comm.*, 873 F.2d at 353.

294. U.S. CONST., amend. V.

295. The *Metro Broadcasting* decision was decided by a 5-4 vote. *Metro Broadcasting*, 497 U.S. 547. Moreover, since the decision was handed down in 1990, Justice Brennan, author of the opinion, and Justices Marshall and White have left the Court.

296. The Court applied an intermediate level of scrutiny and determined that the FCC's interest in promoting diversity was an important governmental interest. *Metro Broadcasting*, 497 U.S. at 567-68 ("[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies.").

297. *Metro Broadcasting*, 497 U.S. at 596 ("The FCC's plan, like the Harvard admissions program discussed in *Bakke*, contains the seed of its own termination.").

we allow the stories and perspectives of those on the margin, the paradigmatic Other, to interrogate the story of the dominant group so that the dominant story is no longer seen as the universal story, and so that its assumption of universality is no longer justified by unilaterally defining those perceived to be different as the negation of the normal and moral order.

The need for inclusiveness in the communication process is as important, and arguably even more important, than it is in the education field. As the Supreme Court observed in 1968, the media is "demonstrably a principal source of information . . . for a great part of the Nation's population."<sup>298</sup> The communications industry daily engages in the explicit constitution of the identity of the polity and of the relationships of social groups in the polity. Specifically, the media has played an important role in the continual constitution of an image of African Americans as the negation of the normal and moral life. Only when institutions are in place which allow the narratives of the excluded to challenge the dominant narrative, so as to reveal the very contingency of the dominant discourse itself, will we begin to destabilize the current tendency of the dominant discourse to fabricate a virtuous and stable identity for itself with a parallel fabrication of a demonized African American Other. This is what critical pluralism attempts to do, and this is what ultimately justifies the inadequately inclusive and inadequately enforced affirmative action policies of the FCC.

Even if there existed an agreement on the desirability of including the perspectives and voices of marginalized social groups, there would still be issues of dispute over the nexus between minority ownership and employment on the one hand, and the emergence of a qualitatively different perspective on the other. This question of nexus is one of the arguments that market individualists advance. "[I]t is not at all apparent," wrote Judge Silberman, an opponent of the FCC's affirmative action policies and of diversity, "why a station owner, be she minority or non-minority, would make programming decisions according to her personal tastes rather than in response to the demands of the market place."<sup>299</sup>

How would one respond to those skeptical of the relationship between diversity of ownership and employment on the one hand,

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298. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); *see also Shurberg*, 876 F.2d at 943-44 (Wald, C.J., dissenting) ("For good or ill, a large portion of the American polity relies upon the broadcast media as a principal source of information about the world in which they live. Given the governmental role in selecting broadcast licenses, I believe that the state bears a responsibility to allocate franchises in such a way as to further the ability of viewers and listeners to obtain access to diverse programming.") (citations omitted).

299. *Id.* at 923.

and diversity of perspectives on the other? One could of course give the simple answer, that Congress<sup>300</sup> and the FCC<sup>301</sup> have found that such a nexus exists.<sup>302</sup> That would not convince the skeptic who sees the Congressional and FCC findings to simply be assertions that a diversity of perspectives will follow from a diversity of ownership.<sup>303</sup> What sort of evidence, or what kind of argument, will be required to persuade the skeptic? Perhaps the skeptic is looking for statistical evidence that shows a direct correlation between minority ownership and employment and the emergence of a distinct minority voice.<sup>304</sup>

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300. See H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982).

301. See 1978 Policy Statement, *supra* note 159, at 981 (“[O]wnership of broadcasting facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming.”).

302. The *Metro Broadcasting* Court found the Congressional and FCC findings of a nexus between minority participation in station ownership and management and increased minority representation on the airwaves to be sufficiently substantial as to satisfy an intermediate level of scrutiny. *Metro Broadcasting*, 497 U.S. at 582 (“[W]e believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.”).

Part of the reason for the Court’s willingness to go along with the findings of nexus was, of course, the general deference to Congress that the Court has shown in matters of factual findings. *Id.* at 3011. But it is also true that given the fact that there was a great deal of varied empirical evidence before it, Congress’s conclusions about the existence of nexus was utterly reasonable.

The majority also addressed other factors which courts in the past have considered relevant in the determination of nexus when the governmental classification is by race. The first question was whether the government had made an effort to achieve its diversity objectives by non-racial means. Reviewing earlier FCC efforts to attain diversity by other means, the Court determined that the Commission had tried and failed to use alternative means, and that only after exhausting such alternative means had it adopted its racial classification scheme.

For many years, the FCC attempted to encourage diversity of programming content without consideration of the race of the station owners . . . . [T]he Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcasting diversity. The FCC did not act precipitately in devising the programs we uphold today; to the contrary, the Commission undertook thorough evaluations of its policies *three* times . . . before adopting the minority ownership programs.

*Id.* at 584, 589.

The Court further considered the impact of the FCC policy on nonminorities. It concluded that applicants who lose out to minority applicants because of the FCC minority policies cannot be regarded as unduly burdened, for they have no legitimate expectation that had it not been for the minority policies, they would receive the license. *Metro Broadcasting*, 497 U.S. at 597 (“Applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership.”).

303. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 923 (D.C. Cir 1989).

304. Judge Silberman’s comment in *Sherburg* suggests as much. *Id.* at 922 (“I take that reasoning [that minority owners are likely to increase diversity of content] to be an



Evidence exists that demonstrates such a correlation,<sup>305</sup> but in my view this evidence is unnecessary to justify inclusive policies in the communications field. In many instances much of the qualitative difference between a minority communicator and a non-minority communicator might be not so much in the body of knowledge which individual communicators recount, but in the framework through which he or she communicates that information.<sup>306</sup> Both minority and majority communicators might talk about the same issues, but given their different life experiences they are likely to present the issues in different ways. It is unlikely, for example, that an African

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assertion of common sense rather than an empirically supported proposition; as such it is simply another way of expressing racial or ethnic stereotypes.”)

305. See *Metro Broadcasting*, 497 U.S. at 580 & n.31; see also CONGRESSIONAL RESEARCH SERVICE, MINORITY BROADCAST STATION OWNERSHIP AND BROADCAST PROGRAMMING: IS THERE A NEXUS?, at app. (1988) (65% of all the radio stations with at least one African American owner target their programming at African American audiences); Lawrence Soley & George Hough III, *Black Ownership of Commercial Radio Stations: An Economic Evaluation*, 22 J. BROADCASTING 455 (1978) (there exists a significant relationship between black ownership of radio stations and African American-targeted programming on those stations); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 339 (1991) (minority station owners more likely to program for their own minority groups than are nonminority owners, but are no more likely to program for other ethnic groups than are nonethnic owners); David Honig, *Relationships Among EEO, Program Service, and Minority Ownership in Broadcasting Regulation*, in PROCEEDINGS FROM THE TENTH ANNUAL TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE 86, 87-88 (Oscar H. Gandy et al. eds., 1982) (radio stations owned by African Americans and programmed for African American audiences tend to employ significantly more minorities, particularly in management, professional, technical, and sales positions than do white owned and programmed stations).

306. For a discussion of the importance of “framing” as a method of representation, see MICHAEL PARENTI, *INVENTING REALITY: THE POLITICS OF THE MASS MEDIA* 220-22 (1986). “Framing” is the manner in which information is presented; elements of presentation such as the particular words used to characterize and label an event or issue, the tone and expressiveness of the presenter’s voice, and the order in which events or issues are presented work together to frame the event or issue. *Id.* For instance, Parenti wrote, “[O]n CBS television news Dan Rather referred retrospectively to the Black civil rights movement and student antiwar movement as ‘the civil disturbances of the sixties.’ How different an impression would have been created had he labeled them ‘movements for peace and justice,’ or ‘movements against military intervention and for racial equality.’” *Id.* Rather’s manner and words framed the events and issues in a negative light. See also IYENGAR, *supra* note 30, at 66-67 (“[T]he overall pattern of [research] results for racial inequality suggests that framing and the subject matter focus of the news both influence attribution [of responsibility for the social ill]. When television news covered racial discrimination in thematic terms, viewers gave predominantly societal attributions for racial inequality. . . . Taken together, the five experiments indicate that . . . episodic framing of poverty increased attribution of individualistic responsibility, while thematic framing increased attributions of societal responsibility. . . . The results reported here indicate . . . that the well-documented tendency of Americans to consider poor people responsible [which] may be due not only to dominant cultural values but also to news coverage of poverty in which images of poor people predominate.”)

American journalist will describe African American politicians in terms of their "threatening" or "non-threatening" posture, as do white journalists. Evidence further suggests that African American station owners are more likely than white owners to employ African Americans in significant positions where decisions about broadcast content and issue framing are made.<sup>307</sup> The claim here is not that all African Americans will have a certain perspective and that all European Americans are unable to possess that perspective. Rather, given their life experiences, African Americans are on the whole, likely to view and report certain events in a different way than are European Americans.

In any case, the objective of racial diversification is not only to ensure that issues of concern to minorities are not omitted, but also that issues traditionally considered to be of exclusive concern to the majority are interrogated by minorities, with the possibility for a gradual transformation of both the nature of the issue as well as the majority's perception of itself. This is what Homi Bhabha might have meant when he observed that narratives of the marginalized are not simply attempts to "invert the balance of power within an unchanged order of discourse, but to redefine the symbolic process through which the social Imaginary—Nation, Culture, or Community—become 'subjects' of discourse and 'objects' of psychic identification."<sup>308</sup> These redefinitions and transformations are rarely easily measured, for they are accomplished gradually.<sup>309</sup>

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307. See Honig, *supra* note 305 at 87-88.

308. Homi K. Bhabha, *Difference, Discrimination, and the Discourse of Colonialism*, in *THE POLITICS OF THEORY* 200 (F. Barker ed., 1983), cited in Henry Louis Gates, Jr., *Critical Fanonism*, in 17 *CRITICAL INQUIRY* 457, 460 (1991).

309. In any case, those who advance the argument of lack of nexus usually have a very narrow view of what constitutes nexus. Often it seems that the only factor they want to look at in the electronic media, especially radio, is African American formatting. But formatting is not the only way that a station could respond to the needs and interests of African Americans. A station's record of hiring minorities and others sympathetic to the cause of minorities might be another indication of the station's responsiveness. The willingness of the station to carry public service announcements related to African American communities might also be another factor. See Akosua B. Evans, *Current Topics in Law and Policy: Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry*, 8 *YALE L. & POL'Y REV.* 380, 404-11 (1990). Surveys conducted by Evans and others show that African American-owned stations tend to have African American general managers and significantly more minority employees than those owned by European Americans. *Id.* at 407. In one survey, 82% of African American-owned stations had black general managers, compared with only 27% of white-owned stations. *Id.*; see also Honig, *supra* note 297, at 83. Honig found that among radio stations which present black-oriented formatting and programs, 72% of black-owned stations hired African Americans in the top job categories—officials, managers, professionals, technicians, salespersons. On the other hand, only 43% of the white-owned and black-oriented stations employed African Americans in those top positions. Evans, *supra*, at 407.

There is one more thing to say about the doctrinal understanding of diversity. Even if there exists evidence of a nexus between minority ownership and employment on the one hand, and programs that reflect the tastes and interests of minorities on the other hand, and even if critics of diversity could concede the importance of framing in the communications process, such critics are likely to present the argument that there is simply no principled way of stopping at only diversity based on race.<sup>310</sup> Why not diversity enhancement programs for Italian Americans, Irish Americans, Jewish Americans, or Polish Americans? The argument is offered not to make the point that some groups are unfairly excluded, but rather to attempt to demonstrate the unprincipled and incoherent nature of the notion of racial diversity. The argument, however, is not persuasive.

This fear of slippery slopes is grounded on what I call "the view from false symmetry."<sup>311</sup> Those who argue that there is no principled way to distinguish between the conditions of African Americans and Italian Americans see symmetry where none exists. In this society, African Americans are the only group that has been consistently seen as the paradigmatic Other, whose identity has been constituted as the negation of the normal and moral order. No other social group, except perhaps Native Americans, has been summarily excluded by governments and by the market from participating in the social and political life of the polity as has the African American community. Furthermore, given the fact that race continues to provide the framework for the discourse about social decay and moral decline in this country, and given that the market continues to exclude African Americans from taking part in that discourse, it is cruelly cynical to trivialize the condition of African Americans by invoking a false symmetry.

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310. *Metro Broadcasting*, 497 U.S. at 614-15 (O'Connor, J., dissenting).

311. In affirmative action jurisprudence the Supreme Court has applied two forms of false symmetry to challenge affirmative action policies. The first form of false symmetry is the Court's perception of similarity between the conditions of African Americans and other social groups. The second is its perception of symmetry between the racist actions of governments employed to the disadvantage of racial minorities and governmental policies designed to assist and include minorities. As an example of the latter type of symmetry, Justice Kennedy's attempt to equate the FCC's distress sale policy with both the former "separate but equal" law of the United States, *see Plessy v. Ferguson*, 163 U.S. 537 (1896), and the apartheid system of South Africa, was particularly egregious. *Metro Broadcasting*, 497 U.S. at 635 ("Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission's racial preference policy: 'The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.' *See South Africa and the Rule of Law* 37 (1968) (official publication of the South African Government).").

It is not only through their argument of symmetry that some justices of the Supreme Court attempt to trivialize the notion of diversity; some have even explicitly announced that the interest in diversity is a "trivial" one.<sup>312</sup> There is nothing trivial, however, about a policy that attempts to provide institutional structures for the admission of the histories and perspectives of a social group, whose exclusion has continually led to its being viewed as the Problem Other, so as to correct that negative image. Only when one is oblivious to history and insensitive to current social conditions will one see the supposed danger of slippery slopes<sup>313</sup> and the triviality that the dissent in *Metro Broadcasting* managed to see.

But on one count Justice Kennedy is right. He concluded his dissent in *Metro Broadcasting* by repeating the famous words of Justice Harlan's dissent in *Plessy*:<sup>314</sup> "The destiny of the two races, in this country, are indissolubly linked together."<sup>315</sup> The question is, what should be the nature of that link? The objective of racial diversity in the media is to destabilize the current forms of association that allow the majority to define the identity of the minority and link the minority to the majority only as a poor imitation of the majority or as the problem Other.

#### VI. DIVERSITY AND REPRESENTATION : A BACKWARD GLANCE (IN LIEU OF CONCLUSION)

The argument for diversity advanced in this Article is likely to be challenged on a number of grounds. Some might be skeptical of the constitutive and transformative power of narratives. Most skeptics are likely to acknowledge the rather unfavorable conditions, both material as well as representational, in which African Americans find themselves, but might dispute that the cultural industry plays a significant role in that outcome. The corollary of denying the constitutive power of the media is to deny its transformative capacity. To such skeptics, narratives are descriptive rather than constitutive, and thus the preoccupation with narratives and the media is a misplaced concern.

In some ways I have already responded to the skeptics. To restate the argument, the skeptics erroneously assume that the stories

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312. 497 U.S. at 633 (Kennedy, J., dissenting) ("I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity.'").

313. The "slippery slopes" argument offered by some members of the Supreme Court is rather weak, and even disingenuous. Courts, including the Supreme Court, draw difficult lines everyday in all areas of adjudication. Drawing and making difficult distinctions is what courts do.

314. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

315. *Metro Broadcasting*, 497 U.S. at 637.

we tell daily through the media are merely descriptive of actual conditions. As we tell our stories, we constitute and produce the very thing we claim to be describing through those stories. Thus, while it is useful to acknowledge the fact that the material deprivation of African Americans cannot be remedied until the structural inequities are addressed, it will be a fatal mistake not to recognize that these structural exclusions and inequities are sustained and legitimated with a web of narratives, symbols, and rhetorical devices that define African Americans as the negation of normalcy.

Others might worry that the sort of diversity advanced in this Article will lead to discord and strife among members of the polity, rather than to dialogue and respectful harmony. For such critics, to embrace narrative diversity in a multiethnic and multiracial society such as the United States is to write the first chapter in the destruction of the "we," the common bonds and interests that are supposed to have held us together. In the educational field, for example, prominent scholars who consider themselves liberals in other areas<sup>316</sup> are on the forefront in sounding the alarm of strife if such diversity were to be implemented.<sup>317</sup>

While I agree with liberals that strife and conflict are undesirable, I disagree with their assumption that diversity will lead to such outcomes, and that absent diversity such undesirable outcomes are less likely to occur. If recent events are any indication, disunion is likely to follow in the long run from a situation where a false "us" has been institutionally imposed on a polity. Richard Sennett is right when he observed that "the sense of 'us,' the act of mutual recognition" among people who see themselves to be different from each other does not occur "as an act of good will," as liberals tend to think, but rather "through discourse, discourse in which we chal-

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316. The well-known Southern historian C. Vann Woodward has described current challenges by minorities and others, to the educational curricula under the banner of multiculturalism as an "outburst of minority assertiveness." C. Vann Woodward, *Equal but Separate*, THE NEW REPUBLIC, July 15 & 22, 1991, at 41, 41 (reviewing ARTHUR M. SCHLESINGER, JR., *THE DISUNITY OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1991)). He laments that "the cult of ethnicity and its zealots have put at stake the American tradition of a shared commitment to common ideals and its reputation for assimilation, for making a 'nation of nations.'" *Id.*

317. Actually, conservatives are even more hostile to the concept of diversity than are liberal critics, but their opposition is motivated by different concerns. Although conservatives, like liberals, are concerned with the possibility of strife and conflict, the basis for at least some conservative opposition is the conviction that the values which marginal groups seek to introduce to the discursive landscape are not meritorious. Some conservatives even believe that such values are in fact a challenge to civilization itself, for they regard the culture and values of the majority as the defining features of civilization. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS* (1987); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991).

lenge each other's identities."<sup>318</sup> It is only through such active interrogation of each other's stories that there "would be a truly . . . social bond, a bond acknowledging otherness."<sup>319</sup> This is what racial diversity in the communication process is meant to do.<sup>320</sup>

Even if my arguments about the value of diversity in this area are persuasive, they are unlikely to diminish the vigor and frequency with which the FCC's minority ownership and employment policies are likely to be challenged. Both disappointed nonminority applicants and conservative forces are likely to continue to attack those policies; both groups are likely to find a sympathetic ear in the federal courts.

Challenges from disappointed non-minority applicants are of course understandable, for those non-minority applicants are denied a valuable and scarce resource. Given the increased demand for, and shortage of, desirable broadcast properties, the consequences of losing are bitter. Indeed, at least in the area of radio, existing bands provide few opportunities for new allotments, and most entries into broadcasting will therefore be through the acquisition of existing facilities.<sup>321</sup> Most of the FCC policies regarding minority ownership are directed at the acquisition of existing stations. As a result, the competition for existing stations will continue to be fierce and the attack on minority policies intense.

No response can be totally persuasive to those disappointed non-minority applicants. One could, of course, tell them that the minority policies affect only a small fraction of the broadcasting licenses, or that the FCC policies do not involve "quota[s] or fixed quantity set-aside[s],"<sup>322</sup> or that "[n]o one has a First Amendment right to a license."<sup>323</sup> These responses are unlikely, however, to be persuasive to those that have lost. Still, one can do little besides repeat the cardinal social truth that when a polity engages in the

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318. Richard Sennett, *The Rhetoric of Ethnic Identity*, in *THE ENDS OF RHETORIC: HISTORY, THEORY, AND PRACTICE* 191, 206 (John Bender & David E. Wellbery eds., 1990).

319. *Id.*

320. See CONNOLLY, *supra* note 8, at 94 ("The human animal is essentially incomplete without social form; and a common language, institutional setting, set of traditions, and political forum for enunciating public purposes are indispensable to the acquisition of an identity and the commonalties essential to life. But every form of social completion and enablement also contains subjugations and cruelties within it. Politics, then, is the medium through which these ambiguities can be engaged and controlled, shifted and stretched . . . . A society that enables politics as this ambiguous medium is a good society because it enables the paradox of difference to find expression in public life.").

321. See *supra* note 224 and accompanying text. Although the AM band has been expanded to accommodate more users, most entries into the broadcasting industry will continue to be through the purchase of existing stations.

322. *Metro Broadcasting v. FCC*, 497 U.S. 547, 599 (1990).

323. *Id.* at 597 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969)).

implementation of a social policy designed to advance a desired goal, such as the control of the dominant discourse's tendency to demonize and exclude minorities from social and political life, some members of the polity will often be adversely affected. The measure of the acceptability of that adverse effect can never be couched in terms of whether those that are adversely affected are "innocent victims," for the notion of innocent victim is conclusory, assuming legitimate expectation on the part of those disappointed.<sup>324</sup> Rather, the measure of acceptability of the adverse effect of a particular policy must depend on the importance of the social policy and the extent to which the means employed to achieve it has been restricted to that which is required to achieve that policy.

To conservative challengers my response is of two kinds, depending on the nature of the challenge. To those whose challenges are premised on the unarticulated assumption that the perspectives of those on the margin have little to offer to the polity, those who believe in the solidity and virtuosity of the identity of the dominant majority, my response will simply be to plead that they take seriously Justice Holmes' counsel in *Abrams v. United States*:<sup>325</sup> life, and in our case, the appropriate form of identity, "is an experiment," and for that experiment to succeed, people must be skeptical of the foundations of their thoughts and of the solidity and virtue of their identities.

To those other conservatives, including some members of the FCC, who may be persuaded by Holmesian skepticism and yet are convinced that every ingredient necessary for the experiment will be admitted by the market, I simply restate what I have shown in Part V: that the market does not always distribute dialogue-chances on the basis of the value of the information to the polity. Indeed, the market often simply stamps truth on the outlooks of the dominant majority and excludes the different as the very negation of truth.

There is one further point that conservative critics might want to ponder. On a pragmatic level a society which continues to institutionally exclude the voices of its minorities might end up paying a high price, for when those minorities finally speak it might not be in a peaceful way. As the 1992 events in Los Angeles clearly showed, there is a limit to how long people will continue to wait to tell their stories and wait to be heard.<sup>326</sup>

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324. The majority in *Metro Broadcasting* made the point that since no one enjoys a First Amendment right to a broadcast license, no one is entitled to a "settled expectation that [his] application will be granted without consideration of public interest factors such as minority ownership." *Metro Broadcasting*, 497 U.S. at 597. For the legitimate expectations argument to be persuasive, it must also demonstrate that the expectation is based on just and fair social arrangements.

325. 250 U.S. 616, 623 (1919) (Holmes, J., dissenting).

326. An African American woman who draws a weekly comic strip for newspapers

put it this way:

After the riots in Los Angeles how many folks were saying how surprised they were that that happened? If mainstream folk understood the black perspective better, they would not be surprised at the rage we're holding. We know white people because we're exposed to them, but they do not know us. If we're going to have a peaceful existence they have to understand our perspective.

Sheila Rule, *The 'Girls' Talking With a Black Perspective*, N.Y. TIMES, July 19, 1992, at 16.

For a sample of a general feeling among African Americans (even middle class ones) of anger and despair that the white majority does not hear (and does not want to hear), listen, for example, to the anguish of an African American insurance broker:

We have sang 'We Shall Overcome,' we have prayed at the courthouse steps, we have made all these gestures—and the door is not open. I am just tired. Pretty soon I'll have grandkids and they will want to sing 'We Shall Overcome.' I will say, 'No, we have sang that long enough'.

Studs Terkel, *Under Our Skin*, MOTHER JONES, May/June 1992, at 43, 43. Or listen to the despairing words of an African American journalist.

From the moment our justice system failed Rodney King, like many black Americans, I have been a walking, bleeding, festering sore. At first, I was so enraged with anger, I actually felt some bizarre satisfaction at the destruction in Los Angeles. For me, that is alarming. When people like me . . . middle class, suburban, professional, black Americans . . . when we cluck as youngsters loot stores and set cars afire . . . when we are consumed by that same rage . . . some thing is desperately wrong. . . . I cry for Rodney King, . . . for what he symbolizes. Rodney King is my brother . . . who could easily meet the same fate. He is scars on my grandmother's knees . . . her gold watch for a lifetime of scrubbing [white people's] floors. . . . He is all-white board rooms and keep-them-out country clubs. He is glass ceilings and David Duke and being watched like a criminal in department stores. . . . I do ask my country, how long must its people suffer before they strike back? My grandmother was far more patient than I . . . but since Rodney King, patience seems more a vice than a virtue.

Joyce Davis, *Fading Patience and Rising Anger*, TIMES-PICAYUNE (New Orleans), May 12, 1992, at B-7.

The purpose of including the desperate voices of two African Americans is not to suggest that the material inequalities and injustices that have led them to despair would not have existed had the concerns and conditions of African Americans been part of the regular discourse in the media. That obviously cannot be true. Rather, the purpose is to indicate that in some ways the desperation among African Americans is informed not only by the level of inequality and injustice that defines the lives of many African Americans, but also by a feeling that those conditions do not become part of the normal discourse in the media unless there is violence or upheaval. It is partly the feeling that one's daily struggles and grievances are invisible to the mainstream. For example, the misery of life in the inner cities never became a serious concern of the media or the presidential campaigns until the Los Angeles riots. Even then, the issue was dropped by both not long after the riots.

In addition, it is arguable that if the voices of minorities were regularly heard in the discursive domain, it might be possible to reduce the probability of reaching such conditions of desperation that force a disenfranchised group to respond violently, for the grievances of the group might have been addressed early enough. One African American journalist writing about the Los Angeles riots observed.

Although most people in my neighborhood had a horror story to tell about their treatment at the hands of the LAPD long before Rodney King, the papers [and presumably the electronic media as well] ignored the issue of police brutality. If it did not happen to the editors driving in from the suburbs then it did not hap-



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pen. No one in my neighborhood was surprised at the brutality of the videotape, but almost everyone in the newsroom [at *The Los Angeles Times*, where she worked] expressed shock. Where had they been?  
Shirley, *supra* note 93, at 26.