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I. Introduction

A. *The Underrepresentation and Negative Portrayal of Women on Television*

Women have been disproportionately underrepresented on camera since the advent of television.[1] Though many think women's representation on camera has increased in the past decade, the hard, statistical fact is that women have appeared on television in only 25% to 30% of all dramatic roles since documentation of women's representation began;[2] moreover, the overall figures have changed little, if at all, since 1969.[3] What has changed to some extent is the visibility of certain women in major, "starring" roles.[4] While it is certainly an improvement to see women in major roles, unfortunately the trend toward giving most television roles to men has not changed. Since women comprise 51% of the population,[5]

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1. Research into the portrayal of women on television has focused on both representation of women (number of females v. number of males) and content analysis (types of roles of females v. males). Findings indicate that women are substantially underrepresented at ratios from 2:1 to 3:1. *See* Joseph Dominick, *The Portrayal of Women in Prime Time, 1953-1977*, 5 Sex Roles 405, 407-08 (1979); Nancy Signorelli & George Gerbner, *Prime Time and Weekend Programming—Little Change for Women in Ten Years*, 8 Media Rep. to Women 8 (1980). When women do appear, they are sex-stereotyped. *See infra* notes 105-119 and accompanying text.

2. U.S. Comm'n on Civil Rights, Window Dressing on the Set: An Update 5 (1979) [hereinafter Update].

3. *See* Signorelli & Gerbner, *supra* note 1, at 8; Update, *supra* note 2, at 67.

4. Signorelli & Gerbner, *supra* note 1, at 8 (leading women characters have increased from 25% in 1975-76 to 37% in 1978).

5. *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1986, at 24 (106th ed. 1985) [hereinafter Statistical Abstract]. 1984 statistics indicate that of the total population (236,681,000), 121,446,000 were women and 115,236,000 were men. *Id.*

43% of the work force,[6] and 44% of the Screen Actors Guild (SAG),[7] their presence on television in only 25% to 30% of total roles qualifies as disproportionately low representation.

Underrepresentation affects both women desiring to work at acting jobs now held by men and audiences observing the lack of women on television. The former group, female actors, suffer from employment discrimination. The latter group, television viewers, get a distorted view of women in the world and are taught, through watching, that women are unimportant and often invisible. The absence of women on television affects men by teaching them to assume the unimportance of women with whom they work or have close personal relationships. For women, and especially for girls, the impact is worse still. Their self-image is diminished first, by the victimization of women by men, and second, by the invisibility of women on television. Thus, women young and old are hurt by their underrepresentation on television.

Not only do women infrequently appear on television, but when they do, they are portrayed in negative, socially disadvantaged ways, as powerless and inferior.[8] Female starring roles such as Wonder Woman[9] and the police team of Cagney and Lacey[10] are exceptions; most television roles fit female stereotypes. Women are frequently cast and displayed for their sexual body parts as in the repetitive opening clip of *Miami Vice*[11] showing two young women in skimpy bikinis bouncing along the beach. Televison also portrays women as helpless and deferential, working at jobs where they are subservient to men. These jobs include female secretaries working for male bosses and female nurses working under male doctors. While employment and educational discrimination have compelled women to work in low-paying and low-status professions, they are not for that reason incompetent or helpless. In fact, a casual survey of bosses and doctors would probably reveal their extreme dependence on these women's work. Of course, as women gain admittance to appropriate educational institutions, they begin filling higher-paying, higher-status professions. Nevertheless, the negative stereotyping of women in television, both in

6. *See* Statistical Abstract, *supra* note 5, at 390. As of 1984, of the total persons within the workforce (115,241,000), women constituted 49,855,000 while men numbered 65,386,000. *Id.*

7. Mark Locher, *The Actor's Life Unmasked*, Screen Actor, Aug. 1984, at 104, 105 (citing 1983 statistics from a SAG Skills & Talent Survey).

8. *See infra* notes 105-119 and accompanying text.

9. *Wonder Woman* (American Broadcasting System 1976 to 1979).

10. *Cagney & Lacey* (Columbia Broadcasting System 1982 to present).

11. *Miami Vice* (National Broadcasting Company 1981 to present).

terms of the jobs they hold and their competence in those jobs, continues.

When women are portrayed as having some power they are frequently portrayed as having only sexual power and using this power in cruel and destructive ways. The women on *Dynasty*[12] exemplify this as do many minor female leads on various detective shows. These women connive their way to the top, usually sexually, only to destroy the innocent men who have helped them. In contrast to these women are the minor, simpering, and helpless female leads who are only too glad for the help of any man, each of whom is somehow more capable of handling life's problems than the women. Other regular characterizations are dutiful wives of more important male characters, such as the son's wife in *Crazy Like a Fox*.[13] It is so unusual to see a woman in any position of earned authority over a man on television that this theme is the main story line in the situation comedy, *Who's the Boss?*[14] This program features a female executive who hires a young man to take care of her house and child. Even in this show, however, the female executive "boss" is somehow sheepishly wrong about everything, and the young male "houseboy" knows best in the end.

Television's representation of women has deep and long-lasting effects on all who watch it. Television serves as a major source of information. People watch it in substantial amounts.[15] Television's teaching aspect particularly affects children, although studies tend to show major attitudinal effects on adults as well.[16] Television reinforces beliefs already held by adults, but shapes beliefs developing in children. Negative beliefs about women harm women who must endure the negative behavior that derives from those beliefs. Even more harm accrues to both young women and girls who see their gender portrayed as inferior, identify with that inferior portrayal, and experience diminished self-esteem.

B. Proposed Solutions

Since women's television roles constitute jobs for actors, the underemployment of women on television raises employment discrimination issues and possible grounds for employment discrimi-

12. *Dynasty* (American Broadcasting Company 1981 to present).

13. *Crazy Like a Fox* (Columbia Broadcasting System 1984 to present).

14. *Who's the Boss?* (American Broadcasting Company 1984 to present).

15. According to the 1986 Nielsen statistics, as of November 1985, people over the age of two watch television an average of 31 hours, 28 minutes per week. 1986 Nielson Report, at 8.

16. *See infra* notes 42-45, 122-136 and accompanying text.

nation suits under title VII of the Civil Rights Act of 1964.[17] Because title VII addresses the disproportionate impact of discriminatory practices on women as a group, it is known as a disparate impact suit.

Winning a disparate impact suit against the major networks and studios which make and control television programs[18] would end women's underrepresentation on television. If female actors could successfully sue the networks and studios for preventing them from competing equally for acting jobs, then the networks would have to provide some mechanism to achieve equal employment for women, resulting in more roles for women on television.

A successful disparate impact suit would require networks and studios to give women a percentage of jobs on television proportionate to their presence in either the general population, the work force, or SAG.[19] This could be accomplished in several ways. First, minor roles could be treated separately. These roles comprise the vast majority of jobs in television and usually minimally affect the main story. They might involve, for example, people in a bar, a janitor, a bus driver, or a judge. Minor roles could be assigned randomly or purposefully to the appropriate number of men and women, depending on what population is used as a measure by the courts (the general population, the work force, or SAG membership). If roles were proportionately assigned to men and women, there would be an increased number of women on television. Without specifically addressing the sex-role stereotyping in television (female nurses, male doctors, etc.), random assignments would, nonetheless, automatically diminish and possibly eliminate negative stereotyping. It would therefore indirectly affect the problem of women's negative television image without raising first amendment concerns, which have traditionally been more difficult

17. 42 U.S.C. § 2000e to 2000e-17 (1982). Everything said here about women applies equally well to all minorities. Network decision makers designate most roles as belonging not just to *men*, but to *white* men. *See* Signorelli & Gerbner, *supra* note 1, at 8-9. Although this article deals with a disparate impact suit for *sex* discrimination, it would apply to *any* form of title VII discrimination.

18. An issue might be raised as to whether networks or studios are the responsible employers. The networks have ultimate veto power on all aspects of all programs that appear on their networks. They are often involved extensively in developing new shows as well as in the day-to-day operations of existing shows. Confidential interview with network programming executive (Fall 1983). Studios (and some independent production companies) are referred to as the actual producers of shows. In essence, both networks and studios employ television actors because they both make employment and payment decisions. They should, therefore, be joined as co-defendants.

19. *See supra* notes 5-7 and accompanying text.

to resolve than issues of employment discrimination.[20]

If a disparate impact suit were successful, an alternative solution to underrepresentation would be to randomly assign the appropriate number of parts to women, but to have them play men in "drag." While this would not change the actual portrayal of men or women, the audience's knowledge that this "man" is a woman, or, less frequently, that this "woman" is a man, could have a substantial and beneficial impact on their perceptions of women. Knowing that a woman is playing a strong and effective man or a man is playing a weak and ineffectual women could counteract the negative content of the actual roles. This positive effect is less direct and its impact difficult to measure.

Since a disparate impact suit for underrepresentation does not directly address the negative portrayal of women, it would still be possible for the employer/networks to create additional roles for women which are substantially the same as the negative roles already created. While more women would appear on television, their roles would still present an inferior image of women. The reinforcement of negative images would counteract the possible advantages of women's greater visibility on television. Thus, combatting underrepresentation is not necessarily a complete solution to the negative portrayal of women on television. Rather, the content of television programs must be questioned. Attempts to regulate the media's content, including the portrayal of women, generally encounter legal difficulties.[21] In special circumstances, however, particularly where the well-being of a child is concerned, the Supreme Court has been willing to impose limitations on the content of expression.[22]

II. An Employment Discrimination Suit Under Title VII

A. Statement of Harm

1. Documentation of the underrepresentation of women on television.

Available documentation has consistently proven women's underrepresentation on television. At most, women have appeared

20. See Thomas Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123 (1978), for a thorough discussion of first amendment bars to content regulation of television programming.

21. Problems with content regulation are discussed *infra* notes 137-156 and accompanying text.

22. See discussion of *FCC v. Pacifica Found.* and *New York v. Ferber*, *infra* notes 150-153 and accompanying text.

in 25% to 30% of the available television roles.[23] Studies on representation conducted during the 1970's show surprisingly little change in representation of women.[24] In examining television programs, both adult and children's programming are relevant. From 1971-1972, Sternglanz and Serbin conducted the major study of children's programs.[25] They thoroughly analyzed ten popular prime time children's programs for male-female representation, as well as male-female images. The study showed that females appeared 33% of the time compared to male appearances of 67%.[26] Interestingly, four popular shows were excluded from the study because there were *no* female characters in them at all. Thus, this study's figure for women's appearances is actually higher than it would have been had those top shows been included.

Research results for adult television programming are comparable. Mackey and Hess analyzed 600 scenes from prime time television shows aired in the Midwest during 1979.[27] They found that men were disproportionately represented throughout all programs.[28] Dominick, in a study involving 1314 prime time television programs from 1953-1977, found that the number of females in

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23. *See supra* note 2 and accompanying text.

24. *See supra* note 3 and accompanying text. Studies of children's commercials have also revealed an underrepresentation of women. Jerome Feldstein & Sandra Feldstein, *Sex Differences on Televised Toy Commercials*, 8 Sex Roles 581 (1982), conducted a study of toy commercials during the 1977 and 1978 holiday seasons. In both years, there were significantly more males than females, but the disparity greatly increased in 1978. *Id.* at 583. Not only did more commercials contain boys, but each individual commercial had more boys than girls. In another study on television commercials, Barbara Knill, Marina Pesch, George Pursey, Paul Gilpin & Richard Perloff, *Still Typecast After All Those Years? Sex Role Portrayals in Television Advertising*, 4 Int'l J. Women's Stud. 497 (1981) [hereinafter *Still Typecast*], researchers looked at adult commercials in 1980 and compared their findings with previous studies conducted in the 1970's. They found that men continued to dominate voiceovers: 92% male in the afternoon, 90% male in the evening. *Id.* at 500, 502. These results showed a slight increase from 87% male in 1972. *Id.* at 497.

Since the employers for commercials are different from employers for television programming, this article will not focus on television commercials. Nevertheless, it appears that the same statistics apply in both cases, so women in commercials could bring the same type of employment discrimination suit. In addition, because commercials by definition are examples of commercial speech, they are not afforded as much first amendment protection. *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Thus, the first amendment considerations, discussed below for television programming, would be easier to circumvent. Therefore, the analysis of a title VII cause of action for discrimination in television programs would apply *a fortiori* to commercials.

25. *See* Sarah Sternglanz & Lisa Serbin, *Sex Role Stereotyping in Children's Television Programs*, 106 Developmental Psychology 710 (1974).

26. *Id.* at 712.

27. *See* W.D. Mackey & D.J. Hess, *Attention Structure and Stereotypy of Gender of Television: An Empirical Analysis*, 106 Genetic Psychology Monographs 199 (1982).

28. *Id.* at 206-07.

starring roles has remained relatively constant.[29] Women are found predominantly in situation comedies; dramatic shows featuring only women stars have rarely exceeded 10%.[30] Signorielli and Gerbner conducted a similar study of prime time television from 1969-1979.[31] Results indicated that on the average, men outnumbered women by a margin of three to one.[32] Although the proportion of female leading roles had risen during the decade studied, the total percentage of women on the screen had not.[33]

Without exception, every study in the area of gender representation indicates that women are disproportionately underrepresented. Furthermore, even though the situation may seem to be improving because of the greater visibility of some female stars, the overall figures of underrepresentation remain unchanged.[34]

2. The harmful effect of the underrepresentation of women on television.

Systematic underemployment of a group is employment discrimination, which is a cognizable harm.[35] Because disproportionately fewer television roles exist for women, female actors are suffering from employment discrimination. Since fewer acting jobs exist for women,[36] they are statistically less likely to obtain jobs in SAG-approved productions[37] which would serve as their entrance into SAG membership; without SAG membership, women have extreme difficulty getting acting work at all.

Even with membership in SAG, women still face fewer job opportunities than their male counterparts. Recent statistics indi-

29. *See* Dominick, *supra* note 1, at 408.

30. *Id.* at 410.

31. *See* Signorielli & Gerbner, *supra* note 1.

32. *Id.* at 9.

33. *Id.* at 8.

34. *See supra* notes 2-4 and accompanying text.

35. *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977); Moore v. Hughes Helicopters, 708 F.2d 475 (9th Cir. 1983); White v. Washington Pub. Power Supply Sys., 692 F.2d 1286 (9th Cir. 1982); Hagans v. Andrus, 651 F.2d 622 (9th Cir. 1981), *cert. denied*, 454 U.S. 859 (1981); Pack v. Energy Research & Development Admin., 566 F.2d 1111 (9th Cir. 1977).

36. Casting is virtually always done by gender. Studios producing television shows send casting lists to actors' agents, often on a daily basis. SAG-approved theatrical agencies, who represent male and female actors, receive lists which specify, by gender and type, who can be submitted for consideration for a role. A list of these agencies is available from SAG. Infrequently, studios will advertise directly in the trade newspapers such as *Variety*. These casting calls are also by gender.

37. All television and major film productions are SAG-approved. Thus, any actor employed in a television or major film production would qualify for SAG membership. *See* SAG Membership Rules and Regulations (on file with *Law & Inequality*).

cate that women comprise 51% of the U.S. population at large[38] and 43% of the work force.[39] If women's acting roles represent from 25% to 30% of all roles,[40] then women are significantly underemployed when compared to their numbers in the population, the work force, or even SAG.

Television's underrepresentation of women also has a negative effect on the attitudes of its viewers. While much research has addressed the question of whether viewing sex-role stereotypes on television has a significant psychological impact on the sex-role attitudes of viewing audiences,[41] the results are also relevant to the underrepresentation of women on television. If, as these studies uniformly show, the content of television programs significantly shapes the attitudes of viewers, particularly young viewers, the absence of women is likely to influence attitudes as well.

Children imitate the behavior they see and model themselves after the images of men and women presented to them.[42] According to the Surgeon General's report on the effects of television violence, preschool children spend more time watching televison than any other activity, except sleep.[43] While children in school may spend less time watching television, studies on the effects of television viewing categorize heavy viewing as twenty-five hours per week, and light viewing as ten hours per week.[44] By these standards, even light viewing involves exposure exceeding an hour per day. Children, therefore, see television characters as role models simply due to frequent exposure to them.

Children learn sex-role stereotypic behavior from observing and imitating role models, including those they see on television. If, as established, women appear less often in television programs,

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38. *See supra* note 5.

39. *See supra* note 6.

40. *See supra* note 2 and accompanying text.

41. *See infra* notes 122-136.

42. Child developmental theorists such as Freud, Kohlberg, and Mischel have indicated their belief that sex-role appropriate behavior is learned by children through observation of male and female role models. *See* Sigmund Freud, New Introductory Lectures in Psycho-Analysis 82-112 (1933); Lawrence Kohlberg, *A Cognitive-Developmental Analysis of Children's Sex-Role Concepts and Attitudes*, in The Development of Sex Differences 82 (Eleanor Maccoby ed. 1966); Walter Mischel, *A Social-Learning View of Sex Differences in Behavior*, in The Development of Sex Differences, *supra*, at 56. Bandura and Walters, through extensive experimental research, have shown that modeling is an important source of behavior acquisition and a powerful teaching technique. *See* Albert Bandura & Richard Walters, Social Learning and Personality Development 47-108 (1963).

43. Sternglanz & Serbin, *supra* note 25, at 710-11.

44. Paul McGhee & Terry Frueh, *Television Viewing and the Learning of Sex-Role Stereotypes*, 6 Sex Roles 179, 182 (1980) [hereinafter McGhee & Freuh].

then girls have fewer role models. Furthermore, because few women appear, girls will tend to identify with this absence. Girls will therefore learn that while men and boys are active in the world, women and girls are most often inactive and invisible. A logical alternative for girls is to identify with men and boys on television. Male images are both more frequent and positive. Research indicates, however, that cross-gender identification is psychologically difficult, if not impossible.[45] Thus, the underrepresentation of women on television not only provides girls with fewer role models but adds the negative information that their gender is unimportant.

B. Proposed Remedy

1. Historical use of title VII for employment discrimination.

Under title VII, employers may not discriminate in their choice of employees based on "race, color, religion, sex, or national origin."[46] This law has been used to combat discrimination in employment since its inception.[47] Title VII reads, in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> . . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[48]

Originally, employment discrimination suits were brought under title VII when an employer specifically indicated that someone of a particular race would not be hired. This obviously discriminatory practice was labeled *facial* discrimination (i.e., discriminatory on its face), and a suit charging facial discrimination was known as a

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45. Kohlberg has found that children attend more to same-sex models. Kohlberg, *supra* note 42, at 114-23. According to the findings of Maccoby and Wilson, children attend to and retain actions of same-sex characters better than characters of the opposite sex. Eleanor Maccoby & William Wilson, *Identification and Observational Learning from Films*, 55 J. Abnormal & Soc. Psychology 76, 81-86 (1957). *Cf.* Eleanor Maccoby, William Wilson & Roger Burton, *Differential Movie-Viewing Behavior of Male and Female Viewers*, 28 J. Personality 259, 265 (1958) (men spent more time watching male characters than did women).

46. 42 U.S.C. § 2000e-2(e)(1) (1982).

47. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (racial discrimination); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (gender discrimination).

48. 42 U.S.C. § 2000e-2(a)(2).

disparate treatment suit.[49] In a disparate treatment suit, the plaintiff had to prove that the employer *intended* to discriminate. Proving an employer's intentions or state of mind is much more difficult than showing the results of that employer's actions. Not until its decision in *Griggs v. Duke Power Co.*,[50] however, did the Supreme Court establish disparate *impact* as an alternative theory under title VII. Under the disparate impact theory, intent is irrelevant; the plaintiff need not prove intentional discrimination. Rather, the plaintiff need only show the *de facto* result of an employer's questionable practice, thereby avoiding the near impossibility of proving the state of mind of another. While the Supreme Court has laid out the procedure for bringing a disparate treatment suit in *McDonnell Douglas Corp. v. Green*,[51] and reiterated it in *Texas Department of Community Affairs v. Burdine*,[52] the specific procedures for a disparate impact suit are less clear and are still being developed.[53]

2. On-camera sex discrimination: a disparate impact suit under title VII.

Television programs may be viewed as a series of roles or jobs to employ actors. Those who control acting jobs are employers. Applying this analysis, actors who experience discrimination in obtaining television roles are experiencing employment discrimination and are eligible to bring suit under title VII. That women are grossly underrepresented in television roles may be the result of an unintentional, yet discriminatory, practice. That is, networks and major studios may not specifically intend to bar women from the roles filled by men, and on a haphazard basis, actually do cast some women in roles originally reserved for men.[54] Nevertheless, the impact of predominantly casting men in television roles has re-

49. For examples of disparate treatment suits, see *McDonnell Douglas*, 411 U.S. at 792; *Burdine*, 450 U.S. at 248.

50. 401 U.S. 424, 431-32 (1971).

51. 411 U.S. at 802-05.

52. 450 U.S. at 252-56.

53. *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Moore v. Hughes Helicopters, 708 F.2d 475 (9th Cir. 1983); White v. Washington Pub. Power Supply Sys., 692 F.2d 1286 (9th Cir. 1982); Hagans v. Andrus, 651 F.2d 622 (9th Cir. 1981), *cert. denied*, 454 U.S. 859 (1981); Pack v. Energy Research & Dev. Admin., 566 F.2d 1111 (9th Cir. 1977).

54. It should be noted that, on occasion, during discussion among those in charge, the gender of some roles may be changed during the casting process. In fact, it has been reported that some producers and television executives are mindful of the underrepresentation of women, and make some effort to readjust gender assignments for those roles. Unfortunately, this is on an ad hoc basis—whenever it occurs to them. Confidential interview, *supra* note 18.

sulted in discrimination against female actors. Thus, a title VII disparate impact suit, which does not address intent, would be the appropriate legal theory of employment discrimination under which female actors should proceed.[55]

3. U.S. Supreme Court and Ninth Circuit holdings.[56]

Griggs v. Duke Power Co. was the first case to hold that there has been a disparate impact on a protected group, despite the fact that no clear intent to discriminate exists, when the result of an employment policy discriminates against a group protected under title VII.[57] This disparate impact theory was later used in *Albemarle Paper Co. v. Moody*[58] and *Dothard v. Rawlinson*.[59]

Dothard, citing *Griggs* and *Albemarle*, outlined the necessary elements of proof in a disparate impact suit.[60] First, the plaintiff must establish a *prima facie* case by showing that the facially neutral standards create a discriminatory impact. Next, if the defendant shows that the discriminatory practice has a manifest relationship to the job, or proves job-relatedness, then the plaintiff must show a less discriminatory alternative.[61]

Step 1: Prima Facie *Showing; Relevant Labor Pool*

Disparate impact, by its very nature, relies on a statistical showing that the employer's practice has led to a distribution of workers that is different from what it would have been had the discriminatory procedure not been used. The employer has, there-

55. Such a suit involves a violation of federal law and thus would be brought in federal court. Congress may give the courts jurisdiction over cases arising under the laws of the United States. U.S. Const. art. III, §§ 1-2. In 28 U.S.C. § 1331 (1982), Congress gave federal district courts original jurisdiction in all civil actions where the matter in controversy "arises under the Constitution, laws, or treaties of the United States." Because this suit arises under 42 U.S.C. §§ 2000e to 2000e-17 (1982), a federal law, the federal courts have original jurisdiction.

56. The vast majority of television programs are produced in California and the networks and major studios are located there as well. In fact, Los Angeles is the capital of the television industry. Since Supreme Court decisions control in all courts, and Ninth Circuit decisions control in California, this article examines the holdings of both these courts.

57. 401 U.S. 424, 431-32 (1971). In establishing the disparate impact extension of title VII, the Court looked to the intent of Congress in enacting title VII and found that "[u]nder the Act, practices, procedures, or tests neutral in their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

58. 422 U.S. 405 (1975).

59. 433 U.S. 321 (1977).

60. *Dothard*, 433 U.S. at 329 (citing *Griggs*, 401 U.S. at 432; *Albemarle*, 422 U.S. at 425).

61. *Id.*

fore, used an employment device that has disadvantaged, or underrepresented, the target group in relation to other groups. Underrepresentation of a target group, such as women, is established by showing there are fewer group members in a specific job than there are group members in the relevant *comparison* population. This comparison group is referred to as the "relevant labor pool."

Establishing the relevant labor pool has been a source of debate. The pool of applicants for a job in question is not a valid relevant labor pool because many persons who possess the skills required for the position may not apply based on their knowledge that they will not qualify under this discriminatory procedure. Thus, the applicant pool is artifically depressed and not an accurate standard.[62]

Another method of determining the relevant labor is to consider the industry in general, rather than the particular workplace. This would generate a "qualified" labor pool,[63] in that all workers within the industry would presumably have the requisite skills to perform the job at issue. Where discrimination is industry-wide, however, the industry labor pool would also be artificially depressed, and thus not a proper standard. When industry-wide discrimination exists in an industry requiring a special skill, one then looks to a comparably qualified group to establish a "qualified" labor pool. In the absence of a special-skills requirement, the general population can be used as the relevant labor force. The general population refers to the number living in the work area who are members of the target group.

Therefore, the two relevant labor forces for the acting industry are (1) the general population and (2) the qualified labor force.

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62. As stated in *Dothard*, 433 U.S. at 330 (citations omitted):

> There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. A potential applicant could easily determine her [qualifying characteristic, in this case] height and weight and conclude that to make an application would be futile. Moreover, reliance on general population demographic data was not misplaced where there was no reason to suppose that [the characteristic at issue] physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.

63. *See* Moore v. Hughes Helicopters, 708 F.2d 475, 482 (9th Cir. 1983); White v. Washington Pub. Power Supply Sys., 692 F.2d 1286, 1289 (9th Cir. 1982); Hagans v. Andrus, 651 F.2d 622, 627 (9th Cir. 1982); Pack v. Energy Research & Dev. Admin., 566 F.2d 1111, 1113 (9th Cir. 1977).

Because most major television shows are cast nationally, the general population of the United States would be the correct target group to use for an on-camera discrimination suit. The general population standard is 51% because women comprise that portion of the population in the United States.[64] The employer's male-to-female employee ratio would therefore be compared against the ratio 49-to-51.[65] It is usually to the advantage of the plaintiff to use this standard because any defendant/employer being sued for sex discrimination typically falls very far below these figures.[66]

For the acting industry, statistics establishing a qualified labor force may be taken from SAG. SAG membership consists of 44% women and 56% men.[67] Due to industry-wide sex discrimination and the scarcity of female acting jobs, SAG statistics might be artificially depressed and thus, an inappropriate measure of the relevant labor pool.[68]

In a 1983 disparate impact sex discrimination case, *Moore v. Hughes Helicopters*,[69] the Ninth Circuit examined the relevant labor pool issue in depth. Drawing on both *Dothard v. Rawlinson*[70] and *Griggs v. Duke Power Co.*,[71] the court stated that: "Disparate impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate."[72]

Admitting that the actual pool of applicants was inappropriate in both Supreme Court cases cited, the court discussed the use

64. In some professions, other qualities in addition to gender, such as age, may be added. But since children, adults, and the elderly also act professionally, age is not an issue in acting.

65. *See supra* note 5 and accompanying text.

66. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the most recent Supreme Court case in this area, the general population of women over age fourteen in Alabama was used as the standard for male versus female prison guards, regarding a height and weight requirement. In fact, the only other population considered and rejected in this case was the applicant pool. *Id.* at 329-31.

67. Locher, *supra* note 7, at 105.

68. *See supra* notes 36-37 and accompanying text. While acting is a special skill, it is not necessarily true that only actors who are members of SAG have that skill. Many talented actors are unable to get their first SAG-approved acting job, and thus cannot join the union. This is probably more true for female actors because there are fewer SAG jobs available for them. Thus, SAG membership is a rough approximation of the qualified labor force. Because there is no rational or empirical reason to believe that any gender difference in the distribution of acting skill exists in the general population, the general population might be a more relevant labor pool from which to measure job discrimination.

69. 708 F.2d 475, 482 (9th Cir. 1983).

70. 433 U.S. at 330.

71. 401 U.S. 424, 431 (1971).

72. *Moore*, 708 F.2d at 482.

of alternative comparison statistics—those from the general population and those from the relevant labor market.[73] The *Moore* court ultimately held that the qualified labor pool was preferable.[74] Thus, it introduced the use of a qualified labor standard to be applied in disparate impact cases in the Ninth Circuit.[75]

In sum, it appears that, while the Supreme Court is willing to accept the general population as a relevant labor pool in disparate impact cases, the Ninth Circuit is not. Whenever there is a special skill involved, the Ninth Circuit requires a comparison with a qualified labor pool for a successful *prima facie* showing of disparate impact. When the necessity of a special skill is questionable, general population statistics may be used unless the defendant can prove that they are inappropriate.

Using the disparate impact model, a suit for on-camera employment discrimination could proceed as follows. The plaintiffs would be the class of female actors; the defendants would be the networks joined with the major studios.[76] All professional actors (SAG members) are considered the relevant labor pool for the Ninth Circuit because acting presumably involves a special skill and SAG membership is a rough estimate of the number of actors in the nation. Female actors must then demonstrate that they have been discriminated against by being employed substantially less than would be expected by their numbers in SAG.

Plaintiffs would first present statistics documenting that men appear two to three times as often as do women on camera.[77] Further, these statistics show no appreciable change. Finally, because women have fewer and less significant roles, the roles they do

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73. It should be noted that in both *Dothard* and *Griggs* the general population standard was used though, at least in the case of *Dothard*, some special skills might have been necessary for the job of prison guard. *Dothard*, 433 U.S. at 330-31.

74. The court stated:

> General population statistics are useful as a proxy for the pool of potential applicants, if ever, only when the challenged employer practice screens applicants for entry level jobs requiring little or no specialized skills. If special skills are required for a job, the proxy pool must be that of the local labor force possessing the requisite skills.

Moore, 708 F.2d at 482-83.

75. Although it offered no guidelines as to what constituted a comparable qualified labor force, the court did speak to the burden of proof for establishing the appropriate labor pool. Following the Fourth Circuit decision in Equal Employment Opportunity Comm'n v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979), the court held that, where it was unclear whether or not the job in question required special skills, and thus comparison to a qualified labor force, the burden fell on the defendant to prove the general population was not the relevant labor pool. *Moore*, 708 F.2d at 483.

76. *See supra* note 18.

77. *See supra* note 1 and accompanying text.

have are necessarily of shorter duration. Thus, a statistical look at comparative number of work days would reveal a great disparity between employment of men and women actors.

If either the qualified labor pool, SAG, or the general population is deemed the relevant labor pool, then women are underemployed on television. Forty-four percent of SAG and fifty-one percent of the general population are women.[78] The studies on female on-camera representation show that 25% to 30% of roles are played by women.[79] The current figures indicate significant disparity from either population. In all probability, a *prima facie* showing of disparate impact could be made.

Step 2: Job-Relatedness; Business Necessity

If a *prima facie* showing of sex discrimination is made by the plaintiff in a disparate impact case, the burden then shifts to the defendant to show that the practice at issue has a manifest relationship to the job. Thus, defendants (networks and studios) would have to show that disproportionate hiring of male actors either has a manifest relationship to the employment in question or is a business necessity.

The defendants' rebuttal requirements for disparate treatment differ from those for disparate impact suits. In a disparate treatment suit a defendant may show, under title VII, that sex "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise."[80] In a disparate impact suit the defendant must meet a burden of persuasion to show that the discriminatory practice is a business necessity. The differences have been distinguished in *Dothard v. Rawlinson*[81] and at greater length by the Ninth Circuit in *deLaurier v. San Diego Unified School District*,[82] *Blake v. City of Los Angeles*,[83] and *Harriss v. Pan American World Airways*.[84]

The Court in *Dothard*, by dividing the case into disparate impact and disparate treatment components, separated the two possible responses by the defendant. The Court found that the defendants, in response to a *prima facie* showing of disparate impact, did not meet their burden of persuasion because they "pro-

78. *See supra* notes 5 & 7 and accompanying text.

79. *See supra* note 2 and accompanying text.

80. 42 U.S.C. § 2000e-2(e)(1) (1982). Further discussion of the defendant's rebuttal in a disparate treatment suit is beyond the scope of this article.

81. 433 U.S. 321, 333 (1977).

82. 588 F.2d 674, 678 (9th Cir. 1978).

83. 595 F.2d 1367, 1379 (9th Cir. 1980), *cert. denied*, 446 U.S. 928 (1980).

84. 649 F.2d 670, 674 (9th Cir. 1980).

duced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards."[85]

The Ninth Circuit has held that the appropriate defendant response differs depending on the type of title VII suit brought. Citing an earlier Ninth Circuit case which viewed the business necessity defense as similar to the disparate treatment BFOQ defense,[86] the court in *Harriss* distinguished the two defenses:

> In our view, however, the defenses apply to different types of Title VII violations. The BFOQ defense is applicable to employment practices that purposefully discriminate on the basis of sex while the Business Necessity defense is appropriately raised where facially neutral employment practices run afoul of Title VII only because of their disparate impact.[87]

In specifying the business necessity standard as appropriate in a disparate impact suit, the court affirmed its earlier decision which had adopted the Fourth Circuit's standard and stated that "the business purpose must be sufficiently compelling to override any [discriminatory] impact [and] the challenged practice must effectively carry out the business purpose it is alleged to serve."[88] The defendant, having the burden of persuasion, must therefore show that a compelling business interest is at stake and that the business interest is furthered by the discriminatory practice.[89]

In sum, both the Supreme Court and the Ninth Circuit distinguish between disparate treatment and disparate impact suits for purposes of the defendant's rebuttal of a *prima facie* showing by the plaintiff. They both impose on the defendant a burden of persuasion. While the Supreme Court requires a general evidentiary

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85. *Dothard*, 433 U.S. at 331.

86. *deLaurier*, 588 F.2d at 678.

87. *Harriss*, 649 F.2d at 674.

88. Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1980), *cert. denied*, 446 U.S. 928 (1980) (quoting Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971)).

89. The "necessity" aspect of business necessity has also been analyzed in the Fifth Circuit and the District Court of Texas. In Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971), the court established a standard which was later implemented in Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981), as follows:

> [T]he use of the word "necessary" in Section 703(e) requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.

Id. at 299. Thus, a showing of business necessity would involve proving that the essence of a job (e.g., television programming) would be undermined if men did not predominate in the jobs (roles) available.

showing of job-relatedness, the Ninth Circuit more specifically requires the showing of a compelling business interest which is furthered by the discriminatory practice.

The traditional defense for the discriminatory practice of male predominance on camera is that only men can play "male" roles. Thus, a close look at these "male" roles is necessary to properly evaluate this defense.

In a title VII suit, the relevant pool of jobs would consist of all on-camera jobs. All on-camera jobs are classified in the same way for purposes of compensation and credits (i.e., starring role, featured role, etc.) and require the same skill, acting, and the same SAG union membership. The division into male and female roles is artificial for purposes of developing the job category. In fact, to allow male jobs and female jobs to be defined as different categories would be to allow the employers to legitimize discrimination by defining it out of existence. Nevertheless, these roles are usually defined by gender and cast that way as a result.[90] The problem women face in the television industry is thus circular. The industry first creates "male" roles and then pleads business necessity when it assigns those roles to men. The question therefore becomes whether the Ninth Circuit will expose this subterfuge in order to guarantee equal employment opportunities to women.

There are two basic types of television roles: (1) major roles—those few roles in a given show which completely dominate the story (usually the regular, main characters plus a few important guest stars), and (2) minor roles—comprising all the rest. The greatest number of actors are affected by discrimination in minor role casting. Many more minor roles exist than major roles. Although women now appear in major roles more frequently than in the past, the overall figures still show that women are underrepresented in minor roles.[91]

Are all the minor, mostly "male" roles, really gender specific? Or are they actually gender neutral? Minor roles rarely have any character development and usually carry along the plot line for the major characters. The parts are small, frequently only a few lines. Actors in minor roles portray different jobs such as janitor, pilot, business person, judge, computer operator, or taxi driver. Because of the unconscious sex-role stereotyping that goes on in our society on a daily basis, these jobs are usually thought of

90. It should be noted that there are some exceptions to this. Not infrequently, in the process of discussion among those in charge, the gender is varied during the casting process. Confidential interview, *supra* note 18.

91. *See supra* notes 2-4 and accompanying text.

as "male" roles. This notion needs reexamination in terms of the very employment discrimination title VII was designed to combat.

The social policy underlying title VII is that all jobs should be available to all people who can perform them, regardless of "race, color, religion, sex, or national origin."[92] Thus, all minor roles should be available to women if they can perform the functions these jobs require. Of course, there already are some women in all these jobs so at least some women can perform the relevant tasks; there is nothing about any job that is intrinsically "male."

Assigning a role as "male" is probably an unconscious process: first, inventing a series of minor characters to help advance the plot line, and next thinking of these characters as men because they are in "male" jobs. Occasionally some parts are assigned to women if there is a special purpose (e.g., sexual interest *vis-a-vis* a male character) or the role is traditionally occupied by a woman (e.g., waitress, secretary, etc.). For the most part, little thought seems to be given to gender specificity of minor roles. Rather, due to sex-role stereotyping, writers, producers, and other persons responsible for casting, think of men as occupying these roles. It seems to take special attention to introduce the possibility that the actual role is basically gender neutral and could just as well be played by a woman.[93]

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92. 42 U.S.C. § 2000e-2(e)(1) (1982).

93. *See supra* note 54. In an effort to demonstrate the gender neutrality of minor roles on television, this article analyzes the casting of a prime-time adult show which aired on CBS in 1984.

Mama Malone is a situation comedy with the following cast breakdown: *major roles*: lead (female), family members (1 female, 2 males); *minor roles*: television crew, five parts of varying importance—all male.

In a situation comedy, the number of nonregular cast members is few. Usually one major guest role may be included per show. In this particular show, *Mama Malone*, the major roles are family members: a mother (lead), her brother, daughter, and grandson. This is balanced for gender, although, aside from the lead which calls for an "old-fashioned" Italian mama, the other roles could arguably be played by either sex. She could live with her sister (not her brother) and could have a granddaughter (not grandson). A stronger case could be made for living with a daughter, as she does, and not a son, because a female single parent would be more likely to have her child (Mama's grandchild) with her.

Leaving the major roles aside, the minor roles are completely gender-neutral. All five roles involve running the show "Cooking with Mama Malone." Lines such as "Show 82-113. Cooking with Mama Malone. Stand by," and "Cue music and announce" are typical of the dialogue for these characters. There is little interpersonal interaction, and none of it is gender-based. Of course, were romance with one of the minor characters introduced (a very unusual occurrence, regardless of gender), the appropriate sex could play the romantic interest.

The gender neutrality of minor roles demonstrated here is even more evident in action shows, where minor characters are often *not* regular cast members, and usually simply add to the local color wherever the action takes place (e.g., bars, factories, etc.).

A possible argument *for* the currently disproportionate number of men in minor roles is that men do hold most of these jobs. The employers therefore might assert they are merely reflecting reality when they cast in this manner. Three possible replies are: 1) that a true representation of the real world is not the goal in any other aspect of television (especially not the action shows that are so disproportionately male), 2) the choice of so many disproportionately male jobs as incidental choices unnecessarily creates a sex-discriminatory impact, and 3) that women's underrepresentation on television reinforces their underrepresentation in society, and thus creates the reality it nominally reflects.

It is difficult to imagine how the networks could maintain the argument that an important consideration in creating and casting roles, particularly minor roles, is realism, especially considering the extremely unrealistic casting and portrayal that is a hallmark of television. If realism were the essence of every television program, then this defense might be believable. Realism is not, however, a major concern of programmers. The reported thinking of television programmers is that the shows they develop and produce have entertainment as their goal, which is best served by giving the public something exciting and out of the ordinary (i.e., unrealistic).[94] In fact, the goal of realism is ascribed to news shows, documentaries, and perhaps public broadcasting shows that do not have to "sell" their product (via high viewing statistics) and can be less concerned with the entertainment function.

Minor roles could easily be modified to include disproportionately traditional "female" jobs or no particular jobs at all because the jobs minor characters perform are usually peripheral to the story line. This corrective measure need only be taken if realism is truly the issue. If it is merely an excuse, then women could easily play these roles as well as men since, again, there is nothing intrinsically male about the job itself.

If most minor roles are gender neutral, is it a business necessity to cast men disproportionately in these roles? In other words, is there a compelling business interest at stake in television programming which prevents offering either 51% of these jobs to women (based on the general population) or 44% (based on SAG membership), as opposed to the current 25% to 30%?

If all roles are viewed as jobs, and if the overwhelming proportion of them are viewed as essentially gender neutral, it follows that it is discriminatory to assign more of these jobs to men than

94. Confidential interview, *supra* note 18.

the relevant labor pool demands. Under a disparate impact suit, upon a *prima facie* showing, the burden of persuasion is on the employer to show business necessity. Thus, the networks and the studios would have to show, for these roles, that only men could fill them and appropriately carry out the purposes of the script. This might prove a very heavy burden for defendants.[95]

Step 3: Less Discriminatory Alternative: Burden of Proof v. Production

Unlike many courts, the Supreme Court and the Ninth Circuit have, with some agreement, addressed this last step: proving a less discriminatory alternative in a disparate impact suit. In *Blake v. City of Los Angeles*,[96] the court, adopting the Supreme Court's standard in *Albemarle Paper Co. v. Moody*, stated: "Even if an employer meets his burden of demonstrating business necessity, Title VII plaintiffs may prevail if they show that alternative selection devices are available that would serve the employer's legitimate interest without discriminatory effects."[97]

While this language appears implicitly to describe a burden of production for plaintiff to show the availability of an alternative, other courts seem to interpret this burden differently. The Ninth Circuit in *Contreras v. City of Los Angeles*[98] stated that the plaintiff's burden is to "*prove*[ ] that the employer has available an alternative nondiscriminatory screening device that would effectively measure the capability of job applicants."[99]

Thus, while the spirit of the Supreme Court holdings (fol-

95. If the defendant establishes that some roles are gender specific, those roles could be dealt with separately from the pool of gender nonspecific roles. For purposes of convenience, there might be a low percentage (e.g., one to five percent) of gender-specific roles that would not be subject to scrutiny.

96. 595 F.2d 1367 (9th Cir. 1980), *cert. denied*, 446 U.S. 928 (1980).

97. *Id.* at 1383 (citing *Albemarle*, 422 U.S. 405, 425 (1975)). See also Harriss v. Pan American World Airways, 649 F.2d 670, 673 (9th Cir. 1980), for the same holding, citing to *Albemarle* and deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 676 (9th Cir. 1978).

98. 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

99. *Id.* at 1271-72 (emphasis added). The court cites Dothard v. Rawlinson, *Albemarle*, and *deLaurier* as authority. A close reading of these authorities, however, does not yield the *Contreras* result that the plaintiff must *prove* a less discriminatory alternative. The confusion may be due to the use of the nebulous word "show" in these cases. In *Dothard*, *Albemarle*, and *deLaurier*, the courts do not imply the necessity of *proving* the alternative, but merely that the plaintiff may provide reasonable alternatives to present practices. *Dothard*, 433 U.S. 321, 329 (1977); *Albemarle*, 422 U.S. at 425; *deLaurier*, 588 F.2d at 676. In any event, the *Contreras* holding appears to be wrong. It is certainly not in the spirit of *Albemarle*. In addition, the defendant, not the plaintiff, is in the best position to test a less discriminatory alternative in the defendant's workplace. Thus, a burden of *persuasion* for the plaintiff, requiring her to prove the alternative by a fair preponderance of the evi-

lowed in *Blake*) tends to saddle plaintiff only with the burden of *production*, at least one case (*Contreras*) in the Ninth Circuit has held otherwise. The issue is still not clearly settled at this time.[100]

While it is unclear whether plaintiff has only the burden of production or the burden of persuasion, a showing can still be made of a less discriminatory alternative to the current method of employing on-camera personnel. Once all on-camera jobs are viewed as jobs per se, actual gender representation can be documented by adding up the number of jobs held by men and women. In the acting industry, the number of work days would be the best measure of work done because a job assignment can last from one day to two weeks or more.

A simple statistical survey of the employment of males versus females is easy to conduct and is basically a structural, as opposed to a content, issue. That is, looking at the number of women versus men hired goes to the form of the television programs in question, not their content. Thus, the remedy also involves a simple structural or formal solution. Requiring the networks to change content as a less discriminatory alternative would raise difficult (although not insuperable) first amendment considerations.[101] Therefore, a content-neutral, or formal, solution is preferable because it is more easily implemented and more likely to succeed.

Several less discriminatory alternatives are available to networks and studios. If most on-camera television roles are actually gender neutral, then discriminatory hiring practices can be circumvented by simply assigning the appropriate proportion of jobs to men and women, without regard to the particular job involved. In fact, all these jobs could be cast from a pool of applicants that included men and women. Alternatively, one can randomly assign the appropriate number (e.g., 44% to 51%) of roles to women, and cast them in that way. Thus, equal employment could be achieved through an alternative that is content neutral in that it does not investigate the way in which a story is written, a character is developed, or even a role is cast (e.g., old v. young, beautiful v. ugly, etc.). A given story may still have a character that is over sixty,

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dence, is excessive. A burden of *production* requiring only that plaintiff bring forward such evidence makes more sense.

100. Adding to the confusion is a Fifth Circuit case, Zuniga v. Kleberg County Hospital, 692 F.2d 986, 989 (5th Cir. 1982), which discusses "proving . . . pretext" by "showing that the employer could have used alternative practices to accomplish the same purpose without discriminatory effects." The court requires the plaintiff to *prove* pretext by "*showing*" a less discriminatory alternative, and thus appears to combine two different evidentiary standards: the burden of proof and the burden of production. Of course, the Fifth Circuit does not control in California.

101. *See infra* notes 137-156 and accompanying text.

crusty, and weathered-looking, or thirty-ish, attractive, and very efficient. The only change would be that the role would be played by a woman, not a man. Thus, this solution specifically addresses gender, and it does so because the gender classifications as currently structured have had an illegally discriminatory impact.

If the defendant can show, as a defense of business necessity, that some roles are gender specific, then only those few roles would not be subject to scrutiny. The occurrence of minor gender-specific roles beyond this established number would be suspect and should be proportionately assigned to men and women. Alternatively, whatever proportion of roles are found to be gender specific could be played by women, dressed and made up as men.

Another non-discriminatory alternative is to assume that all roles are gender specific (this could apply to major roles, for example) and simply to cast the appropriate number of female actors as male characters. This particular alternative presents no first amendment difficulties at all. With women playing men in appropriate numbers, the employment discrimination issue is completely addressed by eliminating all disparity as to employment. In addition, since the roles—their content, including gender of character—remain completely unchanged, there is no free speech issue. The character is presented to the public in exactly the way conceived by the writers and producers. The only difference is the undisclosed gender of the person doing the job (i.e., playing the role).

The proposed alternative hiring practices are easy to administer and monitor. The employer could decide which roles to assign to which gender. Roles could be randomly or purposefully assigned, depending on the preference of the employer. The only requirement would be for the resulting figures to achieve the appropriate proportion of gender representation. These alternatives are indeed less discriminatory than current discriminatory practices.

4. Benefits and limitations of a disparate impact suit for on-camera sex discrimination.

a. Indirect benefit on television's images of women.

An interesting additional benefit to the proposed less discriminatory alternatives is that they indirectly affect sex-role stereotyping. Sex-role stereotyping, along with underrepresentation of women, has been shown to have deleterious effects on the develop-

ment of young girls.[102] Without directly monitoring stereotyping, a positive effect can be achieved by simply equalizing women's representation on television, using the less discriminatory alternative of casting women in formerly "male" roles. Some of the current stereotyping is reflected in the simple choice of gender classification. Correction of the disparate impact upon women through structural, noncontent methods also corrects unconscious stereotyping and ameliorates, to some extent, sex-role stereotyping and its harmful effects. In fact, the mere underrepresentation of women on television has been seen as enhancing the sex-stereotyped effect.[103] By correcting underrepresentation, the stereotyping effect is lessened.

The effect of decreasing sex stereotyping is less direct if the nondiscriminatory alternative of women playing men in traditional male roles is adopted. It maintains the extant preponderance of male images and sex-role stereotyping. Ironically, it is because the alternative leaves this condition untouched that it creates no free speech problem. Nevertheless, that women are playing men would probably have some indirect effect on the viewer. When audiences realize the "man" they see is a "woman," the message that men and women are not as different as they appear is inescapable. Thus, a less direct but still powerful benefit is derived from this alternative—one that should, at least indirectly, lessen the harm of sex-role stereotyping.

In sum, a ruling requiring men and women to appear on television in proportionate numbers would be highly effective in reducing the currently harmful effects both of underrepresentation of women and also sex stereotyping. It is potentially easy to effect and probably raises few, if any, first amendment issues if carried out in a structure-based, content-neutral manner, with the employer as judge of who gets which part.

b. Limitations on the positive effect of the proposed disparate impact suit.

Both reassignment of men's roles to women and gender role reversal would distribute the existing roles between men and women more equitably. Because neither of these solutions directly addresses the content of the programs involved, negative images of women are not directly affected by these corrective measures.

If one remedial strategy is adopted (reassigning a certain per-

102. *See supra* notes 42-45 and accompanying text; *see also infra* notes 122-136 and accompanying text.

103. *See supra* text accompanying notes 42-45.

centage of men's roles to women), it could be effected in two ways. First, existing minor roles could be randomly assigned to the appropriate proportion of men and women without changing the characters or the lines they speak. This would overcome some of the negative images of women because women would be playing roles not specifically written for them. These roles would be less likely to cater to the unconscious female stereotypes of writers and producers. Thus, women could conceivably appear as truck drivers or top executives. In addition, their dialogue, although meager (since we are dealing with very minor roles), would not be specifically denigrating to women since it was not written with female stereotypes in mind. Therefore, it might tend to be more direct and forceful. These are steps in the right direction, but do not reach the problem of negative images of women in the roles that remain women's parts.

Second, if the appropriate number of roles are assigned to men and women but the employers change the scripts creating new minor women's roles which reflect the same negative images as in the past, virtually no change at all in negative images is effected by a successful disparate impact suit. In fact, although a favorable judgment would have the positive effect of an increased number of women, there might be a negative effect to seeing more women portrayed negatively.

If the other remedial strategy is adopted and women are assigned roles which they play dressed as men, no change in content would be effected at all. Negative images of women currently on television would continue unchanged. The only effect would be the knowledge that some of the "men" were really women—a fact that would tend to diverge from stereotypes. Nevertheless, this information is one step removed from the actual experience of viewing the programs as they unfold, and thus would tend to have less emotional impact on the viewer in terms of attitude development.[104]

Because a disparate impact suit for underrepresentation could right the wrong of underemployment of female actors, it has been explored at length in this article. Since it only minimally touches on other important problems of television's portrayal of women, other solutions are explored below. Specifically, this article documents the negative image of women on television and the learning of attitudes from television, particularly by children. This article also examines first amendment issues which arise when solutions

104. For a discussion of attitude learning based on television viewing, see *supra* notes 42-45 and accompanying text.

to negative gender portrayal involve changes in the content of televison shows.

III. The Negative Portrayal of Women on Television: First Amendment Considerations

A. Documentation of the Negative Portrayal of Women on Television

Defining what is negative about the portrayal of women on television has been the subject of an extensive series of psychological studies on television programming and commercials for children and adults.[105] Most of the studies in this area examine the behavior of male and female characters on television, and place these behaviors into various categories. For example, Sternglanz and Serbin analyzed characters in ten children's shows for gender, behavior, importance in the plot, and "goodness" or "badness."[106]

Males are significantly more aggressive, constructive, and helpful. In addition, there is a tendency for males to behave, or act, more often than did females.[107] In other words, both males and females might be physically present in a scene but females stand silent and inert while the males engage in some activity, verbal or otherwise, that could be scored as "behavior." In addition, there is a tendency for males to be rewarded for their behavior.[108]

In contrast, females are signficantly more deferential than males and are punished when they exhibit high levels of activity. There is also a tendency for female behavior to have *no* outcome.[109] Thus, a female character might actually do something but that action would have no impact whatsoever on her environment. It is clear that children's shows project images of men that are strong yet helpful, who are able to effect change in their environment. On the other hand, the image of women is that they are deferential and inactive, and have little impact on their environment.

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105. While any legal cause of action concerning the content of commercials would involve the producers of commercials (who are different from the producers of television programs), the research on commercials is included in this section because the psychological analysis is similar. Any legal action arising from the analysis, however, would be brought against the sponsors and also the networks who air the commercials. First amendment defenses that the sponsors or networks might raise would have less chance of success because commercial speech is less protected by the first amendment. *See supra* note 20 and accompanying text.

106. Sternglanz & Serbin, *supra* note 25, at 711; *see also supra* notes 25-26 and accompanying text.

107. Sternglanz & Serbin, *supra* note 25, at 713.

108. *Id.*

109. *Id.*

These images of women are not isolated occurrences, nor have they improved with time. In a series of studies on both children's and adults' commercials, researchers arrived at similar results.[110] For example, Knill, Pesch, Pursey, Gilpin and Peluff looked at adult commercials from 1970 to 1980 and found little change in the portrayal of women over the ten-year span.[111] Women are restricted to endorsing household and feminine care products and are overwhelmingly portrayed as housewives and mothers, in spite of the increase of women in the actual work force.[112]

These results hold true for adult programs as well.[113] For example, Harris and Voorhees[114] conducted a study on sex-role stereotyping on prime time television. After looking at 280 hours of ten-minute segments aired during 1977, they found that traditional sex-role stereotypes of men and women predominate. Men show little emotion and appear significantly more often in situations featuring work, cars, or sports.[115] Women dominate situations featuring home, romance, and physical appearance. The women are also significantly younger than the men; most women are between twenty and forty, whereas a significant number of men are over fifty.[116]

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110. *See supra* note 24. In Feldstein & Feldstein, *supra* note 24, at 586, a 1977 study of toy commercials indicated that girls are significantly more likely to appear in passive roles than boys. Although this difference in activity-passivity was less significant in 1978, the reduction in doll commercials and a greater absence of girls on camera may have accounted for the decrease in passive girls. Renate Welch, Althea Huston-Stein, John Wright, & Robert Plehal, *Subtle Sex-Role Cues in Children's Commercials*, J. Communications, Summer 1979, at 202 [hereinafter *Sex Role Cues*], selected male-targeted and female-targeted toy commercials from children's programs aired in 1977. These spots were analyzed for their formal features. Results indicated that "commercials directed at boys contained highly active toys, varied scenes, high rates of camera cuts, and high levels of sound effects and loud music." *Id.* at 207. Those directed at girls contained more fades and dissolves. In addition, neutral (unisex-targeted) commercials used for comparison contained mostly male narrators; any females present rarely spoke. Female dialogue was limited to female commercials. Researchers concluded that the stereotyped *formal* aspects of the commercials studied are likely to have a subtle effect that would enhance the obvious, stereotyped *content* aspects, and are more difficult to counteract because formal aspects are harder for the viewer to identify. *See id.* at 208. *See also Still Typecast*, *supra* note 24, at 487.

111. *Still Typecast*, *supra* note 24, at 498, 504.

112. *Id.*

113. *See, e.g.*, Mackey & Hess, *supra* note 27, at 208; Mary Harris & Sara Voorhees, *Sex-Role Stereotypes and Televised Models of Emotion*, 48 Psychological Rep. 826 (1981); Russell Weigel & James Loomis, *Televised Models of Female Achievement Revisited: Some Progress*, 11 J. Applied Soc. Psychology 58, 60 (1981); Dominick, *supra* note 1, at 410-11; Signorielli & Gerbner, *supra* note 1, at 9.

114. Harris & Voorhees, *supra* note 113, at 826.

115. *Id.*

116. *Id.*

In another interesting analysis, Weigel and Loomis[117] did a 1978 update of a 1972 study that had shown that marriage and employment were consistently portrayed as incompatible for women.[118] In other words, if women wanted to work, they would never marry. In 1978, some small improvement was noted: while few working women are likely to marry, if they do they are at least as likely to have successful marriages as either men or non-working women.[119]

Overall, it is certainly accurate to say that women are consistently portrayed on television in a negative manner, which essentially consists of a great deal of sex stereotyping of women. Women, when present, are weaker, less active, and have less impact on the world. They function only within the home or in relationships with men and are concerned with how they present themselves physically to men. If they work, they have few or no lasting sexual or romantic relationships. Also, they are only valuable to men when they are considerably younger, and become dispensible as they age. Men, on the other hand, while perhaps suffering from their portrayal as emotionless, are active in the world and certainly remain important as they age. These views are both traditional and negative from the women's point of view.

B. The Harmful Effect of the Negative Portrayal of Women on Television

Research indicates that people imitate the behavior of role models.[120] Because television plays such a significant part in today's society,[121] television characters have become role models for both children and adults.

A series of studies have examined the influence of television sex-roles on the behavior of child audiences. McGhee and Frueh addressed this issue, first in 1974 and later in 1980.[122] They explored the relationship between time spent watching television and the propensity of children, grades one through seven, to see men and women in stereotyped ways. They found heavy television watchers (twenty-five hours per week) had significantly more ster-

117. Weigel & Loomis, *supra* note 113, at 58.

118. *Id.* (citing A.L. Manes & P. Melnyk, *Televised Models of Female Achievement*, 4 J. Applied Soc. Psychology 365 (1974)).

119. *Id.* at 62, 63.

120. *See supra* note 42 and accompanying text.

121. *See supra* notes 15 & 43-44 and accompanying text.

122. Terry Frueh & Paul McGhee, *Traditional Sex Role Development and Amount of Time Spent Watching Television*, 11 Developmental Psychology 109 (1974) [hereinafter *Traditional Sex Role*]; McGhee & Frueh, *supra* note 44, at 179.

eotyped views of men and women than children who were light watchers (ten hours per week).[123] Thus, children watching less television show less tendency to sex stereotype. This indicates that children are either picking up sex-stereotyped attitudes from television or television is confirming the stereotyped attitudes of children. While stereotypical attitudes are probably due to influences other than television, those values are less reinforced by minimal television viewing.

While the McGhee and Frueh study shows the reinforcing effect of current television images on stereotyped attitudes, other studies have created television-like shows and commercials that are non-sex-role stereotyped, and compared the effects of this material with that currently available on television. These studies show that even a brief presentation of non-sex-stereotyped television material produces less sex-stereotyped attitudes in children.

For example, O'Bryant and Corder-Bolz studied sixty-seven male and female children aged five through ten from three ethnic groups. The children were shown cartoons interspersed with commercials showing women in both traditional and nontraditional jobs.[124] Children tested at the beginning and again at the end of the experiment indicated they learned whether or not to stereotype these occupations based on the role models they viewed.[125] Thus, those who saw women presented only in "traditional" occupations thought that women should hold only those traditional jobs. In contrast, those who saw commercials of women in nontraditional roles had an expanded notion of what kinds of jobs women should hold. Furthermore, girls changed their preferences for certain occupations based on the roles portrayed by women in the commercials.[126] This last finding validates the work of Kohlberg and Maccoby—that children learn more from same-sex role models.[127]

In another study by Davidson, Yasuna, and Tower,[128] actual

123. *Traditional Sex Role*, *supra* note 122, at 109; McGhee & Frueh, *supra* note 44, at 183.

124. Shirley O'Bryant & Charles Corder-Bolz, *The Effects of Television on Children's Stereotyping of Women's Work Roles*, 12 J. Vocational Behavior 233, 234-35 (1978). In the commercials, an announcer interviewed a woman working at her job site, asking her how she liked the fictitious drink "Zing" and how she liked her job. Traditional female jobs were telephone operator, fashion model, file clerk, and manicurist. Nontraditional jobs were pharmacist, welder, butcher, and laborer.

125. *Id.* at 243.

126. *Id.*

127. *See supra* note 45.

128. Emily Davidson, Amy Yasuna & Alan Tower, *The Effects of Television Cartoons on Sex-Role Stereotyping in Young Girls*, 50 Child Development 597 (1979).

network cartoons were rated as high-stereotyped, low-stereotyped, or neutral. These cartoons were shown to five- and six-year old girls who were then tested for their attitudes on sex-role stereotyping. The results indicated those girls who viewed the low-stereotyped programs were much less likely to stereotype women than the girls who viewed the high or neutral programs.[129] Other studies also show a very direct relationship between the attitudes television programs and commercials convey about women and the attitudes children have toward women's roles in society.[130]

In addition to television's effect on children's attitudes, studies have shown that television affects adults' attitudes as well. Ross, Anderson, and Wisocki[131] did the first study on sex-role stereotyping and television viewing behavior in adults. They found that those adults[132] who were most inclined to stereotype women also watched the most television.[133] While this study suggests that television creates and reinforces sex stereotypes, it may also indicate that those adults who see women in the most stereotypic ways also enjoy watching this depiction on television, and thus watch more frequently.

A more dispositive study was conducted by Jennings, Geis, and Brown.[134] In this very creative study, two matched series of commercials were presented to fifty-two female college students. One series contained replicas of actual network commercials depicting men and women in traditional sex roles. The other series contained the same commercials, only the sex roles were reversed.[135] Those women who saw the nontraditional versions showed more independent thinking (as measured on a test for con-

129. *Id.* at 599. Following the study, researchers hypothesized that the neutral program was not in fact neutral. This would account for the similarity in results between the neutral and highly stereotyped programs.

130. *See* Suzanne Pingree, *The Effects of Nonsexist Television Commercials and Perceptions of Reality on Children's Attitudes About Women*, 2 Psychology Women Q. 262 (1978); *cf.* Nancy Cobb, Judith Stevens-Long & Steven Goldstein, *The Influence of Televised Models on Toy Preference in Children*, 8 Sex Roles 1075 (1982) (after viewing commercials which sex-stereotyped toys, children of both sexes spent more time playing with toys identified as sex-appropriate).

131. Laurie Ross, David Anderson & Patricia Wisocki, *Television Viewing and Adult Sex-Role Attitudes*, 8 Sex Roles 589 (1982).

132. College students and elderly people were the subjects of this study. *Id.* at 590.

133. *Id.* at 591. Measures used were number of hours per week watched, and sex-stereotyped rating of those shows.

134. Joyce Jennings, Florence Geis & Virginia Brown, *Influence of Television Commercials on Women's Self-Confidence and Independent Judgment*, 38 J. Personality & Soc. Psychology 203 (1980).

135. In the foreign food commercial, for example, a distinguished looking woman extolled the virtues of the delicious vegetable dish her handsome husband had prepared for her. *Id.* at 205.

formity) and more self-confidence when making a public speech (scored by independent raters) than before the viewing.[136] It therefore appears that the presentation of non-sex-stereotyped behavior has a strong effect even on adult women presumably less impressionable than children.

It must be remembered that these studies document the effects of brief exposure only. Years of watching sex-stereotyping on television would strengthen and deepen sex-stereotyped attitudes. Also, changing firmly rooted attitudes is more difficult than strengthening previously held beliefs. Thus, the strong effect non-traditional images had on these women, both as children and adults, speaks to the strength of television as a shaper of attitudes. With their negative messages about women's subservience, lack of importance, and use as sexual objects, one can only guess how much damage stereotyped female images produce on a daily basis.

C. "Free Speech"

Given the overwhelming empirical evidence that women are negatively portrayed on television and are harmed thereby,[137] the question becomes why no corrective action has been taken. Certainly by the 1970's this information was generally known and agreed upon. Whenever anyone suggests taking action to address this harm to women, they are met with the argument that no matter what content appears on television the choice to put that content before the viewers is protected by the first amendment.[138] Thus, there could be no legally cognizable cause of action because the first amendment would always be a defense. Any law which might be established to regulate the content of television shows would be barred by the television programmers' first amendment right to free expression. That is, the first amendment protects the autonomy of those in charge of programming. Merely raising a first amendment defense is usually enough to silence dissent on the content of television programs. To understand the lack of progress in this area one must look at the way the first amendment has been used in the past.

The first amendment has been thought to protect "free speech." The question not explicitly addressed, however, is whose free speech does the first amendment protect? Television networks almost exclusively control the content of television programs. Some input comes from the major studios producing them.

136. *Id.* at 207.
137. *See supra* notes 105-136 and accompanying text.
138. Krattenmaker & Powe, *supra* note 20, at 1123.

This network control persists from the original idea for a story through the final casting and beyond.[139] Thus, the "speech" being protected as the content of television programs is the speech of the major networks and studios. Furthermore, studies on the content of television shows reveal that this "speech" represents a fairly unified view: one that is negative to women. This unified view of women admits of no dissent or counterviews because control over the medium through which this speech is presented is in the hands of the few.

1. Judicial limitations on free speech in broadcasting and films.

Absolute first amendment protection of television presentations, at least with regard to the news,[140] met with some difficulty at first. Initially, television and radio were regarded as "scarce" resources because the airwaves over which they could be transmitted were limited. These airwaves were regulated by the government under the "scarcity rationale."[141] Providing "equal access"

139. The content of television shows is controlled for the most part by the networks for whom programs are produced, and to a lesser extent by the major studios that produce them. Although the networks often protest publicly that they are simply purchasers of a product, in fact, the networks take almost total control, not only in selling the original idea, but through every step, including actively participating in every episode. Thus, a person, group, or studio, with an idea for any kind of television show, must contact the person at the network in charge of that type of show (e.g., movie, series, docudrama, etc.). The basic idea for the show is usually presented first, followed by a long series of meetings with various network executives, resulting in acceptance or rejection of the idea. The network then requests scripts or has them written by a writer of its own choice. Even when the network does not directly choose the writer, the writer must still be picked from a list of "acceptable writers" that the network generates for this purpose. All people involved in the production of television shows, including producers, directors, and major actors, are chosen from these lists. The more powerful studios have some level of control as well, but the network always has the ultimate approval. Even after a series becomes a hit and has been running for several years, a specific network executive is assigned to the show and attends all important meetings, including casting, and is often on the set during filming as well. The network is involved in, and has veto power over, every step in the process. Networks thus control the content of the programs they broadcast. Given that most television viewers watch the three major networks, these networks together control what most people watch. Confidential interview, *supra* note 18.

140. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). This case establishes that the broadcast media may not attack a citizen without giving her or him an opportunity to respond on the air. This affirms the importance of the "fairness doctrine" and the FCC's power to enforce it. The first amendment is not a defense against compliance with the fairness doctrine.

141. The right of access—the right of many voices to be heard—is an issue that until recently was given special consideration when the speech involved the broadcast media (television and radio). The courts' reasoning for this special consideration is that: (1) the broadcast media are qualitatively different from other forms of communication, and (2) access to broadcast media is physically limited (it is a

for dissident political views became the major concern in this era under the "fairness doctrine."[142]

The Federal Communications Commission (FCC) promulgated a set of rules under the Communications Act of 1934[143] controlling the granting and renewing of licenses to broadcast. Under these regulations, the landmark case, *Red Lion Broadcasting Co. v. FCC*,[144] held that a politically conservative radio station was obliged to give equal time to a liberal journalist whom it had maligned. In doing so, the Court rejected the station's first amendment right to transmit whatever it wished without restriction. Instead, the Court took the position that the journalist had a first amendment right to respond, especially to an attack over a scarce medium to which he otherwise did not have equal access.[145] Initially, then, the free speech of those controlling the airwaves was balanced against other considerations, including the right of persons who were attacked for their political views to respond. In *Red Lion*, however, content of programs per se was not at issue.

More recently, the FCC has begun deregulating the airwaves—first radio and then television[146]—under the theory that, due to new technology, the media are no longer scarce resources. The rationale for deregulation is that with the advent of cable television, satellite broadcasts, and other advances,[147] the scarcity rationale no longer applies. Despite new technology, however, the three major networks still control the vast majority of television programming and audiences.[148] The FCC's recent moves toward

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"scarce" resource). *See Red Lion*, 395 U.S. at 388. This "scarcity" rationale formed the basis for control by the Federal Communications Commission (FCC), which licenses radio and television stations throughout the United States. The FCC regulates licensing to prevent stations from broadcasting over one another, creating impossible interference problems. There are a limited number of spots available in any given area, and people can bid for these spots. In addition to controlling the initial licensing and subsequent renewal, the FCC is able to control problems in broadcasting through revocation of licenses where necessary.

142. *Red Lion*, 395 U.S. at 373-86.

143. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended 47 U.S.C. §§ 151-609 (1982)).

144. 395 U.S. at 367.

145. *Id.* at 378.

146. In recent years, the FCC trend has been toward deregulation. Such decisions as Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), where the court upheld the FCC's decision to abandon almost all of its regulations concerning radio broadcasting, lend support to this trend. The FCC then issued a Report and Order deregulating television as well. FCC Report and Order 293, 56 Rad. Reg. 2d (P & F) ¶ 1005 (Aug. 21, 1984).

147. New media services include cable television, subscription television, multipoint distribution systems, direct broadcast satellites and low power television.

148. *See* U.S. Comm'n on Civil Rights, Window Dressing on the Set: Women and Minorities on Television 57 (1977) [hereinafter Window Dressing].

deregulation mean that a wider application of *Red Lion* is not likely. One might hope that the FCC will intervene to allow women (or groups representing them) to respond to their biased portrayal by presenting an alternative view of themselves.[149]

In *FCC v. Pacifica Foundation*,[150] one of the few cases limiting broadcasters' first amendment rights, a radio station was prohibited from airing a program during the day which the Court thought unsuitable for children. In *Pacifica*, the Court prevented a very liberal, listener-supported radio station from airing a monologue by comedian George Carlin which included a large number of "filthy words."[151] The Court reasoned that because the broadcast media has a different and greater effect on audiences, and more importantly, on children, than does written material, it requires more careful surveillance. Interestingly, both these special considerations also apply to the negative portrayal of women on television. The television programs at issue are broadcast over a special medium (television) and very definitely affect children (especially girls) negatively. *Pacifica*, however, is the only case to date where the Supreme Court chose to limit broadcasters' first amendment rights *vis-a-vis* program content. Furthermore, *Pacifica* dealt only with identifiable, socially unacceptable words. It is therefore doubtful the Supreme Court would be interested in tackling the more complex problem of women's negative portrayal on television. Unfortunately, these portrayals are too often accepted by the public, the networks, and the judiciary, although harmful to at least the female half of the audience.

Another case strongly limiting media's first amendment rights does not deal with the broadcast media. Instead it deals with a child pornography film. In *New York v. Ferber*,[152] the

149. A typical example of the unresponsiveness of the FCC to community groups charging employment discrimination is Black Broadcasting Coalition v. FCC, 556 F.2d 59 (D.C. Cir. 1977), where, in spite of substantial discrimination, the FCC granted renewal without a hearing. The D.C. Circuit required the FCC to hold a hearing (although not necessarily to withhold renewal). For a thorough analysis of the FCC's record on licensing and discrimination in employment, see Window Dressing, *supra* note 148, at 741-85. For two successful court challenges to the FCC's unresponsiveness to racial-discriminatory programming, see Office of Communication at the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); *In re* Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975). For an unsuccessful court challenge for sex discrimination in programming, see National Organization for Women v. FCC, 555 F.2d 1002 (D.C. Cir. 1977).

150. 438 U.S. 726 (1978). A radio station of Pacifica Foundation brought this suit challenging the FCC's holding that the monologue it had aired was prohibited because it was indecent. The Supreme Court upheld the FCC's decision.

151. The "filthy words" monologue consisted of extensive use of the word "fuck," and other expletives. *See id.* at 751-55.

152. 458 U.S. 747 (1982). A bookstore proprietor was convicted for violation of a

Court held that a film showing two preadolescent boys masturbating was completely unprotected by the first amendment. The Court concluded that the film, and child pornography in general, is non-speech and thus not protected by the first amendment. This decision focused on the harm to the child actors, not the speech value of those who produced the film. This is the first time the rights of those who are most abused by pornography, that is, the actors themselves, have been recognized. The decision is potentially a landmark decision, although it is very unclear whether courts will use *Ferber* to limit what some see as abuses sanctioned by the predominant interpretation of the first amendment.[153]

Andrea Dworkin has observed that pornography silences women, and thus violates women's speech rights under the first amendment.[154] Unfortunately, the national fight against the extremely abusive and degrading portrayal of women in pornography has so far proved unsuccessful.[155] While criminalizing child pornography is laudable, it is doubtful that courts would extend *Ferber* to address the negative portrayal of women, even girls, on television; the damage done by sex stereotyping, though real, is subtle. If the *Ferber* analysis has not even been applied to adult pornography, which consists of blatantly negative images of women,[156] courts will not likely apply the analysis to the negative image of women on television.

Though some case law limits the first amendment rights of

New York statute prohibiting distribution of material depicting a sexual performance by a child. He had sold films of two boys masturbating. He challenged his conviction claiming that the statute violated the first amendment. The Supreme Court disagreed, and upheld his conviction. In this case, the Court held that child pornography will *not* be given first amendment protection because harm to children occurs in the *making* of the pornography, and thus it must be regulated without regard to its content. *Id.* at 758; see also discussion of *Pacifica*, *supra* notes 150-151 and accompanying text.

153. *See* Catharine MacKinnon, *Not a Moral Issue*, 2 Yale L. & Pol'y Rev. 321 (1984); Andrea Dworkin, Pornography: Men Possessing Women (1979).

154. Andrea Dworkin, *Silence Means Dissent*, Healthsharing Conference (Summer 1984) (on file with *Law & Inequality*).

155. To date, the anti-pornography ordinance written by Catharine A. MacKinnon and Andrea Dworkin has either passed locally and been overturned in the courts, or not passed at all. In Indianapolis, Indiana, it was passed in 1984 but was struck down by the district court as a first amendment violation. This decision was upheld by the Seventh Circuit in American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). *American Booksellers* was recently affirmed without oral argument. 106 S. Ct. 1172 (1986). In Minneapolis, Minnesota, it was passed by the city council in 1984, but was vetoed twice by the mayor. In Los Angeles, California, it was tabled by the county council in 1985. In Cambridge, Massachusetts, it was placed on the ballot as a referendum, and lost, receiving 44% of the vote.

156. It seems superfluous to point out pornography *is* the representation of women as sexual objects.

those who would harm or silence others with their speech, the law is sparse and probably could not be used effectively to challenge the content of current television programming.

2. Superiority of an employment discrimination suit to combat the negative portrayal of women on television.

Due to the existing problems of combating the negative portrayal of women on television, attacking the problem from an employment discrimination point of view appears to be the most successful strategy. Because it is incontrovertibly true that women are underrepresented on camera, employment discrimination is a viable attack. Though it is also true that women are portrayed negatively and are harmed by that portrayal, current law does not defend either audiences' rights to hear and see other, positive images or women's rights to respond with a positive portrayal of themselves. Also, current law for the most part does not prohibit speech that harms its audience. *Pacifica*[157] is an exception, but the FCC recently appears to be moving in the opposite direction.[158] *Ferber*,[159] of course, is not concerned with the harm to the audience but with the harm to the "speakers." Given the current state of the law, then, approaching the negative portrayal of women by attacking the employment discrimination against women promises the best result. If women actors succeed in bringing and winning a title VII discriminatory impact case, then they will make an important first step toward stopping the harm television programming causes women.

157. 438 U.S. 726 (1978).
158. *See supra* notes 146-149 and accompanying text.
159. 458 U.S. 747 (1982).