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REGULATING TARGET MARKETING AND OTHER RACE-BASED ADVERTISING PRACTICES

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Since the 1960s, a great deal of attention has been paid to eradicating discrimination in most sectors of U.S. society including education, housing, employment, and banking. In contrast, efforts to level the playing field in the marketplace have been largely neglected. Today, shoppers of all colors expect to be treated fairly in consumer transactions that often begin with advertising. Our laws promote equality and social justice, safeguard individual liberties, and prohibit some forms of discrimination. However, many of the messages we receive in advertising are inferentially racist: we absorb them and incorporate them into our own individual value systems without even noticing. As a result, our cultural communications system can undermine the values of our democracy if we are not vigilant in identifying and correcting behavior that is unfair to certain segments of our community.

This article examines the phenomenon of race-based targeted marketing as a contributing factor to the racial tension of our media age, and evaluates the role of government regulation in preventing the dissemination of racist messages through advertising. The article first looks at the evolution of "mass" marketing into today's standard use of targeted marketing techniques, and especially how those techniques can sometimes have racist effects. Next, we discuss both measurable and esoteric harms of cultural racism. Finally, we look at existing laws designed to regulate advertising generally and specific laws that reach discriminatory advertising for particular products and services. In particular, we analyze the Federal Trade Commission's existing authority to regulate unfairness in advertising as it might be used to prevent advertising with racist effects. Finally, we suggest guidelines for use by advertisers who affirmatively wish to avoid advertising practices that cause racist harms.

INTRODUCTION

> *"Lott's messy departure should . . . invite another of America's all too infrequent candid conversations about race, so that the white conscience pays more constructive attention to the black experience and erases a little more of the stain of slavery."*[1]

Nearly fifty years have passed since the Supreme Court declared that segregating Black schoolchildren "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[2] In those fifty years, much has changed—today, overt discrimination against citizens based on race is illegal not only for government agencies but also for employers and landlords and even in the marketplace.

Yet we can still see evidence of racism throughout American culture: the police beating of Black motorist Rodney King in 1991, the shooting death of Amadou Diallo by police in New York, the burning of mosques, synagogues, and Black churches, shootings at a Jewish cultural center in Los Angeles, the dragging death of James Byrd, Jr. in Texas, allegations of disenfranchisement of Black voters, racial profiling and the recent internment of thousands of Muslims and people of Arabic descent.

Yet racism is far more insidious than even these (mostly) overt incidents indicate. As our culture has increased in sophistication and diversity, racism is seldom explicitly verbalized.[3] More and more often, racism is the invisible thread of our American quilt. The recent fall of Senate Majority Leader Trent Lott illustrates this evolution of cultural racism. Lott was forced to resign as Majority Leader not because he made an overtly racist comment, but because he spoke favorably of a colleague's candidacy for the presidency—a candidacy that campaigned on an overtly racist platform. Lott's racism was not overt, but his failure to acknowledge the harms of past racism illuminated the way that our culture can overtly

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1. Robert Kuttner, *A candid conversation about race in America*, BOSTON GLOBE, Dec. 29, 2002, at A25.

2. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

3. In his article, *The Theory of Cultural Racism*, James M. Blaut wrote that "[n]owadays we seem to have a lot of racism but very few racists." Blaut's theory is that racism has not disappeared, it has simply evolved over time. He describes three stages of racism: *religious racism*, the dominant theory of the early nineteenth century, equated White people with Christianity and held non-Christian, non-White races to be inferior; *biological racism*, popular from 1850 through 1950, promoted a scientific view of White people as genetically superior; and *historical* or *cultural racism*, prevalent today, presents European culture as superior to other cultures. *See* James M. Blaut, *The Theory of Cultural Racism*, 23 ANTIPODE: A RADICAL JOURNAL OF GEOGRAPHY 289–299 (1992), *available at* http://mdcbowen.org/p2/rm/theory/blaut.htm.

denounce racism while failing to truly address the often subconscious level of racism.

One social commentator refers to racism that is not overt as "inferential" racism.[4] Inferential racism can be described as:

> those apparently naturalized representations of events and situations relating to race, whether "factual" or "fictional," which have racist premises [sic] and propositions inscribed in them as a set of *unquestioned assumptions.* These enable racist statements to be formulated without ever bringing into awareness the racist predicates on which the statements are grounded.[5]

This is exactly the type of statement made by Senator Lott.

Inferential racism and subtle discrimination is not limited to politics, of course. If we look closely, we can find examples throughout our culture. In the marketplace, minority customers are now filing lawsuits against merchants for discrimination and harassment based on race. In October 1997, the Department of Justice began investigating Avis following allegations that the car rental company denied rentals to Black customers.[6] In April 2002, the NAACP filed suit against Cracker Barrel Old Country Restaurants for widespread, institutionalized discrimination against patrons of color.[7]

In the mass media, unflattering stereotypes of minorities are reinforced and perpetuated. For example, Black female movie characters are depicted as violent and use vulgar profanity at rates significantly higher than White female movie characters.[8] In a sample of local television news programs, mug shots of crime suspects were four times more likely to be shown if the suspects were Black than if they were White.[9] A 1994 survey of prime time news advertising found that, when a

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4. Stuart Hall, *The Whites of Their Eyes: Racist Ideologies and the Media, in* GENDER, RACE AND CLASS IN MEDIA 20 (Gail Dines & Jean M. Humez eds., 1995).

5. *Id. See also* Barbara Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 989 (1993), where a similar explanation is advanced. "Psychoanalytic theory posits that individuals respond to conflicts between social norms that condemn racist attitudes and beliefs and their own racist ideas by excluding the latter from conscious recognition. Thus, norms that label only conscious discrimination as blameworthy may be counter-productive, as they may operate primarily to perpetuate racist attitudes in a relatively intractable form." *Id.* (internal citations omitted).

6. Lisa Miller, *Justice Department Probes Allegation that Avis Practices Discrimination*, WALL ST. J., Oct. 17, 1997, at B6.

7. NAACP v. Cracker Barrel Old Country Stores, Inc., No. 4:01-CV-325-HLM (N.D.Ga. filed on Apr. 11, 2002), Final Amend. Compl., at ¶¶ 121–128.

8. *See* ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA (2000), *available at* http://www.raceandmedia.com.

9. *Id.*

commercial represented only one race, that race was White nearly 100% of the time.[10] If this is media for the masses, then clearly the masses are White.

In advertising where media meets the marketplace, racist attitudes are no less evident and affect both minority businesses and minority consumers. The real estate and banking industries provide examples of the strong connection between inferential racism and discriminatory practice. The failure of these two industries to adequately serve minority populations is well-documented. This discrimination has resulted in the passage of federal laws to combat these practices, especially "redlining".[11] Despite these laws, the practice of "steering" customers to neighborhoods based on their race is still a problem and has now begun to surface on the newest advertising medium, the Internet. For example, the Association of Community Organizations for Reform Now (ACORN) recently accused Wells Fargo Home Mortgage of perpetuating racial segregation through racial classifications on its website.[12] Wells Fargo responded by disabling the site's "Community Search Service," which said, among other things, that "residents in its 'low-income' lifestyle category are 89 percent Black and rank high 'for using pest control services.'"[13] In another case, a now defunct online company was accused of racial redlining when it failed to serve predominantly Black neighborhoods.[14]

Minority media are also disproportionately impacted by cultural racism. According to a study conducted by the Civil Rights Forum and released by the Federal Communications Commission in January 1999, ninety-one percent of respondent urban radio stations had encountered "no Urban/Spanish dictates" while trying to sell advertising air time—meaning that advertisers directed that their ads not be placed on urban (i.e. minority) radio stations.[15] These urban broadcasters also reported that

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10. *Id.*

11. Redlining is a pattern of discrimination in which financial institutions refuse to make mortgage loans, regardless of the applicant's credit record, on properties in specified areas. At one time, lenders actually outlined these areas with a red pencil. BLACK'S LAW DICTIONARY (7th Edition 1999). In a recent example, Mid America Bank settled a lawsuit charging that the savings and loan institution failed to provide products and services in predominantly Black and Hispanic neighborhoods. *See Mid America Bank Settles Redlining Suit*, January 3, 2003, *at* http://www.diversityinc.com/public/4156.cfm. Redlining violates the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3612 (1997). For additional discussion regarding the Fair Housing Act, the Community Reinvestment Act of 1978, 12 U.S.C. § 30 (2002), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2002), *see infra* Part III.

12. Ronna Abramson, *Wells Fargo Accused of Online Redlining*, INDUSTRY STANDARD, June 22, 2000, *available at* http://www.thestandard.com/article/display/0,1151,16296, 00.html.

13. *Id.*

14. *See* Lake v. Kozmo.com, Inc., No. 00-CV-815 (D.D.C. 2000).

15. "Urban is a radio music format targeted to predominantly Black audiences." CIVIL RIGHTS FORUM ON COMMUNICATION POLICY, WHEN BEING NO. 1 IS NOT ENOUGH: THE

sixty-one percent of their advertising was sold at a "minority discount," meaning that advertisers paid lower rates to minority-formatted stations than to general-formatted stations with comparable demographics.[16] They estimated that these two practices reduced their revenues by an average of sixty-five percent.[17]

Anecdotal evidence collected during this study strongly suggests that these discriminatory business practices are motivated not by an objective analysis of the marketplace, but by racist attitudes and stereotypes. The study cites BMW's refusal to place advertising with urban formatted stations in the metro New York area, despite research showing that forty-six percent of adults owning or leasing BMWs in the New York metropolitan area were Black.[18] Other stereotypes include outright false generalizations such as "Black people don't eat beef" or "Black people don't eat mayonnaise."[19] In addition, several respondents reported that people were concerned that if Blacks or Hispanics frequented their stores or used their products, it might negatively impact the number of White customers.[20] Some advertisers stated that they were afraid that petty theft would increase in their stores if they targeted their ads to Black or Hispanic consumers.[21]

At the same time, minority exposure to the media and advertising tends to be higher than that of the general population. In 1997, the average adult listened to the radio 22.5 hours per week, while the average Hispanic adult listened 24.45 hours per week and the average Black adult listened for 25.5 hours.[22] During that same year, televisions were on an average of 50.24 hours per week in the average American household; in Hispanic households the average figure was 56.17 hours per week, while Black households had the television going for more than 69 hours each week.[23] For minorities, this translates into a staggering amount of exposure to advertising messages. Advertising, particularly on television, may especially impact children although no current data exist to support this

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IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS 13 n.4 (1999), *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/ [hereinafter CIVIL RIGHTS FORUM].

16. *Id.*

17. *Id.*

18. *Id.* at 12.

19. FEDERAL COMMUNICATIONS COMMISSION, BRIEFING NOTES ON ADVERTISING STUDY 4–6 (1998), *available at* www.fcc.gov (on file with the Michigan Journal of Race & Law).

20. *Id.*

21. CIVIL RIGHTS FORUM, *supra* note 15, at 3–4.

22. *Id.* Sixty minutes of the average American adult's day were spent reading, watching, or listening to advertising. In 1997 alone, $13.4 billion was spent on radio advertising, $44.5 billion on television advertising, $41.6 billion on newspaper ads, and $9.8 billion on magazine advertising. *Id.*

23. *Id.*

contention.[24] In 1985, the average child between the ages of 2 and 11 watched an average of four hours of television each day—1/5 of which was spent viewing advertisements.[25] By high school graduation, the average child has spent 10,000–15,000 hours watching television, compared to only 11,000 hours in schoolroom instruction. The recent high school graduate has seen over 200,000 commercials on television alone.[26]

At its best, advertising provides consumers with information that can assist them in making purchasing decisions. At its worst, advertising reinforces and perpetuates racism, classism, sexism, homophobia and a host of other harms. The ubiquitous nature of advertising-supported media means that advertisers do not simply promote their products, but they also participate in the shaping of American values. But what values do they shape?

Recognizing the significant role that advertising plays in American life, this article examines the phenomenon of race-based targeted marketing as a contributing factor to the racial tension of our media age and evaluates the role of government regulation in preventing the dissemination of racist messages through advertising. In Part I, the article first looks at the evolution of "mass" marketing into today's standard use of targeted marketing techniques, and especially how those techniques can sometimes have racist effects. In Part II, the article discusses both measurable and esoteric harms of cultural racism. Part III examines existing laws designed to regulate advertising generally and specific laws that reach discriminatory advertising for particular products and services. Part IV specifically analyzes the Federal Trade Commission's existing authority to regulate unfairness in advertising as it might be used to prevent advertising with racist effects. Finally, recognizing the difficulty of governmental intervention in the marketplace, this article suggests guidelines for use by advertisers who affirmatively wish to avoid advertising practices that cause racist harms.

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24. The impact of television advertising may be greater on Black children than it is on White children. A twenty-five year-old study suggested that fifty-six percent of Black children had no understanding of the sales intent of advertising compared to an earlier study of White children where eighty-five percent had at least a minimal understanding. The authors concluded: "... without the ability to understand the manipulative and biased approach taken by advertisers, millions of younger black children may well be vulnerable to the influence of commercials ... [T]hese same black children watch so much more TV and so many more commercials, far more than their White counterparts." Timothy P. Meyer, Thomas R. Donohue & Lucy L. Henlke, *How Black Children See TV Commercials*, 18 J. ADVERTISING RES. 51, 57 (1978). Since then, this study has been discredited to a certain extent because the samples used were not entirely comparable: the White children involved in the study were from suburban homes whereas the Black children were from the inner-city. The differences in socio-economic background did not provide a fair comparison.

25. D. Kunkel & B. Watkins, *Evolution of Children's Television Regulatory Policy*, 31 J. BROADCASTING & ELECTRONIC MEDIA 367 (1987).

26. Children's Television Act of 1990, H. Rep. No. 101-385, at 5 (1989).

I. TARGET MARKETING: RATIONAL ECONOMICS OR SUBVERSIVE RACISM?

In the early years of print and broadcast media, the media itself—and consequently, its advertisers—attempted to reach a broad audience of readers, listeners, and viewers. Advertisers marketed "for the masses," rather than specifically targeting narrow, racially and socio-economically defined segments of consumers.[27] However, recent decades have seen an explosion of media outlets and a decline of mass media such as general interest magazines (e.g., Saturday Evening Post, Life) and broad-based television networks. The rise of increasingly more focused media (e.g., magazines such as *Ebony* and *Latina* and cable television networks such as Black Entertainment Television) has led to new capabilities for advertisers to target narrow demographic populations. Called "target marketing,"[28] this ability to target specific, definable consumer groups through "market segmentation,"[29] is the backbone of marketing theory today.[30] As the numbers and economic clout of Black, Latino, and Asian-American consumers increase, marketers are likely to continue to tailor their advertising to each market segment.[31]

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27. RICHARD S. TEDLOW, NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA (1990).

28. Philip Kotler, Marketing Management 262 (7th ed. 1991).

Target marketing is undertaken as follows: the first step is target segmentation during which the entire market is subdivided into discrete groups of buyers; the second step involves evaluating each market segment to determine its potential and selecting one or more to penetrate; and the third step requires an advertiser to develop a marketing mix to appeal to those market segments. *See* P.R. Dickson & J.L. Ginter, *Market Segmentation, Product Differentiation, and Marketing Strategy*, 51 J. MARKETING 3 (Apr. 1987); *see also* PHILLIP KOTLER & GARY ARMSTRONG, MARKETING: AN INTRODUCTION 202–03 (1990).

29. Market segmentation is defined as the process of dividing the market into homogenous segments and developing unique marketing programs for individual target segments. P.N. Bloom & W.D. Novelli, *Problems and Challenges in Social Marketing*, 45 J. MARKETING 79 (1981).

30. LESTER TUROW, BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD (1997). *Cf.* N. Craig Smith & John A. Quelch, *Ethical Issues in Researching and Targeting Consumers*, *in* ETHICS IN MARKETING 145 (N. Craig Smith & John A. Quelch eds., 1993)

31. The Selig Center reports that White consumer market share is expected to decline from 87.4% in 1990 to 80.1% in 2007 while African American market share should rise from 7.4% in 1990 to 8.6% in 2007, Latino market share should increase from 5.2% in 1990 to 9.4% in 2007, and Asian American market share should grow from 2.7% to 4.7% between 1990 to 2007. Jeffrey M. Humphreys, *The Multicultural Economy 2002: Minority Buying Power in the New Century*, 62 GA. BUS. & ECON. CONDITIONS 1 (2nd Quarter, 2002), *available at* http://www.selig.uga.edu/forecast/GBEC/GBEC022Q.pdf; *see also* M. HALTER, SHOPPING FOR IDENTITY: THE MARKETING OF ETHNICITY (2000) (discussing the effects of the 2000 census on markets).

A. *Target Marketing: A Rational Economic Approach to Advertising*

According to marketing theorists, today's effective marketing plan must comprehend its target market both demographically (age, race, gender, etc.) and psycho-graphically (lifestyle, penchant for adventure, openness to advertising, etc.). This approach allows for delivery of a customized, effective message without the increased expense of reaching uninterested consumers.[32] For example, a cosmetics company might expect its advertising to have more impact when placed in a magazine geared for women, such as *Vogue* or *Cosmopolitan*, than if it placed the same ad in a publication with a broader readership, such as *Time Magazine*. A perfume company might advertise in both forums, but design an ad targeted to women differently than an ad placed in a magazine with a primarily male readership. In another example, a manufacturer whose pick-up truck is popular with farmers might design an ad intended to attract urban buyers, thus increasing the market for its product.

In theory, target marketing does two important things: it allows advertisers to reach the population most likely to buy their products and it allows advertisers to design marketing campaigns that will appeal to the population they want to reach. However, targeting specific groups of customers also allows marketers to decide to convey certain information to certain demographic markets. When an advertiser holds stated or unstated beliefs about a target group, the result may be a failure to advertise products or a discriminatory approach in its marketing to those groups. In this way, the segmentation of markets contributes to the segmentation of society.[33]

Target marketing is not bad in and of itself because it allows companies to market their products more efficiently. Yet advertising can be a double-edged sword because the use of demographic data in any marketing plan is affected by the advertiser's own experiences and culture. This article addresses race-based advertising practices influenced by racist stereotypes and attitudes, particularly those practices that perpetuate cultural racism and/or result in significant harms to groups defined by race. Other categories, such as gender or age, could be analyzed in a similar fashion, but are outside the scope of this article.

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32. In his book entitled *American Skin: Pop Culture, Big Business and the End of White America*, however, Leon E. Wynter argues that the current target marketing model may now be giving way to a new one "where ethnic difference does not divide but actually brings diverse constituencies together." LEON E. WYNTER, AMERICAN SKIN: POP CULTURE, BIG BUSINESS AND THE END OF WHITE AMERICA (2002). Using Budweiser's "whassup?" ad as an illustration of this post-racial marketplace, Rob Walker argues that "today's commercial culture is less concerned with how explicit racial identities will be received, and more open to letting audiences sort out just how much such questions even matter in the first place." Rob Walker, "*Whassup Barbie?*" BOSTON GLOBE, Jan. 12, 2003, at D1.

33. *See* TUROW, *supra* note 30.

B. *Targeting the Masses: Who Gets the Message?*

Advertisements intended to appeal to the masses commonly reflect an unspoken assumption that the "masses" are White. Indeed, the absence of ethnic minorities is perhaps the most common form of inferential racism in mass advertising. When minorities are not represented, mass culture remains "White"—literally excluding significant numbers of consumers.[34]

Early ads acknowledging that some members of the masses are not White relied on stereotypes familiar to Whites: for example, the images of Aunt Jemima pancakes or the "sneaky" Frito Bandito.[35] In the early 1960s, Blacks appeared in only five percent of television commercials, primarily in unimportant or subservient roles. By 1969, the proportion of appearances by Black actors increased to eleven percent.[36] Twenty years later, twenty-six percent of all television advertising using live actors integrated Blacks, and Blacks appeared alone in eleven percent of all television ads, a figure approximating their representation in the U.S. population. Despite the overall improvement, Blacks appeared principally in large groups and played a dominant role in only eight percent of the ads, well below the proportion of Blacks in the U.S. population and their television viewing time.[37]

Statistical data from the early 1990s indicate that racial and ethnic minorities were still underrepresented in some advertisements and that in some instances, ads including people of color depict them stereotypically. For example, Black Americans are often portrayed as athletes, inner-city residents, or in positions of inferiority.[38] While the use of these stereotyped

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34. According to the United States 2000 Census, at least 25% of Americans are non-Whites. *See* U.S. Census Bureau, Census 2000 Summary File 1, Matrices P3, P4, PCT4, PCT5, PCT8, and PCT11, *available at* http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF1_U_QTP3_geo_id=01000US.html.

35. Lisa Romero & J. Barlow LeVold, *Why is Advertising Important?*, *at* http://door.library.uiuc.edu/adexhibit//racism.htm (last visited May 7, 2003).

36. *See* J. Dominick & B. Greenberg, *Three Seasons of Blacks on Television*, 26 J. ADVERTISING RES. 160 (1970); *see also* H. Kassarjian, *The Negro and American Advertising, 1946–65*, 6 J. MARKETING RES. 29 (1969).

37. Robert E. Wilkes & Humberto Valencia, *Hispanics and Blacks in Television Commercials*, 18 J. ADVERTISING 19, 20, 23 (1989).

38. J. Cristor, R. Lee & M. Hunt, *Race and Ideology: African American Images in Television Advertising*, 14 J. PUB. POL'Y & MARKETING 48, 50 (1995) ("Although contemporary advertisements arguably portray African Americans in a wider variety of roles than has historically been done, and although many negative and demeaning stereotypical portrayals of African Americans (e.g., servants, maids, porters) have largely disappeared, portrayals of African Americans remain narrow and stereotypical. One of the most common contemporary stereotypes is that of the African American athlete."). *See also* Charles R. Taylor, Ju Yung Lee & Barbara Stern, *Portrayals of African, Hispanic, and Asian Americans in Magazine Advertising*, 38 AM. BEHAVIORAL SCIENTIST 608, 619 (1995).

images is not always wrong per se, it can become harmful when used to the exclusion of other portrayals.

When Black actors were included in advertisements, they were generally in large groups or playing minor roles.[39] A study of 1992–1993 national magazine ads found Blacks portrayed in eleven percent of all ads, but in a minor or background role in over sixty percent of those ads.[40]

Similarly, less than five percent of the ads in the study included Hispanic Americans and most of those were in minor or supporting roles.[41] Other studies confirm these results. In 1983, Czepiec and Kelly examined 234 advertisements with human models and found only three Hispanic models.[42] On television, Hispanics were found in six percent of TV commercials, but mostly in background roles or as members of large groups.[43] They are also stereotypically portrayed in family settings.[44]

Asian Americans, who comprised 3.6% percent of the U.S. population, were represented by less than one percent of ad models.[45] Two recent studies found Asian Americans to be over-represented in magazine advertising at four percent of all ads and 8.4% of all television ads. Furthermore, unlike African Americans and Hispanics, Asian Americans were shown in a major role in half of the advertisements in which they were included.[46] Despite this higher level of representation, the studies concluded that Asian Americans were portrayed in a stereotypical fashion. They were typically shown in business settings or with high technology products and seldom depicted in the home or in family or social settings.[47] Asian

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"[African Americans'] greater representation in non-technical product advertisements also confirms the stereotype of a poorly educated group. In failing to show African Americans using complex and scientifically advanced products, the implication is that they either do not understand or are not interested in learning about this product type." This same issue has been highlighted in the debate about the portrayal of women in advertising. *See* David M. Axelrod, *Ring Around The Collar-Chain Around Her Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising*, 28 HASTINGS L.J. 149 (1977).

39. Wilkes & Valencia, *supra* note 37, at 20, 24–25.

40. Charles R. Taylor & Ju Yung Lee, *Not in Vogue: Portrayals of Asian Americans in Magazine Advertising*, 13 J. PUB. POL'Y & MARKETING 239, 242 (1994).

41. *Id.*

42. H. Czepiec & J. Kelly, *Analyzing Hispanic Roles in Advertising: a Portrait of an Emerging Subculture, in* CURRENT ISSUES & RES. IN ADVERTISING (J. Leigh & C. Martin eds., 1983).

43. Wilkes & Valencia, *supra* note 37, at 22.

44. Taylor et al., *supra* note 38, at 619.

45. Pat Guy, *Study Says Ads Overlook Minorities*, USA TODAY, July 24, 1991, at B1.

46. Taylor & Lee, *supra* note 40, at 242; *see also* Charles R. Taylor & Barbara Stern, *Asian Americans Television Advertising and the "Model Minority" Stereotype*, 26 J. ADVERTISING 47, 53 (Summer 1997).

47. Taylor & Lee, *supra* note 40, at 244; *see also*, Taylor et al., *supra* note 38, at 619 (contrasting the "all work, no play" stereotype of Asians with the stereotype of Asian Americans as family-oriented); Taylor & Stern, *supra* note 46, at 57. Taylor and Stern present findings that Asians are most often depicted in business settings and rarely, even with Asian women, depicted in family settings. They also note that the lack of portrayal in family and social

Americans were the minorities most often depicted anonymously in the background of television advertising.[48]

The trend for better representation of minorities in network television advertising may actually be due to the fact that target marketing has increased advertiser awareness that minorities are part of the "mass" consumer market. Despite increased opportunities for target marketing, network television is one of the remaining media with broad appeal for mass—rather than segmented—marketing. In a review of race-based advertising practices in magazines and television covering the period from the dawn of broadcast television through the dawn of cable, three researchers noted:

> In some respects, the difference found between media may simply reflect differences in targeting. Television in the 1980s remains a mass medium. Alternatively, the magazine industry has become increasingly segmented. As this fractionalization of magazine readers takes place, some publishers may feel that they have relatively few black readers. At the same time, advertisers who wish to reach black readers can utilize numerous vehicles (e.g., *Ebony, Jet*) specifically targeted to the black consumer market.[49]

As cable, satellite, and high definition TV continue to bring more specialized channels, it is unclear whether "mass" marketing will remain a viable marketing strategy. It is certainly possible that network television advertising will emulate more specialized magazine advertising and that minority representation will decrease on so-called "mass" media. In a sense, this scenario is simply a return to the early days of media, when "mass marketing" in "general interest" media could more accurately have been defined as target marketing to Whites.

The difference today is that minority audiences have access to programming and advertising geared directly toward their demographic groups. The problem is that by defining a market that targets Whites as a "mass market," minorities are relegated by their absence to second-class status—or worse, to no status at all. The "average" American is still White and cultural racism is reinforced.

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situations sends a false message and one that "may contribute to a misunderstanding of Eastern cultures, in which family identity is a long standing tradition." *Id.*

48. Taylor & Stern, *supra* note 46, at 54, 58.

49. George M. Zinkham, William J. Qualls, & Abhijit Biswas, *The Use of Blacks in Magazine and Television Advertising: 1946–1986*, 67 JOURNALISM Q. 547, 552–53 (1990).

C. *Targeting Minorities: What is the Message?*

Merchants today use advertising to deliver subtle messages to consumers along with and sometimes, instead of, information about the attributes of products and services. Television advertising in particular plays an integral part in shaping U.S. culture with moving pictures that consumers may perceive only subconsciously.[50] The ability to broadcast controversy instantaneously across America has even caused the advertising community to question its role in fueling the country's racial tensions.[51]

Racist messages are conveyed through the media in four basic ways:(1) through explicit racism, (2) by the use of stereotypical images, (3) through ill-advised race-based advertising practices, and (4) by the targeted marketing of certain harmful products designed specifically for sale to minority communities.

1. Explicit Racism

Prior to the abolition of slavery, print media was heavily supported by ads for the sale or recovery of runaway slaves.[52] Although slavery ended with the passage of the Thirteenth Amendment, explicitly racist advertising continued. In post-emancipation American society, the most obvious type of racist advertisement was easily identified: "This (product or service) is for Whites only" or "This will not be sold to non-Whites." Such overtly discriminatory advertising against racial minorities is admittedly rare today and perhaps non-existent in national advertising. Most Americans would find such explicitly discriminatory advertising offensive.[53] Personal dating advertising is a notable exception. An informal survey of such ads found that half of all advertisers explicitly indicate the race of the date being sought.[54] Perhaps because the public distinguishes ads for romantic liaisons involving personal choices about intimate

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50. *See e.g.*, Herbert Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 PUB. OPINION Q. 349 (1965). For example, a national advertising campaign attempted to convey an image of racial harmony among Texaco's purportedly diverse workforce after the company had settled employment race discrimination claims for a record $176 million. Dottie Enrico, *Texaco Launches Diversity Ads Following Prior Lawsuit*, USA TODAY, Aug. 29, 1997, at 3B.

51. Adrienne Ward, *What role do ads play in racial tension?* ADVERTISING AGE, Aug. 10, 1992, at 1.

52. Jane Rhodes, *The Visibility of Race and Media History*, *in* GENDER, RACE AND CLASS IN MEDIA 35 (Gail Dines & Jean M. Humez eds., 1995).

53. David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902–15 (1993) (stating that overt discrimination "has lost all social acceptance").

54. Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 878 (1994).

partners from impersonal business transactions, Americans accept the racially exclusionary ad that announces: "Single White male seeks single White female."

Still overt racism is not entirely a historical artifact. The Walt Disney Company recently settled for $1.5 million a lawsuit brought by Rev. Jesse Jackson against one of Disney's radio stations that was giving away "Black Hoes" as joke prizes. The phrase "Black Hoe" satirized a slang pronunciation of "Black whore."[55] Similarly, Goodyear ran an ad in Peru portraying what was intended to be a humorous comparison between tires and a Black man's lips. When this ad was shown in the U.S. during a broadcast special on racist advertising, Goodyear apologized to Black groups for its insensitivity, claiming that as soon as senior management learned of the ad, it was canceled.[56]

2. Stereotypical Images

While explicit racial discrimination is rare in commercial advertising, implied or inferential racial messages are not. The most offensive contribution of advertising to racial tension may be advertisements that contain insulting racial stereotypes.[57] A prime example is the long running controversy regarding Crazy Horse Malt Liquor, which reportedly was targeted not toward Native Americans, but toward those who love the "Old West." Native Americans viewed these forty ounce bottles of high-powered malt liquor as an "insult bordering on blasphemy" against the great leader of the Oglala Sioux who reputedly spoke out against drinking liquor.[58] This dispute was recently settled with an apology and the exchange of ceremonial gifts.[59] Native Americans have also protested against such stereotypical marketing practices as "Indian Joe's Smoke Shop" and an Air Canada advertisement called "Sitting Comfortbull"

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55. *Survey—Creative Business—Racial Stereotyping in Advertising*, FIN. TIMES, July 17, 2001.

56. *Goodyear Tire Apologizes to Black Groups for TV Ad*, WALL ST. J., Dec. 18, 1997, at B10.

57. Marketers Bristor and Lee found that African Americans are typically portrayed in stereotypical or negative roles in advertising. J.M. Bristor & R.G. Lee, *Race and Ideology: African American Images in Television Advertising*, 14(1) J. PUB. POL'Y & MARKETING 48 (1995). For an encyclopedic review of pictorial stereotypes, *see* IMAGES THAT INJURE: PICTORIAL STEREOTYPES IN THE MEDIA (Paul M. Lester ed., 1996); *see also* Sonya A. Grier & Anne M. Brumbaugh, *Noticing Cultural Differences: Ad Meanings created by Target and Non-Target Markets*, 28 J. ADVERTISING 79 (1999) (positing that the use of ethnic target marketing strategies have come under scrutiny in part because of perpetuated stereotypes).

58. Michael A. Fletcher, *Crazy Horse Again Sounds Battle Cry*, WASH. POST, Feb. 18, 1997, at A3; *see also Crazy Horse Spirit or Spirits*, NAT'L L.J., Dec. 1, 1997 at 4 (one case is currently pending in Rosebud Reservation tribal court in South Dakota).

59. Associated Press, *Brewery Settles Crazy Horse Beverage Suit*, N.Y. TIMES, Apr. 27, 2001, at A14.

featuring an overweight White man sitting in an executive class seat ahead of an Indian chief in ceremonial clothing holding a spear.[60] Other stereotypical images, such as the Frito Bandito, a caricature of Mexicans, and Aunt Jemima, an image of the "mammy" slave associated with Black women, have been criticized and withdrawn or modified.[61]

3. Race-Based Advertising Practices

As noted above, target marketing that seeks to reach minority consumers is not inherently bad and can often have positive results. Advertisers may create commercials that feature people of color speaking slang, a language other than English, or that feature other ethnic cues such as rap music, a Swahili brand name, or pictures of cultural artifacts. A 1997 study shows that Black Americans who have a strong cultural identity vividly remember such advertising and evaluate it more favorably than advertising without ethnic cues.[62] However, these types of race-based advertising practices can create negative results when harmful products, such as cigarettes or alcohol, are marketed more heavily toward minority consumers than toward the general population.

In marketing literature, discussion of racial targeting generally focuses on unhealthy products and product harms. One survey found that most people believe targeting is unethical if it concerns harmful products or vulnerable audiences.[63] Yet it is unclear whether race-based target marketing has caused greater consumption of harmful products, or whether Black Americans' heavy use of such products has caused target marketing.[64] Defenders of target marketing to adults note that suggestions that

60. Ann Merrill, *Indian Community is Upset over Smoke Shops' Motif*, STAR TRIBUNE, June 12, 1996, at 1A. Similarly, the "Redskins," Washington's football team name, is considered offensive because it refers to the American colonists' practice of killing Native Americans and turning in their "redskins" and scalps for a reward from the US government. The caricature stereotype face logo and the stereotyped words to the original Redskins fight song (e.g., "we want heap more") also are offensive. Bruce C. Kelber, *"Scalping the Redskins:" Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform*, 17 HAMLINE L. REV. 533, 537, 550, and 578 (1994)

61. *See also* CAROL MOOG, ARE THEY SELLING HER LIPS: ADVERTISING AND IDENTITY 207–08 (William Morrow & Co. 1990).

62. William J. Qualls, Jerome D. Williams & Jacqueline A. Williams, *Racial Exclusiveness versus Racial Inclusiveness: The Effects of Target Marketing, abstracted in* 1997 MARKETING & PUBLIC POLICY PROCEEDINGS 13 (Easwar Iyer & George R. Milne eds., 1997).

63. Craig Smith & Elizabeth Cooper-Martin, *Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability*, 61 J. MARKETING 1, 15–16 (July 1997).

64. *See infra* Part III. The dissenting opinion in Brown v. Philip Morris, Inc., 250 F.3d 789 (3rd Cir. 2001), discusses the problem associated with dismissing the complaint brought against the tobacco industry insofar as it impeded plaintiffs' efforts to present evidence relating to causation: did racial steering or targeted marketing—rather than a predisposition for menthol—cause African Americans to increase their consumption of the harmful products?

people of color are less sophisticated consumers and more vulnerable to target marketing are paternalistic and perhaps racist as well.[65] In addition, it is important to note that minorities are exposed to advertising that is not specifically targeted at them. Because they receive the same messages that Whites receive via mass marketing, it is unclear whether the targeted messages have a serious impact. Nevertheless, as discussed in Part II below, some commentators believe that race-based advertising practices may perpetuate cultural racism.[66]

Cigarette and alcohol advertising provides a prime example of race-based practices. With the goal of protecting the general public from the dangers of smoking, the U.S. Congress banned advertisements for cigarettes from the two widest reaching media, radio and television.[67] Furthermore, the Food and Drug Administration proposed "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents."[68] This attempt to regulate cigarette marketing, particularly toward children, was superseded by a settlement between the state Attorneys General and the large tobacco companies.[69] Similarly, so-called "hard liquor" advertisers, as opposed to

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65. *See* Debra Jones Ringold, *Social Criticisms of Target Marketing: Process or Product?* 38 AM. BEHAVIORAL SCIENTIST 578, 588 (1995); *see also* Jack E. Calfee, *"Targeting the Problem": It Isn't Exploitation, it's Efficient Marketing*, ADVERTISING AGE, July 22, 1991, at 18.

66. Smith and Cooper-Martin contend that low-income African Americans who are less socially integrated may have greater difficulty making rational purchasing decisions, thus exposing them to greater economic, physical, and psychological harms. Craig Smith & Elizabeth Cooper-Martin, *Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability*, 61 J. MARKETING 1 (July 1997). Since minorities rely on mainstream media as much as whites do, the extent to which targeted marketing causes such harms is undetermined.

67. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970).

68. 61 Fed. Reg. 44,396 (Aug. 28, 1996). *But see* F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (holding that the FDA lacks authority to regulate tobacco products).

69. On November 23, 1998, the Attorneys General of forty-six (46) states, five (5) territories, and the District of Columbia (the "Settling States") signed a Master Settlement Agreement (MSA) with the four (4) largest tobacco companies in the U.S. (Philip Morris, RJ Reynolds, Brown & Williamson, and Lorillard) to settle state suits brought against the companies to recover costs associated with treating smoking-related illnesses. According to the MSA, the tobacco industry is projected to pay the Settling States in excess of $200 billion over the course of 25 years. Four states—Florida, Minnesota, Texas and Mississippi—settled their tobacco cases separately from the MSA states. In exchange for the Settling States' release of their claims against the tobacco companies, the companies agreed to end or curtail some of their activities such as outdoor advertising and brand name sponsorships. The tobacco companies also agreed to fund a program of public education to reduce youth smoking and tobacco-related diseases. *See* http://www.naag.org/issues/issue-tobacco.php and http://tobaccofreekids.org/research/factsheets/pdf/0059.pdf; *see also,* Ross D. Petty, *Tobacco Marketing Restrictions in the Multistate Attorneys General Settlement: Is this Good Public Policy?* 18 J. PUB. POL'Y & MARKETING 249 (Fall 1999).

wine and beer advertisers, voluntarily refrained from television advertising until recently.[70]

Advertisers are allowed other outlets for their advertising and even a cursory look at this advertising shows exactly to whom they are marketing. A study published in the *Chicago Sun Times* in 1992 noted that there had been a decrease in cigarette ads in magazines aimed at white-collar readers, but an increase in those aimed at blue-collar and minority readers.[71] In particular, this study found 1210 tobacco billboards in minority neighborhoods versus 214 in White neighborhoods, and 1300 billboards advertising alcohol in minority neighborhoods versus 115 in White neighborhoods.[72] The study concluded that "minority neighborhoods are [ten times] more likely to have billboards hawking dangerous products than White areas of the city."[73]

Several studies show that a higher proportion of billboards in Black neighborhoods advertise tobacco and alcohol products than billboards in other areas.[74] Another study examined 705 billboards along a 690-mile route of federal primary aid highways in southern Michigan. This study found that only 55 billboards, 7.8% of the sample, contained ads for tobacco or alcohol products. However, three quarters of these billboards were located in urban areas and only one quarter in rural areas. The authors found a statistically significant difference in the proportion of urban billboards (11.7%) advertising these "bad" products versus rural billboards (3.8%) advertising the same products.[75]

There are clear examples of targeted marketing of harmful products to the Black community. Leading Black magazines such as *Jet* and *Essence* receive a higher proportion of income from cigarette ads than other

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70. *See* Sally Goll Beatty, *Seagram Flouts Ban on TV Ads Pitching Liquor*, WALL ST. J., June 11, 1996, at B1, B8; *see also* Christina Merrill & Judy Warner, *Spirited Debate: Does Seagram Have a Hidden Agenda by Breaking the Voluntary Ban on Broadcast Advertising?* ADWEEK, Nov. 4, 1996, at 28.

71. L.A. McKeown, *Tobacco Ads Inhibit Lung Cancer Stories: Study*, CHI. SUN TIMES, Jan. 30, 1992, at 21; *see also* Diana Hackbarth et al., *Booze and Butts in Fifty Chicago Neighborhoods: Market Segmentation to Promote Dangerous Products to the Poor* (1991) (unpublished study available from Chicago Lung Association showing a disproportionate number of billboards in Chicago's minority dominated wards advertising cigarettes and liquor). *See also* Kathryn A. Kelly, *The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities*, 5 U. FLA. J. L. & PUB. POL'Y 33 (1992).

72. Hackbarth et al., *supra* note 71.

73. *Id.*

74. *See* Richard W. Pollay et al., *Separate But Not Equal: Racial Segmentation in Cigarette Advertising*, 21 J. ADVERTISING 45, 47 (1992); *see also* C. Basil Schooler, *Alcohol and Cigarette Advertising on Billboards: Targeting with Social Cues* (Paper Presented at International Communication Association Conference, 1989).

75. Charles R. Taylor & John C. Taylor, *Regulatory Issues in Outdoor Advertising: A Content Analysis of Billboards*, 13 J. PUB. POL'Y & MARKETING 97, 103 (Spr. 1994).

magazines.[76] Cigarette companies sponsor cultural events such as the Kool Jazz Festival and the Dance Theater of Harlem that appeal to Black people.[77] St. Ides malt liquor has targeted Black teenagers with advertisements featuring a Black rap star.[78] Protests from the Black community caused the manufacturer to withdraw the campaign.[79]

4. Creating Harmful Products to Target Minorities

Targeted marketing techniques may have even more profound effects on consumers of color when harmful products are developed solely for their potential sale to minority communities.[80] In 1995, R.J. Reynolds Tobacco came under fire from then Health and Human Services Secretary Louis W. Sullivan for developing Uptown, a mentholated cigarette brand to be marketed to Black Americans despite their higher rates of tobacco-related illness and death. At that time, thirty-four percent of adult Black Americans smoked, compared to twenty-nine of all American adults. Since sixty-nine percent of Black smokers preferred menthol, compared to twenty-seven percent of all adults, Uptown promoted a lighter menthol with a glamorous nightlife image in Black magazines. The cigarettes were to be packed filter down to further appeal to Black smokers. Ultimately, R.J. Reynolds responded to public protest and abandoned its plans for Uptown.[81]

R.J.R. Tobacco's attempt to target minorities with harmful products is not unique. Documents released during Congressional hearings on the proposed multi-state settlement agreement with the four largest tobacco

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76. Richard W. Pollay, et al., *Separate, But Not Equal: Racial Segmentation in Cigarette Advertising*, *in* GENDER, RACE AND CLASS IN MEDIA 110 (Gail Dines & Jean M. Humez eds., 1995).

77. Allen Scott, *Rally Faults Tobacco Pitch to Minorities*, BOSTON GLOBE, June 1, 1997, at B8.

78. *Malt Liquors Continue to Draw Criticism: Offensive Advertising by Manufacturers*, MODERN BREWERY, May 18, 1992, at 2.

79. W. John Moore, *An Industry on the Rocks*, 24 NAT'L L.J. 8 (1992).

80. Similarly, tobacco companies introduced such women-specific brands as Philip Morris' Virginia Slims (and its seductive "You've Come A Long Way, Baby" advertising campaign) to target women and girls. These ads cynically equated smoking with independence, sophistication and beauty and preyed on the unique social pressures that women and girls face. In the 1970s, women were targeted with advertising for so-called "low tar" and "light" brands, with implied claims of reduced risk that the tobacco companies knew to be false. *See* http://tobaccofreekids.org/reports/women/.

81. *See* James R. Schiffman, *After Uptown, Are Some Niches Out?* WALL ST. J., Jan. 22, 1990, at B1; *see also* Michael Specter, *Reynolds Cancels Plans to Market New Cigarette: Uptown Brand Attacked as Aimed at Blacks*, WASH. POST, Jan. 21, 1990, at A4.

companies[82] show that these companies were actively targeting the Black community with mentholated brands such as Kool.[83]

Smaller tobacco companies followed this strategy as well. In 1995, a small cigarette distributor designed a package for X brand menthol cigarettes. While the marketer claimed "X" stood for extra menthol, many Black Americans felt the "X" was similar to the X used in Spike Lee's movie "Malcolm X." The use of a red background for the letter X and green letters to spell menthol on the black box displayed the three colors that many Black Americans associate with African heritage. The company did not widely distribute this low-priced generic brand but came under criticism nonetheless.[84]

The alcohol industry has also targeted the Black community. Black Americans in low-income neighborhoods disproportionately consume malt liquor and the industry has advertised the beverage more heavily to this population.[85] For example, G. Heileman Brewing proposed a higher alcohol malt liquor product called PowerMaster. The new brand was to be 5.9% alcohol. This was sixty-five percent more alcohol than regular beer and thirty-one percent more than Heileman's Colt 45, the market leader. After much controversy, the Bureau of Alcohol, Tobacco and Firearms cancelled its prior approval of the brand name and Heileman withdrew its proposal. Fortune magazine described PowerMaster as one of the biggest goofs of 1991.[86]

Unfortunately, targeted marketing techniques undermined by inferential racism are not simply "goofs." The next section demonstrates that the dissemination of racist messages through advertising, even when unintentional, can result in significant harms for both ethnic minorities and for society at large.

II. RACE-BASED TARGETING AND CONSUMER HARMS

In 1992, a majority of marketing and media executives believed "that advertising has played a role in the country's current racial problems."[87] Social critics Courtney and Whipple contend that: "[I]t is indisputable that advertising is at least one contributing influence affecting the way children and adults view their roles in society.... There is also mounting evidence ... that more responsible advertising could play a positive and

82. *See* Petty, *supra* note 69.

83. Barry Meier, *Data on Tobacco Show a Strategy Aimed at Blacks*, N.Y. TIMES, Feb. 6, 1998, at A1.

84. Derrick Z. Jackson, *Making Money by Any Means Necessary*, BALTIMORE SUN, Feb. 7, 1995, at 15A.

85. Alan Farham, *Biggest Business Goofs of 1991*, FORTUNE, Jan. 13, 1991, at 81.

86. *Id.* at 81. *See also* Alix Freedman, *Heileman, Under Pressure, Scuttles Power Master Malt*, WALL ST. J., July 5, 1991, at B1; *see also* Smith & Cooper-Martin, *supra* note 63.

87. Ward, *supra* note 51, at 1.

beneficial role [in ameliorating social ills]."[88] Certainly it is disingenuous for advertisers to claim that advertising encourages people to buy and use or to switch to new product brands, and yet deny responsibility for the numerous harms caused by discriminatory advertising.[89]

The nefarious consequences of discriminatory advertising can be categorized into four fundamental types of injuries. First, economic harms result when minority consumers pay more for products or receive less value for their money than do similarly-situated Whites. Second, minority consumers may experience health harms because they are subjected to "over-advertising" about risky products and lack sufficient information about beneficial products. Third, some studies support the contention that psychological harm occurs when low self-esteem and alienation damage both minority consumers and the larger society. Although it is important to note that these findings are not universally accepted. Finally, society is harmed when race-based advertising practices create false distinctions, marginalize certain groups of citizens and undermine values of equality and fairness.

A. *Economic Harms*

While minority consumers may not shun products when isolated advertisements contain no racial diversity, over time, a series of non-diverse advertisements may be interpreted as a message that the marketer does not wish people of color to purchase the product.[90] Consequential economic harms for the minority consumer may manifest themselves in the form of diminished shopping opportunities as well as increased search and opportunity costs.[91] Minority consumers may also incur opportunity costs when they substitute one product or service with another, less-preferred product or service. It is possible that minority consumers may not be aware that less expensive or better products are available, or they may not know where or how to purchase these products. Target marketing could have the effect of narrowing choices regarding the existence and availability of advertised items. In many cases, the result may be that minority consumers pay more than Whites do to purchase

88. ALICE E. COURTNEY & THOMAS W. WHIPPLE, SEX STEREOTYPING IN ADVERTISING 58 (1983).

89. WILLIAM M. O'BARR, CULTURE AND THE AD: EXPLORING OTHERNESS IN THE WORLD OF ADVERTISING 206 (1994).

90. *See* Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1223 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 898 (2d Cir. 1993).

91. Peter Siegelman, *Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need To Know, and How Can We Find Out?* in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69, 78 (Michael Fix & Margery Austin Turner, eds., 2000), *available at* http://www.urban.org/UploadedPDF/report_card.pdf.

comparable items.[92] In addition, those advertisers who are "willing" to deal with Blacks and other minorities can exact a premium for doing so.[93] Yet, on the other hand, an argument can be made that low-income minorities may be more savvy about the marketplace because they must survive with fewer resources.

Minority consumers may also receive less value for their purchases. For high-dollar purchases, such as homes, this can have a significant impact. For example, minority homebuyers who are "steered" toward homes in minority neighborhoods may discover too late that neighborhoods segregated by race are often also segregated by class. The poorest neighborhoods, particularly in urban areas, are often inhabited primarily by non-White residents. Since the poorest neighborhoods tend to experience problems such as poor schools and high crime rates, home values can decline rather than appreciate over a number of years.

Along these lines, prospective minority homeowners receive fewer opportunities to access important financial services. With no visible advertising in their communities, these potential homebuyers do not believe that they would qualify for a mortgage.[94] Credit and banking institutions' failure to advertise and reach out to ethnic minorities may result in fewer minority homeowners.

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92. ALAN R. ANDREASEN, THE DISADVANTAGED CONSUMER 166 (1975). Under perfectly competitive conditions, no single supplier of goods and services can cause prices to rise by withholding its goods or services from the market. This is because the individual supplier operates on a horizontal demand curve, which is perfectly elastic; that is, if a supplier attempts to raise the price of its goods or services above the competitive price—the competitive price is equal to marginal cost—then the supplier's sales will drop to zero. However, in order for a supplier's demand curve to be perfectly elastic—the elasticity of a supplier's demand curve measures how sensitive consumers are to price changes—there must be adequate substitute products or services for consumers to switch to in the event that a supplier raises its prices above marginal cost. By limiting the access of minority consumers to substitute products and services, target marketing has the affect of decreasing the elasticity of a supplier's demand curve. With fewer substitutes to choose from, minority consumers will be less sensitive or responsive to changes in price; hence, a supplier of goods or services in an industry that uses race-based target marketing will result in minority consumers paying prices that are above the supplier's marginal cost. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §§ 1.1, 1.2 (1994).

93. Regina Austin, *A Nation of Thieves:" Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 150–51 (1994).

94. To encourage loan applications from residents and potential homebuyers in certain minority neighborhoods, Mid America Bank will advertise in those areas under the provisions of a settlement agreement with the U.S. government. The bank was accused of failing to provide products and services in predominantly minority neighborhoods. Although Mid America opened twenty branch offices between 1994 and 2002, none of them were located in predominantly Black or Hispanic neighborhoods. *See Mid America Bank Settles Redlining Suit*, *at* http://www.diversityinc.com/public/4156.cfm (last visited May 9, 2003).

B. *Health-Related Harms*

Studies show that low-income consumers of all races have less information about healthy products than middle- and high-income consumers.[95] People of color who are also low-income consumers may be less likely to purchase such products and to receive the benefits from using them.[96] In a recent study of advertising on prime time television, researchers found that a disproportionate number of ads for unhealthy foods were aired on television programs favored by Black Americans. In contrast with eleven percent of ads shown during shows preferred by Whites, thirty percent of ads shown during programs preferred by Black Americans were for desserts and sweets. Two percent of ads shown during programming favored by Whites were for soda versus thirteen percent of the advertisements aired during programs favored by Black audiences.[97]

Consumption patterns may indicate that some minorities are more likely than some Whites to consume harmful products, leading to higher rates of health-rated problems. Marketing researchers Moore, *et al.*, conducted a review of consumption patterns and related health risks for tobacco and alcohol products in Black and Hispanic communities.[98] They asserted that traditionally, Black Americans had the highest tobacco usage rate of any group, while recent data places them at parity with Whites. They also noted, however, that older Blacks still have a higher usage rate and that some groups, like inner-city youth, may also have high usage but may simply not be well-represented in broad national samples. Furthermore, Black Americans tend to smoke mentholated brands of cigarettes with higher tar and nicotine levels and they may tend to under-report smoking frequency.[99] The Center for Disease Control reports that Black men are thirty percent more likely to die from smoking-related diseases than their White counterparts.[100] For Hispanics, overall smoking rates are lower, but among certain groups such as Cuban-American men, more than half those surveyed smoked and almost two-thirds were heavy smokers.[101] These findings are not conclusive because differences were found

95. *See* David J. Moore, Jerome C. Williams & William J. Qualls, *Target Marketing Alcohol and Tobacco Messages to Ethnic Minority Market Segments*, 6 J. ETHNICITY & DISEASE 83 (Winter/Spring 1996).

96. According to the U.S. Census Bureau, 22.7 percent of all African Americans were below the poverty level in 2001 compared to 9.9 percent of Caucasian Americans and 11.7 percent of the entire U.S. population. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, TABLE 1, MARCH 2002 *available at* http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm.

97. Manasi A. Tirodkar & Anjali Jain, *Food Messages on African American Television Shows*, 93 PEDIATRIC RES. 439.

98. Moore, et al., *supra* note 95.

99. *Id.* at 84–85.

100. Scott, *supra* note 77.

101. Moore, et al., *supra* note 95, at 86–87.

based on a number of factors, such as the age group and the product at issue. Nevertheless, it is fairly clear that Blacks are disproportionately impacted by consuming harmful products.[102]

Similar patterns appear for alcohol consumption. On average, Blacks report lower alcohol consumption rates, but heavy users tend to be older. To date, no one has surveyed inner cities—home to high concentrations of minorities—to determine consumption patterns there. Hispanics also report lower alcohol usage rates than Whites, but other studies reveal problems with heavy drinking. Indeed, health studies show that Blacks and Hispanics suffer disproportionately from alcohol-related problems including liver disease, esophageal cancer, and premature death.[103] Blacks, but not Hispanics, also suffer disproportionately from tobacco-related diseases such as coronary heart disease and lung cancer. Given current consumption levels, researchers are concerned that in the future, Hispanics will follow this pattern for tobacco-related diseases.[104]

Another recent example of the marketing of harmful products that disproportionately affect minorities is the controversy over advertising of foods high in fat or calories and its correlation to obesity among members of minority and immigrant communities.[105] According to the Centers for Disease Control and Prevention, about twenty-seven percent of Blacks and twenty-one percent of Hispanics are obese compared to seventeen percent of Whites.[106] Moreover, Black and Hispanic women become obese 2.1 times and 1.5 times faster, respectively, than White women while Hispanic men become obese 2.5 faster than White men. Black and White men develop obesity at the same rate until age 28, after which Black men become obese 2.2 times faster than their White counterparts, according to a 17 year study of 9,179 people.[107] Although there are many reasons for these differences, experts suggest that some factors include poor nutrition, a lower percentage of grocery stores in

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102. *Id.*

103. *Id.* at 87–88.

104. *Id.* at 84, 87.

105. Some consumer advocates now argue that the federal government should regulate advertising for junk food because of its deleterious effects on inner-city children. *See* Pelman v. McDonald's Corp., 237 F. Supp.2d 512 (S.D.N.Y. 2003) (complaint dismissed with leave to refile). *See also* Plaintiff's Amended Verified Complaint (No. 02-CV-7821), filed Feb. 12, 2003 where plaintiffs are overweight children who consumed foods at two McDonald's restaurants in the Bronx. One of the plaintiffs is a 14-year-old girl who is 4 feet 10 inches tall and weighs 170 pounds. Plaintiffs brought a suit against McDonald's for failing to disclose nutritional information in a clear and understandable manner. *McDonald's Seeks to get Obesity Lawsuit Dismissed*, USA TODAY, Nov. 20, 2002 *available at* http://www.usatoday.com/money/industries/food/2002-11-20-mcdonalds_x.htm.

106. David Barbosa, *Rampant Obesity: A Debilitating Reality for the Urban Poor*, N.Y. TIMES, Dec. 26, 2000, at F5.

107. Nanci Heilmich, *Minority Adults Grow Obese at Faster Rates than Whites*, USA TODAY, June 18, 2002, at 8D.

urban areas as compared to suburban areas, a lack of readily available healthier foods such as fresh fruits and vegetables, and insufficient information about the nutritional benefits of such foods.

Advertising targeted at children and teens "bombards" them with images of soda, hamburgers, and snack food.[108] Fast food restaurants, which are readily accessible in their neighborhoods, tend to target urban minorities. In addition, school-aged children and teens are exposed to advertising at school through Channel One, the Primedia-owned network that airs in thousands of public classrooms every day.[109] At the same time, there are fewer alternatives available to them.[110]

C. *Psychological Harms*

Considerable literature exists regarding the impact of environment on personality development, socialization, and self esteem. Some studies show that discriminatory advertising can have a substantial negative impact on people of color. Social comparison theory suggests that consumers often compare themselves to the people depicted in advertising. People who casually view advertisements tend to identify with the actor in the ad if the actor is perceived as similar to the viewer. They are more likely to be favorably impressed with such an advertisement than with one where they perceive the actor(s) as dissimilar to them.[111] Furthermore, consumers for whom race is important will positively identify with products advertised by actors of their race.[112] This theory, which was judicially recognized by a court in a discriminatory housing case, predicts that targeting minority consumers with advertising will increase sales to those groups.

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108. In an op-ed piece entitled "Fast food, fat kids," Dr. Hass blamed fast food advertising, in part, for the fact that forty percent of his pediatric patients at the South End Community Center are obese. Dr. Hass is physician-in-chief at the South End Community Health Center in Boston, MA, assistant clinical professor of pediatrics at Harvard Medical School, and senior associate in medicine at Children's Hospital. Dr. Gerald Hass, *Fast Food, Fat Kids*, BOSTON GLOBE, Dec. 23, 2002, at A19.

109. According to Alissa Quart, Channel One has a daily twelve-minute news program, with two minutes of commercials. Describing recent efforts to eliminate marketing from the school environment, Ms. Quart reported that the Los Angeles school board voted to ban soda vending machines in its schools as of January 2004, citing the correlation between soda consumption among teens and the growing percentages of obese youth. Alissa Quart, *"Unbranding" Our Schools*, BOSTON GLOBE MAGAZINE, Jan. 12, 2003, at 18.

110. Barbosa, *supra* note 106.

111. Tommy E. Whittler & Joan DiMeo, *Viewers' Reactions to Racial Cues in Advertising Stimuli*, J. ADVERTISING RES. 37, 56 (Dec. 1991).

112. *Id.* For a recent study involving adolescents with similar results, *see* Osei Appiah, *Ethnic Identification on Adolescents' Evaluations of Advertisements*, 41 J. ADVERTISNG RES. 7 (Sept. 2001).

> It requires no expert to recognize that human models in advertising attempt to create an identification between the model, the consumer, and the product. In other words, advertisers choose models with whom the targeted consumers will positively identify, hoping to convey the message that people like the depicted models consume and enjoy the advertised product. Therefore, if the consumer wants to emulate the model, he or she will use the product, too.[113]

As we know, minority consumers are underrepresented in national advertising. These consumers, exposed to mainstream 'White' advertising with few non-White models whose representations are usually stereotypical, may experience isolation and disaffection.[114] On the other hand, people of color learn to discount stereotypical images that do not reflect their reality.[115]

Ethicist Michael Green studied self-development in today's culture, with a particular emphasis on Native Americans who are bombarded with derogatory images of their culture and themselves.[116] Although his study focused primarily on the Native American experience, he addressed general issues of culture and human development. As Green noted, connection to a culture and its traditions provides an individual with a sense of place, power, tradition, identity, connectedness, and self-confidence. Individuals and cultures that lose their system of meaning become disoriented and suffer a loss of hope. Social disintegration then sets in unless this meaning can be reconstituted.[117] By focusing on the way in which advertising perpetuates racial stereotypes, Green concluded that advertising has a dehumanizing effect on individuals whose cultural identities and self-confidence are diminished and devalued.[118]

In his classic article, *Words That Wound*, legal scholar Richard Delgado argued that racial minorities suffer similar sociological injury from racial discrimination.[119] He noted that traditional stereotypes about

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113. Saunders v. General Serv. Corp., 659 F. Supp. 1042, 1058 (E.D.Va. 1987).

114. Marsha L. Richins, *Social Comparison, Advertising, and Consumer Discontent*, 38 AM. BEHAVIORAL SCIENTIST 593, 598 (1995).

115. *Id.* ("individuals can avoid negative self-feelings by simply refusing to compare themselves with idealized media images").

116. See Michael Green, *Images of Native Americans in Advertising: Some Moral Issues*, 12 J. BUS. ETHICS 323 (1993).

117. Id. at 326 (citing W. Churchill, *Sam Gill's Mother Earth: Colonialism, Genocide and the Expropriation of Indigenous Spiritual Tradition in Contemporary Academics*, 12 AM. INDIAN CULTURE & RES. J. 48 (1988) and R. Tsosic, *Changing Women: The Cross-Currents of American Indian Feminine Identity*, 12 AM. INDIAN CULTURE & RES. J. 1 (1988)).

118. Green, *supra* note 116, at 329.

119. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) *reprinted in* WORDS THAT WOUND:

poor achievement levels often become self-fulfilling realities because minorities frequently experience low self-esteem caused by race discrimination.[120] Further, he determined that minority children in particular have difficulty coping with racism and often develop feelings of rejection, alienation, and a lack of self-confidence and motivation.[121] Psychologist Kenneth Clark provided a simple explanation for such reactions: "Human beings ... whose daily experience tells them that almost nowhere in society are they respected and granted ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth."[122]

Children of color often feel inferior and isolated from society. Social scientist Sandra Bartky explained that the "psychic alienation of the black man" is a form of psychological oppression caused by the "internalization of intimations of inferiority" that leads to the "estrangement or separating of a person from some of the essential attributes of personhood."[123] The research throughout this article shows that advertising plays a significant role in transmitting such "intimations of inferiority" to people of color in America on a daily basis. As with consumer discrimination, "everyday exposure to race-based targeted marketing may have" a cumulative debilitating effect over the course of a person's lifetime.[124]

Even the use of positive stereotypes in advertising can lead to psychological harm. For example as previously mentioned, Asian Americans often are portrayed as hard-working and technically-skilled. When these portrayals are the primary images associated with Asian Americans, they may lead to negative stereotyping that Asians are not skilled in social settings.[125] Furthermore, stereotypes that can pressure Asians to attempt to excel in expected areas may result in a corresponding loss of self-esteem and lack of desire to identify with the dominant culture if they fail to excel.[126]

CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89, 90–93 (Mari J. Matsuda, et al., eds., 1993).

120. *Id.* at 92.

121. *Id.* at 93, 95.

122. *Id.* at 91 (quoting KENNETH CLARK, DARK GHETTO 63–64 (1965)).

123. SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 22 (1990) (quoting FRANTZ FANON, BLACK SKINS, WHITE MASKS 12 (1967)).

124. Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. Section 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003) (identifying the causes and effects of "Consumer Racial Profiling").

125. Taylor & Lee, *supra* note 40, at 244.

126. *Id.*

D. *Societal Harms*

Finally, society as a whole is harmed by racial discrimination in advertising. As researchers Wilkes and Valenci determined:

> [M]any in the host society may have little or no direct contact with certain minority groups, thus enhancing the power of the media to shape attitudes of the host society toward the minority groups. Consequently, to the extent that members of the host society are denied an opportunity to learn about minorities through the media . . . due to insufficient frequency of appearance, or are provided with mainly stereotypical representations, the effect may be to perpetuate stereotypical attitudes toward minority groups, as well as to interfere with the acculturation process of those minorities.[127]

America may be a pluralistic society, but as one Black advertising executive has noted, Black Americans know far more about Whites than Whites know about Blacks.[128] This failure to understand the experiences of non-Whites has far-reaching implications. In 1963, the United Nations recognized these implications when it passed the Declaration on the Elimination of All Forms of Racial Discrimination. The Declaration stated:

> . . . that all forms of racial discrimination, and still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, besides constituting a violation of fundamental human rights, tend to jeopardize friendly relations among peoples, co-operation between nations and international peace and security . . . that racial discrimination harms not only those who are its objects but also those who practice it . . . that the building of a world society free from all forms of racial segregation and

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127. Wilkes & Valencia, *supra* note 37, at 20–21.

128. Marsha Cassidy & Richard Katula, *The Black Experience in Advertising: An Interview with Thomas J. Burrell*, *in* GENDER, RACE AND CLASS IN MEDIA 96 (Gail Dines & Jean M. Humez eds., 1995). Burrell notes: "when I came down out of my black neighborhood to work for a white company, I had to understand white society . . . We are a minority in a white society, and in order to survive in that society, we have to know it . . . [but] you can live your whole life as a white person without ever having to know black people and black culture. And many, many people do, and many people who are in the advertising business do . . ." Similarly, film director, Spike Lee, was quoted in the *Boston Globe* saying: "If you're a black person in America, from the time you could think, you were bombarded with images of white people, bombarded with white culture. . . . I would say I do know more about white culture than Michael Mann [a white film director] knows about black culture." Vanessa E. Jones, *Hour of Reckoning*, BOSTON GLOBE, Jan. 8, 2003, at C6.

> discrimination, factors which create hatred and division among men, is one of the fundamental objectives of the United Nations.[129]

It may be tempting to dismiss advertising as a "propaganda system for commodities."[130] But advertising is much more than that and, in fact, plays a significant role in shaping the language and values of our society.[131] We live in a consumption-based society and the messages we absorb from commercial speech are part of the language of our shared national culture. We all know that "a diamond is forever," that "when it rains it pours," and that women "have come a long way, baby."[132] Indeed, one social critic has called the marketplace "the major structuring institution of contemporary consumer society."[133]

Advertising not only sells products, it also produces and transforms ideologies.[134] When people of color are invisible, presented as stereotypes, or are targeted heavily for harmful products, society devalues the contributions and even the lives of those minority group members. In their analysis of institutionalized racism, Pendarvis and Howley write that:

> Personalized discrimination, though fostered by institutionalized discrimination, varies in form and intensity among individuals and among groups. Both forms of discrimination, however, produce hardships for those discriminated against. Out of proportion to their numbers, more women than men are poor, more blacks than whites, more Hispanics than Anglos, more American Indians, and more of the rural populace. Exceptions occur, and extraordinary individual successes are documented in the popular and professional media—often as exhortatory examples. In general, though, the chances of a minority child's growing up to become a well-paid professional or highly successful business person

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129. *Resolution Adopted by the General Assembly. 1904 (XVIII). United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904, U.N. GAOR, 18th Sess., Agenda Item 43, U.N. Doc. A/RES/1904(XVIII), *available at* http://www.humanrightsreference.com/appendix5.html (last accessed Jan. 5, 2003).

130. Sut Jhally, *Image-Based Culture: Advertising and Popular Culture*, *in* GENDER, RACE AND CLASS IN MEDIA 80 (Gail Dines & Jean M. Humez eds., 1995).

131. *Id.*; *see also* Hall, *supra* note 4.

132. Jhally discusses the transformation of public attitudes toward diamonds as a result of the advertising slogan developed in 1947 by an advertising copywriter. *See* Jhally, *supra* note 130, at 77. "When it rains, it pours" is the long-used slogan of Morton salt (check your kitchen!). The Virginia Slims slogan, "You've Come a Long Way Baby" was actually ill-received by feminists, as Gloria Steinem discusses in her now-famous article about advertisers' attempts to manipulate the content of women's magazines. *See* Gloria Steinem *Sex, Lies and Advertising*, MS. MAGAZINE (July/Aug. 1990).

133. Jhally, *supra* note 130, at 78.

134. Hall, *supra* note 4, at 18–19.

are much less than those of an equally capable child from the white majority.[135]

III. GOVERNMENT'S ROLE IN COMBATING RACISM IN ADVERTISING

The notion that cultural racism causes harms to non-White Americans is not a new one: the government has addressed this issue through a variety of laws and innumerable lawsuits. Not only has the government acknowledged these harms, but it has actively worked to create a less racist society through laws prohibiting discrimination in education, housing, and employment. Even commerce has been subject to anti-discrimination laws. This section will look at the evolution of laws expressing a public policy against racism as well as existing laws that provide limited protection against the harms of race-based target-marketing.

A. *Public Policy Recognizes Harms of Racism*

The harm caused by racial discrimination already has been recognized in many other areas besides advertising. In *Strauder v. West Virginia*, the United States Supreme Court invalidated a West Virginia statute prohibiting Blacks from serving on juries. Justice Strong argued that the Fourteenth Amendment protected Blacks from such "discriminations, implying inferiority in civil society . . ." that was "practically a brand upon them . . . an assertion of their inferiority.[136] The harm postulated by Justice Strong in *Strauder* was further addressed by the Court in *Brown v. Board of Education*, the landmark case challenging government-mandated racially "separate but equal" schools. In that case, the Supreme Court found that separating children for schooling based on their race was unconstitutional. Asserting that the doctrine of 'separate but equal' had "no place" in the field of public education, the Court concluded that "separate educational facilities are inherently unequal."[137] According to the Justices, even if the quality of the physical facilities and other tangible factors were objectively equal, government-sponsored racial discrimination branded Black children as inherently inferior, amounting to a denial of equal protection under the law in violation of the U.S. Constitution.[138]

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135. EDWINA D. PENDARVIS & AIMEE HOWLEY, OUT OF OUR MINDS: ANTI-INTELLECTUALISM AND TALENT DEVELOPMENT IN AMERICAN SCHOOLING, 125 (1995).

136. 100 U.S. 303, 308 (1880).

137. 347 U.S. 483, 495 (1954).

138. *Id.*

Since its decision in *Brown v. Board of Education*, the Supreme Court has continued to denounce racial discrimination and the use of stereotypes. In *Edmonson v. Leesville Concrete Co.*, the Court stated: "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotype retards that progress and causes continued hurt and injury."[139] In *Bush v. Vera*, it similarly noted: "Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."[140] Similarly, in a case involving gender discrimination based on stereotypes, the Court noted: "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . ."[141]

B. *Existing Laws Provide Limited Protection Against Race-Based Targeting*

The primary thrust of U.S. advertising law is to prevent marketers from deceiving American consumers.[142] Through enforcement by the Federal Trade Commission, the Postal Service, state Attorneys General, injured competitors, and industry self-regulation, the United States can rightfully pride itself for the role it has played as global leader in the regulation of deceptive advertising.[143] While advertising that excludes racial minorities could be considered deceptive under some circumstances, it has never been challenged as such.[144] Currently, the U.S. has no comprehensive law or regulation addressing race-based advertising practices.[145]

In contrast, discriminatory advertising is controlled by industry regulations or by statutory enactments in other countries.[146] For example, in 1963, the *Canadian Code of Advertising Standards* was first published by Advertising Standards Canada, the Canadian advertising

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139. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991).

140. Bush v. Vera, 517 U.S. 952, 985 (1996).

141. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

142. Ross D. Petty & Robert J. Kopp, *Advertising Challenges: A Strategic Framework and Current Review*, 35 J. ADVERTISING RES. 41 (1995).

143. *See* Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 SUFFOLK TRANSNAT'L L. REV. 309, 348 (1994) [hereinafter *Advertising Law and Issues*].

144. For a discussion of deceptive advertising statutes related to discriminatory advertising, *see* Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289 (1993). Even this article does not attempt to argue that discriminatory advertising is deceptive.

145. *See Advertising Laws and Issues*, *supra* note 143, at 346; *See also* James J. Boddewyn, *Controlling Sex and Decency in Advertising Around the World*, 20 J. ADVERTISING 25 (Dec. 1991).

146. *See Advertising Laws and Issues*, *supra* note 143.

industry's national self-regulatory body whose primary functions are to receive and review complaints from the public in regard to advertising and to provide pre-clearance services to advertisers for certain kinds of advertising. The *Code* addresses fourteen different specific issues, most relating to honesty in marketing claims. The *Code's* final provision addresses advertisements that are discriminatory, exploitive or inciting to violence, demeaning of individuals or groups, or undermining to human dignity. It specifically states that "advertisements shall not condone any form of personal discrimination, including that based upon race, national origin, religion, sex or age."[147] The United Kingdom's Race Relations Act of 1976 makes it "unlawful to publish or to cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an act of discrimination."[148] Acts of discrimination include refusing on racial grounds to provide goods, facilities, or services altogether, or in a like manner and on like terms. While this statute and its predecessors have reportedly decreased the number of explicitly discriminatory advertisements (e.g., Scottish housekeeper sought),[149] they do not effectively address contemporary discrimination whereby advertisements send subtle messages through stereotypes, omissions, and targeting, as described above.

A number of U.S. statutes and federal government agency regulations address race-based advertising in a piecemeal manner. For example, the Department of Defense prohibits any of its *Stars and Stripes* newspapers from carrying racially discriminatory advertisements[150] and the Department of Energy (DOE) prohibits any home heating supplier from "unfairly discriminat[ing] against any person" in providing information about energy conservation and DOE programs.[151] In October 2000, then President Clinton signed an Executive Order designed to increase opportunities and access for disadvantaged businesses, containing the first multicultural advertising guidelines for federal government departments and agencies.[152] Citing the expansive role played by advertising and the

147. http://www.adstandards.com/en/standards/adstandards.asp § 14(A).

148. 6 *Statutes* 765 (1976). The Act also provides a defense for publishers of innocent publication who have been reasonably assured that the discriminatory act would otherwise be lawful (e.g., certain clubs and employers outside of Britain are allowed to discriminate).

149. S.H. BAILEY, D.J. HARRIS & B.L. JONES, CIVIL LIBERTIES: CASES AND MATERIALS 609 (3d. ed. 1991).

150. 32 C.F.R. 246 (1997).

151. 10 C.F.R. 456, 458 (1997).

152. American Advertising Federation (AAF) *available at* http://www.aaf.org/multi/principles.html. According to the AAF, it developed voluntary guidelines along with thirty-eight advertisers, agencies and media companies to encourage greater diversity in advertising and more understanding of multicultural marketing as a key strategy to achieve growth. On its website, the AAF indicates that the guidelines entitled "Principles and Recommended Practices for Effective Advertising in the American Multicultural

information technology industries, Clinton directed each executive branch department "to ensure that all creation, placement, and transmission of federal advertising is fully reflective of the nation's diversity."[153] While protection is limited, plausible arguments can be made that some forms of race-based advertising are illegal under current U.S. law.

1. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982

The Third Circuit is the first federal appeals court to address the issue of targeted marketing and racial discrimination. In *Brown v. Philip Morris, Inc.*, plaintiffs were a group of Black Americans who designated themselves as "Black Smokers." They filed suit against a number of tobacco companies, non-profit organizations supported by the tobacco industry, and a public relations firm representing the tobacco industry. Plaintiffs alleged that defendants violated the Civil Rights Act of 1866 when they "unlawfully engaged in targeted marketing and sales of mentholated tobacco products to African Americans on the basis of their race."[154] The targeted marketing campaign giving rise to plaintiffs' allegations included billboard, magazine, and other types of advertising that promoted the sale to and consumption by Black smokers of various mentholated tobacco products.[155]

Although there is currently no U.S. law regulating the practice of race-based targeted marketing, Congress has enacted legislation that generally limits advertising of tobacco and alcohol products. Specifically, the Federal Cigarette Labeling and Advertising Act of 1965[156] and the Alcohol Administration Act of 1988[157] provide that these products' labeling must include the Surgeon General's warnings about the dangers

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Marketplace" have industry-wide support, including endorsements from the American Association of Advertising Agencies, the Association of National Advertisers, and the Association of Asian American Advertising Agencies, among others. Twenty-six companies and agencies committed to adopting the principles, including Verizon Communications, Coca-Cola, Johnson & Johnson and Kraft General Foods.

153. Statement, President William J. Clinton, The White House Office of the Press Secretary (October 6, 2000), *available at* http://www.house.gov/kilpatrick/pr001006.htm.

154. Brown v. Philip Morris, Inc., 250 F.3d 789, 794 (3rd Cir. 2001).

155. Similar allegations have been made against alcohol companies. For example, G. Heileman Brewing Company and others were criticized for advertising their malt liquor products in a way that implied their elevated alcohol content. Critics contended that low-income, predominantly minority neighborhoods were subjected to such advertisements despite the efforts of the U.S. Bureau of Alcohol, Tobacco and Firearms to eradicate them. *See* Alix M. Freedman, *Malt Advertising That Touts Firepower Comes Under Attack by U.S. Officials*, WALL ST. J., July 1, 1991, at B.1 and *supra* note 86 and related text. In 1995, the U.S. Supreme Court struck down the law prohibiting purveyors of malt liquor to use alcohol content in their advertisements. *See* Rubin v. Coors Brewing Co., 115 U.S. 1585 (1995).

156. 15 U.S.C. §§ 1331–41 (1997).

157. 27 U.S.C. §§ 213–219 (1997).

of product use. The Public Health Smoking Act of 1969[158] specifically bans cigarette advertising on television and radio and regulates advertising in certain media.[159] Neither party in the *Brown v. Phillip Morris* case claimed that defendants provided any consumers—White or Black—with warnings about the additional health risks caused by menthol products in contrast with non-menthol products.

Defendants in *Brown v. Phillip Morris* conceded that tobacco companies designed certain menthol cigarettes specifically to appeal to Black American consumers, including the previously-mentioned "Uptown" cigarettes. Defendants further conceded that: (1) mentholated tobacco products are more harmful to smokers' health than non-mentholated products and (2) while Black Americans account for 10.3% of the U.S. population, they account for a significantly greater share of menthol cigarette smokers.[160]

While plaintiffs agreed that the information that Black Americans received about menthol cigarettes did not differ in any respect from the information provided to others, they alleged that defendants' advertising conveys a particular message to Black Americans that is not similarly conveyed to White customers.[161] Plaintiffs admitted that defendants targeted Black smokers with non-menthol as well as menthol cigarettes by using Black models and athletes in their advertisements for both those products.

The Civil Rights Act of 1866 prohibits racial discrimination in commercial transactions. Specifically, § 1981 provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . ."[162] Making and enforcing contracts is defined as including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[163] Section 1982 guarantees to all citizens the right to "inherit, purchase, lease, sell, hold, and convey real and personal property."[164]

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158. Pub L. No. 91-222, 84 Stat. 87 (1970).

159. That legislation was drafted at the request of cigarette manufacturers who were seeking to avoid further regulation and to limit the ability of anti-smoking advocates to air public service announcements under the Federal Communications Commission's "unfairness doctrine." *See* Camille P. Schuster & Christine Pacelli Powell, *Comparison of Cigarette and Alcohol Advertising Controversies*, 16 J. ADVERTISING 26–27 (1987).

160. "Black Smokers cite reports fixing the percentage of African American menthol smokers at, variously, 31%, 61.5% and 66%." *Id.*

161. The sales messages suggest to African Americans "that menthol cigarettes are healthier than non-menthol cigarettes, are of high quality, enhance the smoker's image, and are glamorous, prestigious and socially acceptable." *Brown v. Philip Morris, Inc.*, 250 F.3d at 795.

162. 42 U.S.C. § 1981(a) (1994) *designated by* Pub. L. No. 102-166 § 101 (1991).

163. 42 U.S.C. § 1981(b) *amended by* (Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991).

164. 42 U.S.C. § 1982 (1997).

The Third Circuit characterized the issue in the case as "whether encouraging African Americans to consume admittedly harmful mentholated products is unlawful under the civil rights statutes," and held, as a matter of law, that "racially targeted marketing of mentholated products cannot, in the absence of any disparity between the products sold to African Americans and the products sold to others, constitute a deprivation of contract or property rights actionable under §§ 1981 or 1982."[165] The Court noted an Eleventh Circuit decision that left open the possibility that targeting minorities with defective products might violate §§ 1981 and 1982. However, the Court concluded that only a situation where virtually all mentholated cigarettes were purchased by Blacks and virtually all non-menthol cigarettes are purchased by Whites might be actionable.[166]

As with many consumer discrimination claims brought under §§ 1981 and 1982, undue judicial skepticism derailed plaintiffs' effort to present evidence in support of their claims.[167] Denouncing the district court's dismissal of plaintiffs' complaint as premature, the dissenting opinion in *Brown v. Phillip Morris* clearly presented a number of flaws in the Third Circuit's rationale. First, the majority improperly determined that plaintiffs failed to allege that the tobacco companies dealt with customers on differing terms because of their race. In fact, plaintiffs complained that their rights to contract and to purchase property were affected—unlike the rights of White consumers—as a result of the tobacco industry's "deliberate and successful targeting of Black Smokers."[168] The clear language of §§ 1981 and 1982 prohibits racially-discriminatory conduct that imposes different *conditions* on the exercise of the rights they protect.[169] Therefore, to state a viable cause of action under these statutes, the Black Smokers were not required to prove that they were deprived of the right to contract with or to purchase property from the defendants. Instead, plaintiffs stated a viable cause of action by establishing that the tobacco

165. Brown v. Philip Morris, 250 F.3d at 794.

166. *Id.* at 798. Although consumers exposed to discriminatory advertising may not be protected by the Civil Rights Act of 1866, one lower court decision refused to dismiss a complaint brought by an advertiser against a newspaper that refused to run ads featuring Black exotic dancers, but continued to run ads featuring White exotic dancers. Howard Spence v. Daily News, 2001 U.S. Dist. LEXIS 1199 (S.D.N.Y. 2001).

167. *Brown v. Philip Morris*, 250 F.3d at 809. Several legal commentators believe that the federal courts have not credited plaintiffs' perception of events in consumer discrimination cases and that they have imposed heightened pleading requirements on such plaintiffs due to their failure to acknowledge that racial discrimination still exists in American society generally and in consumer settings in particular. *See* Harris, *supra* note 124.

168. *Brown v. Philip Morris*, 250 F.3d at 807.

169. "Contrary to its express language and its legislative history, courts routinely dismiss §§ 1981 and 1982 claims where defendants' behavior degrades—but does not completely deny—the goods and/or services plaintiffs sought to purchase." Harris, *supra* note 124.

companies' practice of targeting Black consumers altered the conditions of the purchase (or contract) for the Black smokers whereas it did not for non-Black consumers.[170] Violations of §§ 1981 and 1982 may exist where race-based marketing practices degrade, but do not completely deny, the purchase of goods and/or services for customers of color.[171]

The dissent in *Brown v. Phillip Morris* analogized the tobacco companies' encouragement of Black consumers to purchase and utilize mentholated products to the unlawful practice of racial "steering" that "creates a separate, racially-segregated market."[172] In the housing context, realtors engage in "steering" when they encourage Whites to live in White neighborhoods, Hispanics to live in Latino neighborhoods, and Black Americans to live in Black neighborhoods by withholding information about the availability of housing. Racial steering is prohibited under both § 1982 and the Fair Housing Act.[173] In the marketplace, advertisers may be guilty of racial steering when they withhold information about the availability of products or services or when they deliberately focus on Black people as their far-preferred targets of more dangerous products, as in the case at issue.[174] When purchasing a product (or making a contract to buy a home), consumers typically engage in a number of activities including: learning about the product's features, inspecting the product, comparing products and their prices, and negotiating with the merchant. Advertisements that discourage or prevent minority consumers from learning about products and their features by specifying racially discriminatory preferences frustrate their opportunity to make purchases (or contracts) on the *same terms* as White consumers.[175] To the extent that advertisers' practices differ in their treatment of Black and White consumers, plaintiffs may succeed in establishing that defendant denied them the *same right* to make and enforce contracts and to purchase property as they afford White customers.

Like the dissent, the majority of the court in *Brown v. Phillip Morris* compared the case at issue to discrimination arising in the housing context. In fact, the Third Circuit supported its decision with dictum from a 1968 housing discrimination case, *Span v. Colonial Village*, brought under both § 1982 and the new Fair Housing law. In that case, the Supreme Court indirectly addressed the issue of discriminatory advertising when it compared § 1982 to Title VIII of the Civil Rights Act of 1968 and identified a number of differences between the scope of the

170. *Brown v. Philip Morris*, 250 F.3d at 807–08.

171. Harris, *supra* note 124.

172. *Brown v. Philip Morris*, 250 F.3d at 809.

173. *Id.*

174. *Id.*

175. *See* Harris, *supra* note 124; *see also Ragin v. Steiner, Clateman and Associates, Inc.*, in which the court stated that "advertising may well be said to relate to opportunities to enter into contracts. . . ." 714 F. Supp. 709, 713 (S.D.N.Y. 1989).

two laws, among them, § 1982's failure to explicitly prohibit advertising that indicates discriminatory preferences.[176] While it has been cited as authority by a small number of courts,[177] the Supreme Court's statement made over thirty years ago, as dicta, is no longer relevant. At that time, the Congress' goal in enacting civil rights legislation was to dismantle the segregated institutions and overtly discriminatory practices that perpetuated the unequal status of Black Americans in the United States. Today, courts are recognizing that contemporary racism includes subtle and unconscious behavior in addition to overt and intentional conduct.[178]

Noting that causation and intent are "classic issues of fact to be resolved by a factfinding jury and not by judicial prescreening,"[179] the dissenter in *Brown v. Phillip Morris* concluded that the district court erroneously dismissed plaintiffs' complaint. Plaintiffs were denied the opportunity to present evidence about causation (did racial steering or targeted marketing rather than a predisposition for menthol cause Black consumers to increase their consumption of the harmful products?) and intent (did racial animus, rather than mere chance, cause the disparity in consumption of menthol cigarettes?). Decrying the majority's decision, Judge Shadur observed:

> I find it particularly poignant that we deal here with a group of defendants whose industry is centered in an area where Blacks were once chattels, viewed as sub-humans—again, ironically in terms of the present litigation, chattels whose slave labor was responsible in large part for the economic success of the tobacco industry.[180]

In contrast with the Third Circuit, the district court for the Southern District of New York determined that the *Daily News* may have violated § 1981 when it refused to run advertisements with pictures of Black erotic dancers.[181] In May 1998, Howard Spence, a part-time adult entertainment promoter, and the *Daily News* entered into an advertisement contract whereby the *Daily News* would run Spence's adult entertainment advertisements. While defendants had previously printed Spence's ads that featured White erotic dancers, they did not print his ads featuring Black erotic dancers explaining that they were "cutting back on ads like that."[182] Although the plaintiff in this case was not a consumer, his

176. Jones v. Alfred H. Mayer, 392 U.S. 409 (1968).

177. *See* Spann v. Colonial Village, Inc., 899 F.2d 24, 35 (D.C. Cir. 1990); Saunders v. General Services Corp., 659 F. Supp. 1042 (E.D.Va. 1986); Ragin v. Steiner, Clateman and Assocs., 714 F. Supp. 709, 713 (S.D.N.Y. 1989).

178. *See* Harris, *supra* note 124.

179. *Brown v. Philip Morris*, 250 F.3d at 811.

180. *Id.* at 810.

181. Spence v. Daily News, 2001 WL 121938 1, 4 (S.D.N.Y. 2001).

182. *Id.* at 1.

allegations of discrimination challenged defendants' race-based advertising practices. The court defined the issue in terms of the advertiser's inability to enforce his contract with the *Daily News* due to the race of the dancers he hired to create his advertisement. Finding that Spence stated a valid cause of action under § 1981, the court denied defendants' motion to dismiss the complaint in which Spence alleged that defendants' advertising policy was applied in a discriminatory way.[183]

2. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000a and 2000e

a. Title II

Title II of the Civil Rights Act of 1964 provides to all Americans the right to the "full and equal enjoyment of the goods, services, facilities privileges, advantages, and accommodations of any place of public accommodation."[184] The authors are aware of no cases in which consumers argued that advertisers employing race-based marketing practices violated the rights protected under the federal public accommodations law. One can argue that advertisements targeting minorities denies minorities the right to equally enjoy the advertised product. In addition, one can argue that advertising that excludes certain people on the basis of race, ethnicity, or national origin, amounts to an attempt to avoid patronage by minority customers thereby violating their right to the "full and equal enjoyment" of "any place of public accommodation."

The statute's applicability is limited insofar as protection under Title II is available only to those plaintiffs who were discriminated against in certain types of establishments.[185] Since retail stores are not among the list

183. *Id.* at 4.

184. 42 U.S.C. § 2000a (1997).

185. At 42 U.S.C. 2000a(b), a place of "public accommodation" is defined as:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

of covered entities, many consumers would be unable to depend on Title II for redress for discriminatory advertising should the courts determine that targeted marketing and other race-based advertising practices are prohibited under the Act.

In addition, the statute's notification requirement precludes some plaintiffs from obtaining relief under Title II. While plaintiffs need not exhaust their administrative remedies, they must notify the appropriate state or local agency of the alleged discriminatory conduct prior to filing suit.[186] Title II's applicability is further limited in terms of the remedies it affords. 42 U.S.C. § 2000a only permits the issuance of an injunction or declaratory relief.[187] The inadequacy of such relief has prompted some commentators to argue that the statute's utility would increase if amended to provide for compensatory damages.[188] Plaintiffs would have greater incentive to pursue their claims against advertisers under Title II if monetary damages were available to them.

b. Title VII

Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment advertising.[189] As in the United Kingdom, U.S. employment advertising cases involve ads with fairly explicit, and thus readily identifiable, discriminatory messages such as job announcements reading "men

186. 42 USC 2000a-3(c) provides, in pertinent part:

> In the case of an alleged act or practice prohibited by this subchapter which occurs in the state, or political subdivision of a state, which has a state or local law prohibiting such act or practice and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under Subsection (a) of this Section before the expiration of 30 days after written notice of such alleged act or practice has been given to the appropriate state or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of state or local enforcement proceedings.

187. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (*per curiam*).

188. *See, e.g.*, Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1251 (1997). *See also* Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 289 n.4 (Fall 2001).

189. Specifically, Title VII made it unlawful for employers: to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer [or other entity covered by the statute], or relating to any classification or referral for employment by [such entity] . . . indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination is a bona fide occupational qualification for employment. 42 U.S.C. § 2000e-3(b) (1988).

wanted."[190] Banning ads that explicitly target potential employees based on gender is consistent with the protections afforded to commercial speech under the First Amendment.[191]

Title VII case law may also provide guidance in cases where merchants attempt to exclude minorities from advertisements due to fears that White customers will be deterred from doing business with them. Under Title VII (and under the Fair Housing Act discussed below), customer preference is not a legitimate reason for discriminating against others on the basis of race, national origin, or gender.[192]

3. The Fair Housing Act

In 1968, Congress enacted the Fair Housing Act (FHA) to combat discrimination in housing.[193] Housing is perhaps the most segregated aspect of American life with Black renters facing as high as a seventy-five percent chance of experiencing discrimination.[194] Congress recognized

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190. *See e.g.*, EEOC v. Guardian Pools, 828 F.2d 11 (11th Cir. 1987).

191. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973); *see also* Hailes v. United Airlines, 464 F.2d 1006 (5th Cir. 1972).

192. *See* Diaz v. Pan Am World Airways, 442 F.2d 385, 389 (5th Cir. 1971) (holding that customer preference for female flight attendants does not permit airlines to refuse to hire males).

193. Fair Housing Act of 1968, 42 U.S.C.S. §§ 3601–3612, at § 3604(c) (1997). "The Act's purpose is to protect against conduct which, either intentionally or in effect, impedes integration and/or perpetuates segregation and discrimination in housing." Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1230 (S.D.N.Y. 1992).

194. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1051–52, 1061 (1989).

For recent data, *see* MARGERY A. TURNER, ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 OF THE HOUSING DISCRIMINATION STUDY (HDS), (U. Conn., Dept. of Econ., Working Paper No. 2002–16, 2001). The findings of this study are summarized, in part, as follows: African Americans still face discrimination when they search for rental housing in metropolitan markets nationwide. Whites were consistently favored over Blacks in 21.6% of tests. In particular, Whites were more likely to receive information about available housing units, and had more opportunities to inspect available units. Discrimination against African American renters declined between 1989 and 2000, but was not eliminated. The overall incidence of consistent White-favored treatment dropped by 4.8 percentage points, from 26.4% in 1989 to 21.6% in 2000.

African American homebuyers—like renters—continue to face discrimination in metropolitan housing markets nationwide. White homebuyers were consistently favored over blacks in 17% of tests. Specifically, White homebuyers were more likely to be able to inspect available homes and to be shown homes in more predominantly White neighborhoods than comparable Blacks. Whites also received more information and assistance with financing as well as more encouragement than comparable Black homebuyers. Discrimination against African Americans homebuyers declined quite substantially between 1989 and 2000, but was not eliminated. The overall incidence of consistent White-favored treatment dropped by 12 percentage points, from 29% in 1989 to 17% 2000. However, geographic

that advertisements conveying a message that certain groups are not welcome to live in certain housing are detrimental to our society and contrary to public policy.[195] For this reason, it included provisions expressly prohibiting discriminatory advertising for housing. Of all the anti-discrimination laws, the Fair Housing Act alone has been used to challenge implied discrimination caused by the omission of minorities from housing advertisements.[196] The Act makes it unlawful to:

> make, print, or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, or familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[197]

Regulations promulgated by the U.S. Department of Housing and Urban Development (HUD), charged with enforcing the FHA, indicate that oral statements and all types of advertising as well as "words, photographs, illustrations, symbols or forms which convey that dwellings are available or not available to a particular group" are included under the statute.[198] In addition, the Act proscribes "selecting media or locations for

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steering rose, suggesting that Whites and Blacks are increasingly likely to be recommended and shown homes in different neighborhoods.

195. FCC Report, When Being No. 1 is Not Enough 30 (1999) *available at* http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study.

196. The Act creates a private right of action to enforce the rights it protects. *See* § 3612(a). "Lawsuits challenging discriminatory advertising may be brought both by fair housing organizations and by readers of discriminatory advertising who are deterred in their housing search or suffer emotional injury. In such a suit, if a court finds that a discriminatory practice has occurred or is about to occur, it may award the plaintiff compensatory damages, punitive damages, a declaratory judgment, and/or appropriate equitable relief." FAIR HOUSING COUNCIL OF GREATER WASHINGTON, EQUAL RIGHTS CENTER, FAIR HOUSING ADVERTISING MANUAL, (1996) (updated 2002), *available at* http://www.equalrightscenter.org/resources/advertisingmanual.pdf.

197. 42 U.S.C. § 3604(c) (1997).

198. HUD issued a set of guidelines in 1972 that identified the types of housing ads that would raise problems under § 3604(c). *See* HUD Advertising Guidelines for Fair Housing, 37 Fed. Reg. 6700 (Apr. 1, 1972). In 1980, these guidelines were promulgated as a regulation. *See* 45 Fed. Reg. 57,102–07 (Aug. 26, 1980) (promulgating 24 C.F.R. Part 109). In 1996, HUD "removed" this regulation on the basis that such "nonbinding guidance" did not amount to regulatory requirements appropriate for codification in the Code of Federal Regulations. 61 Fed. Reg. 14,380 (April 1, 1996). However, HUD still views the guidance contained in that regulation as "very helpful." *Id.* at 14,378. The text of the now-removed version of 24 C.F.R. Part 109 is available at 54 Fed. Reg. 3308–10 (Jan. 23, 1989)." Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(C): A New Look At The Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 220 (2001).

advertising . . . which deny particular segments of the housing market information."[199]

According to HUD policy, an illegally exclusionary message is implicitly communicated to people of color when housing ads fail to portray non-White models. As previously discussed, such messages constitute racial steering because they encourage (or discourage) individuals to live (or not to live) in certain neighborhoods based on race. Therefore, HUD regulations on the use of "human models" in advertising read as follows:

> Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness on the basis of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in a metropolitan area and both sexes. Models, if used, should portray persons in equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.[200]

Case law has interpreted the FHA as "broad and inclusive."[201] In one case, a consumer alleged that, over the course of many years, the *New York Times* had substantially excluded Blacks from real estate advertising thereby implying its preference for White home seekers.[202] The Court found that the *Times* "engaged in a pattern of publishing real estate ads featuring White models as potential customers and black models as service employees except for the exclusive use of black models for housing in predominantly black neighborhoods."[203] Characterizing such conduct as the "targeting" of racial groups, the Second Circuit held that defendant violated the FHA when it published such advertisements.[204]

In contrast with the other substantive provisions of the FHA, proving discriminatory intent is not a requirement for establishing a violation of § 3604(c).[205] A plaintiff simply needs to show that the challenged

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199. 24 C.F.R. § 100.75 (1997).

200. 24 C.F.R. § 109.30 (b) (1996), *removed*, 61 Fed. Reg. 14,378, 14,380 (Apr. 1, 1996).

201. In United States v. Long, 429 U.S. 871 (1976), the Supreme Court found that the word "indicates" required a broad interpretation of the statute; *see also* Trafficante v. Metropolitan Life Insurance, 409 U.S 205 (1972), *cited in* Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991).

202. Ragin v. N.Y. Times Co., 923 F.2d 995, 1002 (2d Cir. 1991).

203. *Id.*

204. *Id.*

205. *See e.g.*, Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991); *see also* Ivan C. Smith, *Discriminatory Use of Models in Housing*

advertisement was made "with respect to the sale or rental of a dwelling" and that it "indicates" a racial preference to an "ordinary reader" or "ordinary listener."[206] In *United States v. Hunter*, the Fourth Circuit was the first to hold that a newspaper was liable for publishing a classified advertisement that contained an explicitly exclusionary message.[207] The advertisement at issue stated that an apartment for rent was located in a "private white home."[208] In its decision, the Fourth Circuit introduced the "ordinary reader" test when it held that, under the FHA, a plaintiff need only show that "to the ordinary reader, the natural interpretation of the advertisements published ... is that they indicate a racial preference."[209] The Fourth Circuit's rationale for applying the Act to ads for dwellings specifically exempted from its provisions was that the owners of such dwellings are free to indulge their discriminatory preferences in selling or renting, but they do not have the right to publicize their intent to discriminate.[210]

Similarly, in *Spann v. Colonial Village, Inc.*, then Circuit Judge Ginsburg "recognized that the practices banned by § 3604(c) might not only discourage minorities from seeking homes available to them, but also might create 'a public impression that housing segregation is legal, thus facilitating discrimination by defendants or other property owners and requiring

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Advertisement: The Ordinary Black Reader Standard, 54 OHIO ST. L.J. 1521, 1525 n.22 (1993). Not requiring proof of intent is consistent with discriminatory zoning cases. *See e.g.*, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F. 2d 1283 (7th Cir. 1977), in which the Seventh Circuit held that the "ultimate effect" of the decision not to reevaluate its zoning laws to include low income housing was discriminatory and thus no intent to discriminate was necessary.

206. Schwemm, *supra* note 198, at 215. "An ad expresses a 'preference' " if "it would discourage an ordinary reader of a particular race from answering it." *Ragin v. Harry Macklowe*, 801 F. Supp. at 1227 (citing *Ragin v. N.Y. Times*, 923 F.2d at 1000).

207. U.S. v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972); *see also* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996); Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993); Ragin v. N.Y. Times Co., 923 F.2d 995 (2d Cir. 1991); HOME v. Cincinnati Enquirer, 943 F.2d 644 (6th Cir. 1991); Spann v. Colonial Village, Inc., 899 F.2d 24, 29 (D.C. Cir. 1990).

208. *U.S. v. Hunter*, 459 F.2d at 209 n.1. "The classified advertisement on January 8, 1970 read: FOR RENT-Furnished basement apartment. In private White home. Call JO 3- 5493. The ad on June 18, 1970 read: FURNISHED APARTMENT, well located, clean quiet. In White home. Gentlemen only. $17.50 a week. Call JO 3-5493. Both ads were placed by an elderly, retired man who lived in southeast Washington, D.C." *Id.* at 209.

209. *Id.* at 215.

210. *Id.* at 213. The FHA's principal exemption is for apartment buildings with four or fewer units where the owner resides: the so-called "Mrs. Murphy" exemption. 42 U.S.C. § 3603(b)(2). A second exemption covers "any single-family house sold or rented by an owner [subject to certain enumerated provisos]." 42 U.S.C. § 3603(b)(1). Schwemm, *supra* note 198, at 187 n.10.

a consequent increase ... in educational programs on the illegality of housing discrimination.' "[211]

The decisions in *Hunter* and *Spann* evince the courts' understanding that advertising shapes public opinion. Clearly, the nefarious effects of using housing advertising to steer consumers exist in other contexts as well. For now, when the object being marketed is real estate, people of color are protected from race-based advertising practices that either encourage or discourage them from purchasing a particular home or renting an apartment in a certain neighborhood. Extending this rule to encompass marketing of other products and services would require us to come to terms with the fact that many Americans are influenced by the subtle or unconscious racist belief that some customers are more valuable than others.

4. The Community Reinvestment Act

The Community Reinvestment Act of 1977 (CRA)[212] requires federal financial supervisory agencies to encourage banks and other deposit-collecting institutions to meet the credit needs of local communities.[213] The statute's goal was to ensure that Americans, regardless of race, have access to capital to purchase homes and build businesses.[214] It provides that banks must make loans and sell mortgages in all communities in which they operate, particularly in low- to moderate-income areas within those communities.[215] The CRA provides greater protection than the Equal Credit Opportunity Act (discussed below) because it requires that: (1) banks consider all people in the surrounding community for the issuance of credit and (2) such communities be informed of credit opportunities. In other words, the CRA requires banks to target their advertising at minority communities.

The CRA's focus is whether the bank's marketing plan included media that would effectively reach low-income people and minorities. The CRA Regulations provide twelve guidelines for measuring a depository institution's compliance, two of which directly related to marketing and advertising. The examination assesses a banks' activities aimed at ascertaining the community's credit needs and the extent of marketing and

211. Shwemm, *supra* note 198, at 225 (citing Spann v. Colonial Village, Inc., 899 F.2d 24, 30 (D.C. Cir. 1990)).

212. Community Reinvestment Act of 1978, 12 U.S.C. § 30.

213. 12 U.S.C. § 2901 et seq. (1997). For rules promulgated under the act, *see* 12 C.F.R. § 25 (1997).

214. Eric L. Hinton, *25 Years Later, Is Community Reinvestment Act Still Relevant?*, *at* http://www.diversityinc.com.

215. Community Reinvestment Act Regulations, 60 Fed. Reg. 22,156 (May 4, 1995).

special credit-related programs informing members of the community of their credit services.[216]

While the CRA imposes liability on a bank if it fails to serve the local community, it is important to note that the CRA does not create a private cause of action for aggrieved members of the bank's community.[217] Instead, it requires federal financial supervisory agencies to consider the depository institution's record in making numerous regulatory decisions.[218] The bank or depository institution is examined based on its lending record as a whole rather than being held directly liable when its advertisements exclude minorities.

One problem in terms of compliance with the law is that there is no set amount that banks are required to invest in or loan out to a given community under the Act. In addition, banks are relied upon to self-report regarding the extent of their efforts to communicate with their communities. Although the CRA is responsible for increasing loans to the target groups by 2.1 percentage points (between 1993 and 2000), other problems have prevented it from being a resounding success.[219] Among these is the proliferation of institutions not covered by the CRA that provide mortgages and other loans to customers, such as mortgage lenders, credit unions, and Internet banks.

The Department of Justice (DOJ) has shown its willingness to prosecute fair lending cases. Violations of the CRA are found when banks engage in discriminatory marketing strategies regardless of whether they actually discriminated against individuals of color in the making of loans.[220] At a banking conference, former Assistant Attorney General Deval

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216. 12 C.F.R. § 25.7 (1997) (repealed effective July 1, 1997). The CRA's regulations were repealed as of July 1, 1997. The entire regulatory system was restructured to reduce paperwork and to emphasize the actual performance of banks in serving the local community rather than the documentation of efforts to try to serve the community. The decision to repeal the advertising requirements does not diminish the banks' need to communicate with members of the local community since the banks are still required to issue credit to them.

217. *See* Harambee Uhuru Sch., Inc. v. Kemp, 1992 U.S. Dist. LEXIS 15125 (S.D. Ohio1992); *cf.* Carl V.J. Norman Inofetz Phase One, Inc. v. Thomas S. Donovan, 1992 U.S. Dist. LEXIS 14972 (E.D. Ohio 1992).

218. CRA examinations are conducted by the following federal agencies: the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.

219. Citing a report released by Harvard's Joint Center for Housing Studies, Hinton reported that "Researchers analyzed 24 million home-purchase loans between 1993 and 2000 and did case studies in nice areas." Hinton, *supra* note 214.

220. *See* Marianne Lavelle, *Critics Fail to Derail U.S. Drive on Fair Lending*, NAT'L L.J., Dec. 26, 1994, at B1. This article notes a settlement with Chevy Chase Federal Savings Bank that promised to invest over $11 million in certain neighborhoods over a five-year period. It also noted three earlier settlements: U.S. v. Shawmut Mortgage Co., Civ. 3.93 CV-2453 (Conn. 1993); U.S. v. Blackpipe State Bank, Civ. 93-5115 (S.D. 1993); U.S. v. First National Bank of Vicksburg in Mississippi, Civ. 5: 94 CV 6(b)(N) (Miss. 1990).

L. Patrick pledged the DOJ's commitment in addressing the impact of race-based marketing, which he described as one of the "more subtle discriminatory practices."[221]

The CRA's provisions are significant in terms of regulating advertising in the United States because they require companies to advertise products widely accepted as beneficial. Other regulations are aimed at protecting the public from harmful products or deceptive information. In enacting both the CRA and the FHA, the Congress acknowledged that individuals residing in certain low-income communities were excluded from a great deal of information taken for granted by most other citizens. Where banks had previously failed to make loans to individuals living in economically disadvantaged communities, federal legislation required advertising to educate individuals and end the cycle of poverty and distress. Could the advertising dictates of the CRA be extended to apply to other goods and services as well?

5. The Equal Credit Opportunity Act

The Equal Credit Opportunity Act prohibits the denial of credit based on race, color, and other protected classes.[222] The statute applies to all creditors who extend or arrange credit in the ordinary course of their business, including banks, small loan and finance companies, retail and department stores, credit card companies, and credit unions.[223] Rules promulgated under the statute prohibit the use of "words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference." It is also illegal, under the statute to discourage individuals from applying for credit through statements "in advertising or otherwise."[224] In addition, creditors may not "directly or indirectly engage in any form of advertising which implies or suggests a policy of discrimination."[225]

All of the U.S. laws and regulations that address race-based advertising practices attempt to remedy the harm that is engendered when people of color are under-exposed to information about useful products or services.[226] With one exception, the federal government has not yet attempted to redress the harms caused when minorities are over-exposed

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221. *Id.* at B2.

222. 15 U.S.C. § 1691 (1997).

223. LYNDA J. OSWALD, THE LAW OF MARKETING 285 (2002).

224. 12 C.F.R. § 202 and § 202.5 (1997).

225. 12 C.F.R. § 528 (1997).

226. One possible exception is the Department of Defense's blanket prohibition of any discriminatory advertising in Stars and Stripes newspapers. *See supra* note 150 and accompanying text. The military may be so progressive in its approach because a substantial proportion of its members are people of color.

to information about harmful products.[227] While some localities have begun to ban alcohol and tobacco advertising on certain inner-city billboards, these measures appear to be directed at protecting children rather than people of color.[228] Now that consumers of color are challenging discriminatory conduct in the marketplace, advertisers may face legal challenges when they attempt to steer customers to or from their products and services.

IV. PROPOSALS FOR EFFECTIVELY ADDRESSING THE HARMS OF RACE-BASED ADVERTISING

In light of the limited protection currently offered under U.S. law, another possible approach for redressing consumers harmed by discriminatory advertising practices would be for the Federal Trade Commission (FTC) pursue such practices under its unfairness authority. The FTC is responsible for regulating all kinds of deceptive or unfair acts involved in marketing goods and services including unfair advertising acts or practices. In this section, we examine the FTC Act's provisions and propose guidelines for assessing consumer unfairness manifested in race-based advertising.

A. *First Amendment Concerns*

Constitutional limitations could affect the ability of the FTC to regulate harmful race-based advertising practices. The First Amendment of the Constitution provides for freedom of speech and has been held to protect commercial speech.[229]

In addition, the Supreme Court has recognized that the First Amendment protects the rights of consumers to receive commercial information:

> So long as we preserve a predominantly-free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the

227. The Bureau of Alcohol, Tobacco and Firearms (BATF) withdrew its approval of the name Powermaster for a malt liquor product. *See supra* note 86 and accompanying text.

228. *See e.g.*, Anheuser-Busch, Inc. v. Schmoke, 1995 U.S. App. LEXIS 24515 (4th Cir. Aug. 31, 1995); Penn Advertising of Baltimore, Inc. v. Schmoke, 1995 U.S. App. LEXIS 24504 (4th Cir. 1995).

229. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). A landlord's refusal to rent to an African American was held to be commercial speech in violation of the Fair Housing Act even though the proposed transaction was otherwise exempt because the property was a single family house. *See* U.S. v. Racey, 1997 U.S. App. LEXIS 10151 (4th Cir. May 7).

> aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.[230]

Presently, however, some disadvantaged minorities may not enjoy the benefits of the free flow of commercial information. Some argue that they receive a disproportionately high amount of information concerning certain harmful products such as tobacco and alcohol and a lower amount of information concerning other products. The proposal presented here is to encourage industry self-regulation of race-based advertising consistent with the First Amendment goal of ensuring the free flow of commercial information to everyone.

The most important point for this analysis is simply that commercial speech that perpetuates racism or causes race-based harms merits no protection under the First Amendment. To hold otherwise would be to use the First Amendment to permit race discrimination, thereby denying equal protection of law under the Fourteenth Amendment.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court denied a First Amendment challenge to a city ordinance banning gender specific help wanted advertising columns in newspapers.[231] The Court based its decision on the fact that discrimination in employment is illegal, and therefore an advertisement concerning discriminatory employment practices is commercial speech about an illegal activity; the First Amendment does not protect such speech.[232]

However, this decision has two problems in its application to race-based advertising more broadly. First, it predates the formal recognition of First Amendment protection for commercial speech announced in *Virginia State Board*.[233] Second, *Virginia State Board* and other decisions explicitly recognize that misleading speech or speech concerning unlawful activity is not protected by the First Amendment.[234] This article proposes that instead of the government, the advertising industry must develop guidelines for race-based advertising. Nevertheless, it is necessary to examine whether such regulations would pass constitutional muster if they were enacted by a governmental body.

Beginning with the 1980 decision of *Central Hudson Gas & Electric v. Public Service Commission*, the Court (over the rigorous dissent of Justice

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230. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

231. 413 U.S. 376, 388 (1973).

232. *Id.*

233. Pittsburgh Press only precedes Virginia State Board by three years and there is some evidence the Court was wavering on commercial speech protection prior to Virginia State Board. *See* Bigelow v. Virginia, 421 U.S. 809, 825–26 (1975) (the Court protected advertising for an abortion service noting: "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas").

234. *Id.*; *see also* Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. 557, 563 (1980)("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity").

Blackmun) has consistently held that commercial speech is entitled to less First Amendment protection than non-commercial speech.[235] *Central Hudson* formulated a four-pronged test to judge the validity of regulation of commercial speech. First, to be protected, an advertisement must concern lawful activity *without deception.* Once this first criterion is met, it must be established that there is *substantial government interest* in the regulation of the advertising. If substantial government interest is shown, then the regulation in question must directly advance that interest. Finally, the regulation cannot be more extensive than necessary to advance that interest.[236] This last criterion is less stringent than the "closely related" requirement for regulation of non-commercial speech.[237]

As noted above, race-based advertising that is not deceptive appears to meet the first prong and is therefore protected. The harms of discrimination would appear to provide substantial governmental interest in regulating race-based advertising. Therefore, the second prong is satisfied, allowing regulation of harmful race-based advertising practices.

The third part of the test requires that the regulation in question directly advance the government's interest. If the government's interest is defined broadly as an interest in combating racism, it is unlikely that regulating race-based advertising will do more than take a small step toward meeting this goal. However, if the governmental interest is defined narrowly to prevent the specific harms attributable to racially discriminatory advertising, then this interest would appear to be directly advanced by the suggestion for regulation discussed below.[238]

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235. *See Central Hudson*, 447 U.S. at 563–566; *see also* 44 Liquormart vs. Rhode Island, 116 S. Ct. 1495 (1996).

236. *Central Hudson*, 447 U.S. at 566.

237. Bd. of Trustees of the State University of N.Y. v. Fox, 109 U.S. 3028 (1989). In U.S. v. Edge Broadcasting Co., 61 U.S.L.W. 4759, 4762 (1994), this clarification was characterized as requiring a fit between the restriction and the government interest that is "not necessarily perfect, but reasonable."

238. In Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 651–53 (6th Cir. 1991), the court held that publishing one advertisement containing a small number of all-White models was not, without more, discriminatory. Finding such speech to be about a legal activity, renting housing, the court performed a Central Hudson analysis, but found that the governmental interest in preventing discrimination in housing was not directly advanced by aggregating effects of legal advertising to find a general sense of discrimination throughout the market for which only the media would be liable. The court stated it was "difficult to determine" how the general discriminatory message deters individuals from seeking specific real estate. The court is incorrect in that the general discriminatory message may deter minorities who have a choice from seeking housing in large parts of Cincinnati. However, the court is correct that the governmental interest in stopping discrimination in housing is directly advanced by pursuing the housing advertisers, not the media they use.

To pass the fourth prong of this test, any regulation must be no more extensive than necessary to forward the asserted interest.[239] This "reasonable fit" requirement was closely examined in *44 Liquormart*, a case involving a total ban on price advertising.[240] There, the Court determined economic and health harms alone would not satisfy the reasonable fit requirement because other regulatory alternatives with less effect on speech could be used. However, the harms stemming from race-based advertising are caused by the speech itself and, therefore, can be subject to some form of regulation. Moreover, guidelines that do not ban information but merely restrict the format used to present the information do not step beyond what is necessary. Consistent with one concern of the Court in *44 Liquormart*, regulating race-based advertising would arguably provide people of color with more information from advertisers who otherwise would closely target the White majority. However, because Black consumers receive the same messages distributed through the mass media as White consumers do, the effect of regulations proscribing race-based advertising is unclear.

The Supreme Court has consistently allowed very stringent regulation of advertising for harmful products and services that would otherwise constitute lawful and non-deceptive commercial speech. In *Posadas de Puerto Rico Association v. Tourism Co.*,[241] the Court was asked to assess the validity of the Games of Chance Act of 1948, which prohibited the advertising of gambling to the residents of Puerto Rico while still allowing its advertising to tourists.[242] This regulation was enacted to protect the people of Puerto Rico from a harmful but legal activity that posed an unreasonable threat to the health of the community if advertised directly to its residents. The Court used the *Central Hudson* Test to uphold the regulation.[243] It determined that advertising for a product, activity, or service could be banned if the product, activity, or service itself could be banned.[244] Although gambling is a legal activity, the court found that it could regulate or ban it and its advertising to protect people from its harmful effects.[245]

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239. The *Housing Opportunities* court also held that the burden placed on the media to monitor and evaluate the entirety of housing advertisements over time violated the fourth prong of *Central Hudson*. *See id.*

240. 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996). The opinion was particularly critical of regulations amounting to a total ban on speech—that is not the case here.

241. 478 U.S. 328 (1986).

242. The Games of Chance Act of 1948, Act No. 221, May 15, 1948.

243. *Posadas*, 478 U.S. at 346–347.

244. *Id.* ("the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling").

245. *Posadas* was criticized and limited in 44 Liquormart vs. Rhode Island, 517 U.S. 484 (1996).

More recently, in *U.S. v. Edge Broadcasting Co.*, the Court analyzed a federal statute that prohibited broadcasters located in states without state lotteries from carrying advertisements for state lotteries that were operated in neighboring states. While the Court cited *Posadas* for the proposition that vice activities could be banned altogether, it declined to reiterate that banning the activities included the power to prohibit advertising them. Instead, the Court solely relied upon a *Central Hudson* analysis to uphold the statute. The Court held, under the fourth prong, that the statute reasonably addressed the overall problem the government sought to address.[246]

While apparently backing away from *Posadas*, *Edge Broadcasting* still provides considerable leeway for the governmental regulation of commercial speech concerning harmful products or services. Both of those cases permitted a complete ban for certain media vehicles for advertising about harmful activities. However, more recent decisions have emphasized the Supreme Court's low level of tolerance for banning advertising.[247]

In *Edge Broadcasting*, the Court analogized the speech prohibitions to time, place, and manner restrictions. These restrictions can be applied to non-commercial speech if they are content neutral and provide alternate channels for communication.[248] In the case of *Clark v. Community for Creative Non-Violence*,[249] for example, the Supreme Court applied these principles to a protest that was banned in Washington D.C. because it was said to violate camping laws by requesting that protesters stay on the Mall in D.C.. The Court applied these principles to the regulation of camping in specified campgrounds and upheld the ruling as content neutral.

The regulation of race-based advertising proposed here is content neutral in terms of the regulation of media vehicles. Moreover, it does not affect the content of the selling message. The advertiser can feature whatever message it desires to sell its product or service as long as the message is not racially discriminatory in content. For these reasons, the suggested regulation should be considered permissible under the First Amendment

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246. *See* Richard P. Mandel, *Regulation of Commercial Speech: Did the 1993 Supreme Court Decisions Clarify the Scope of First Amendment Protection?*, 13 J. PUB. POL'Y & MARKETING 159, 162 (Spring 1994).

247. *See* Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001) (holding prohibitions banning tobacco advertising within 1,000 feet of a school violate the First Amendment); *see also* Greater New Orleans Broad. Ass'n, Inc. v. U.S., 527 U.S. 173 (1999) (holding that broadcast prohibitions of advertising for privately owned casinos do not advance the government's interest in reducing the social costs of gambling because other forms of gambling are advertised).

248. *See* Clark v. Community for Creative Non-Violence 468 U.S. 288, 293 (1984) (Time, place and manner restrictions also can be applied to commercial speech). *See e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); In re R.M.J., 455 U.S. 191, 201 n.13 (1982).

249. 468 U.S. at 293.

as mere time, place, and manner restrictions. In addition, the proposal passes the *Central Hudson* test for commercial speech regulation.[250]

B. *Federal Trade Commission Regulation of Unfair Advertising*

In 1938, the Wheeler-Lea Amendment to the Federal Trade Commission Act increased the FTC's power to promote competition by giving it the authority to control "unfair and deceptive acts and practices."[251] The Act's enforcement rests entirely with the FTC as only the Commission may bring suit under the Act. Although consumers and business competitors do not have the right to sue, they may bring informal complaints to the FTC's attention.

1. Deception

While FTC challenges of deceptive advertising are commonplace, the Commission has never challenged race-based advertising as deceptive.[252] Nevertheless, it is conceivable that some such advertising claims may fall under the FTC's control where deception is defined as "a material representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances."[253] Consider the following claim. The Physicians' Committee for Responsible Medicine (PCRM) petitioned the FTC to stop the dairy industry's "milk mustache" advertising campaign featuring male and female celebrities of all races.

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250. In *U.S. v. Racey*, the Fourth Circuit summarily found the First Amendment permissive for the prohibition of discriminatory speech where the underlying transaction was exempt under the Fair Housing Act. 1997 U.S.App. LEXIS 10151.

251. Pub. L. No. 75-447, § 3, 52 Stat. 111 (codified as 15 U.S.C. § 45(a)(1)(1938)). The operative sentence of Section 5 reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

252. *See e.g.*, Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution*, 30 AM. BUS. L.J. 1 (1992), *reprinted in* 15(2) ADVERTISING LAW ANTHOLOGY 45 (1993). In a recent case brought under Tennessee's Consumer Protection Act, T.C.A. § 47-18-101, et seq—not the FTC Act—plaintiffs claimed that, because of their race, defendant Waffle House engaged in deceptive or unfair conduct. Waffle House agreed to settle the case for an undisclosed amount. In that case, a group of African Americans alleged that Waffle House violated the Act when employees at the Waffle House closed the restaurant's doors to prevent the African American patrons from entering. According to the complaint, defendants engaged in unfair or deceptive acts by violating T.C.A. § 47-18-104 (10), (14), and (27) when they closed their doors even though they advertised goods or services for sale "24 hours a day, 365 days a year, including Thanksgiving and Christmas" but failed to disclose a limitation of quantity. Berry v. South East Waffles, L.L.C., No. 4: 01-CV-46 (E.D.Tenn.), ¶¶ 133–142 (case settled on August 6, 2002).

253. Federal Trade Commission, FTC Policy Statement on Deception, Oct. 14, 1983, *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm [hereinafter FTC Policy Statement]. *See also* Cliffdale Associates, Inc., 103 F.T.C. 110, 174–184 (1984).

According to the PCRM, the ads seduce all consumers with promises of strong bones, lower blood pressure, and better sports performance. The claims regarding the bone-protecting benefits of milk are false with respect to Blacks, males, and older women because Blacks and males in general have a much lower risk of osteoporosis and there is no scientific evidence that adding extra calcium, from milk or anything else, is helpful for people in these groups.[254] The PCRM states that studies have shown only that the milk ad claims can be made with respect to Asian and Caucasian females in their bone-building years.[255]

The claims made by the milk industry could be considered deceptive. The standard used for making such determinations would require the FTC to prove first that milk mustache ads contain representations or omissions that are likely to mislead the consumer. In one ad, where Black model Tyra Banks posed in a bikini and a milk mustache, the caption reads: "Stop drooling and listen. One in five victims of osteoporosis is male. Don't worry. Calcium can help prevent it. And ice cold, low-fat milk is a great source of calcium. . . ." Because the featured model is a Black celebrity, the ad is likely to mislead consumers since it suggests that milk can help to prevent Black individuals from developing osteoporosis, a claim that is contrary to fact. The FTC could argue that the milk mustache ads are likely to mislead consumers because of their "omissions" rather than "misrepresentations." The Commission examines the overall impression created by the ad to determine whether "qualifying information necessary to prevent a claim, representation, or reasonable expectation or belief from being misleading was not disclosed."[256] Failure to disclose the lack of scientific evidence supporting the bone-protecting benefits of milk for Black people in ads where Black models tout these benefits can clearly be characterized as a misleading omission.[257]

Second, the FTC must determine whether the consumer's interpretation or reaction to the misrepresentation or omission is reasonable. "When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the

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254. *The "Milk Mustache" Ads Are All Wet: PCRM Takes It to the Federal Trade Commission*, 3 PCRM MAGAZINE (Spring 1999), *available at* http://www.pcrm.org/news/milk_mustache_complaint.html.

255. "Nearly all studies that have examined calcium intake have specifically excluded African Americans due to differences in bone density. Within the FDA's review of literature on calcium and osteoporosis, all subjects in five of seven cited studies were Caucasian. In the two remaining studies, one included 80 women of European ancestry and only 1 from India, while the other included 295 women with only 9 subjects identified as not Caucasian." Id.

256. FTC Policy Statement, *supra* note 253.

257. "The nature, appearance, or intended use of a product may create the impression on the mind of the consumer, . . . and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." Cigarette Rule Statement of Basis and Purpose, 29 FR 8324, 8352 (July 2, 1964).

misleading interpretation."[258] A strong argument can be made that a reasonable consumer viewing endorsers of all races sporting milk mustaches could believe that the ads convey the message that the bones of people of all races, including Black Americans, would benefit from drinking milk.

The FTC'S Policy Statement refers specifically to advertising that is targeted to certain groups. In those cases, the Commission determines the effect of the advertising practice on a reasonable member of the target market. The Policy Statement identifies "children, terminally ill patients, and other subgroups" as examples of target audiences. It is unclear whether the milk industry ads are specifically targeted to Black consumers. If the ads featuring Black models are located predominantly in neighborhoods with large Black populations and in media largely directed at Black consumers, perhaps an argument could be made that such ads were targeted to that racial group. In that case, the FTC could establish that a reasonable Black consumer could interpret an ad juxtaposing a mustachio-ed Black model with text that promotes the bone-protecting virtues of milk as suggestive that drinking milk would protect his or her bones.

Lastly, the FTC must show that the representation, omission, or practice is material. Certain claims are presumptively material; among them, express claims and claims involving health, safety, or other areas with which the reasonable consumer would be concerned.[259] Health claims are at issue in the milk industry ads. Failing to disclose that drinking milk may not effectively protect the bones of Black Americans is material because such an omission is likely to affect a consumer's choice of or conduct regarding the product.[260] Supplying accurate information about the findings of medical studies is necessary for Black consumers to make healthy food selection decisions.

While the message conveyed in the milk mustache campaign is not deceptive for young Caucasian females, the FTC could determine that the milk industry ads are deceptive for Black audiences (as well as male and older female audiences). Because the effect of the milk ads' message differs depending on the race of the consumer, the ads can be characterized as race-based advertising that discriminate against Black consumers. This example illustrates the FTC's control over such a practice under its deception authority.

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258. National Commission on Egg Nutrition, 88 F.T.C. 89, 185 (1976); Jay Norris Corp., 91 F.T.C. 751, 836 (1978). *See* FTC Policy Statement, *supra* note 253. Among other guidelines, the Policy states that: "accurate information in the text may not remedy a false headline; written disclosures or fine print may be insufficient to correct a misleading misrepresentation; other practices of the company may direct consumers' attention away from the qualifying disclosures."

259. *Id.*

260. *Id.*

2. Unfairness

Although the milk industry ad campaign provides a good example of race-based advertising that is deceptive, advertising that targets people of color is not usually deceptive. Neither is advertising that excludes, under-represents, or stereotypes people of color. Therefore, regulation of such advertising is more likely to occur under the FTC's unfairness jurisprudence. In fact, the FTC has previously challenged target marketing under the unfairness doctrine with its "900-Number" Industry Rule. This rule bans 900-Number Telephone services directed at children under the age of twelve. The FTC established two tests to determine if advertising is being inappropriately targeted at young children. The first bright line test asks whether fifty percent or more of an advertising vehicle's audience is under 12 years old. The second test requires the Commission to examine a variety of factors such as the placement of the ad, the subject matter, visual content, language, and the apparent age of any models or characters.[261]

The Supreme Court articulated the most expansive interpretation of the FTC's unfairness authority in a case the Commission brought against Sperry & Hutchinson.[262] The Court identified three criteria for determining unfairness in both advertising and non-advertising cases. The challenged conduct must: (1) injure consumers, (2) violate established public policy, and (3) be unethical or unscrupulous. Since unethical or unscrupulous conduct also typically violates public policy, the FTC bases its decisions only on the first two elements.[263]

With its primary focus on unjustified consumer injury, the injury criterion itself can warrant a finding of unfairness.[264] The injury must be substantial, it must not be outweighed by any countervailing benefits to consumers or competition, and it must be an injury that consumers could not reasonably have avoided.[265]

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261. 16 C.F.R. § 308 (1997).

262. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). These criteria were first announced by the Commission in its Statement of Basis and Purpose of the so-called Cigarette Rule. *See* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

263. Federal Trade Commission, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm [hereinafter FTC Policy Statement on Unfairness]. Since the 1994 FTC Act Amendments, public policy considerations may not serve as a primary basis for determining unfairness. The Federal Commission Act Amendments of 1994, P.L. 103-312; 108 Stat. 1691 (1994).

264. *Id.*

265. Federal Trade Commission, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, App. to International Harvester, Inc., 104 F.T.C. 949, 1072 (1984). For an analysis of this statement, see Neil W. Averitt, *The Meaning of 'Unfair Acts of Practices' in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981).

An injury sufficiently substantial to be deemed unfair must not be trivial or merely speculative. Although harms suffered by each consumer may not be significant, substantial injury is caused if a small harm is done to a large number of people.[266] Despite its emphasis on physical or financial injury resulting from purchasing a harmful or over-priced product or service, the FTC has recognized that emotional injury may occur to a consumer even when no sale has occurred. For this reason, the FTC's Telemarketing Sales Rule considers unfair a number of abusive practices including the use of profane or obscene language, making repeated phone calls with intent to annoy, abuse or harass, and failing to honor a consumer request not to be called.[267]

The FTC could find substantial economic, health-related, psychological and societal harms that flow from race-based advertising, whether such practices entail targeting people of color with unhealthy products or services or excluding them from ads for healthy products and services. The many harms caused by such practices were described in Part II above. The FTC could attempt to prove, for example, that alcohol, tobacco, or fast food advertising targeted to minorities is likely to cause more consumption (and therefore serious health risks) than without such targeted advertising. The FTC recognizes unwarranted health and safety risks as substantial injuries and it typically focuses on cases that could affect consumer health and safety.[268]

In addition, the Commission could establish that Black consumers who were not informed about certain products or services were economically harmed because they suffered opportunity costs or because they paid more for less. In fact, it is well established that consumers are injured when they pay more for products or services because of unfair practices.[269] In one example, a court refused to dismiss a state law claim brought by Black and Hispanic plaintiffs who were targeted with oppressive credit practices.[270] Although the plaintiffs' claims were brought under the Illinois statute prohibiting deceptive and unfair acts and practices rather than the FTC Act, the court was asked to determine the

266. FTC Policy Statement on Unfairness, *supra* note 263.

267. 16 C.F.R. § 310.4 (2002).

268. *Reauthorization of the Federal Trade Commission Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2nd Sess. 23, 25, 29 (1982)* (citing *Philip Morris Inc.*, 82 FTC 16 (1973)).

269. *See e.g.*, Orkin Exterminating Co. v. FTC, 849 F.2 1354 (11th Cir. 1988)(Pest exterminator specified a fix fee for future re-inspections in its consumer contracts, but then increased those fees).

270. Fairman v. Schaumburg Toyota, Inc., 1996 U.S. Dist. LEXIS 9669 (N.D. Ill. July 9, 1996).

same question regarding the extent of plaintiffs' injury resulting from paying more than White consumers to obtain credit.[271]

Secondly, the injury must not be outweighed by any benefits produced by the sales practices in question. The FTC recognizes that advertisers utilize techniques that "may prevent consumers from effectively making their own decisions."[272] The Commission's Policy Statement identifies withholding information as one such advertising technique. An argument can be made that advertising that excludes, under-represents, or stereotypes people of color effectively withholds information from them since minorities are less likely to identify with and to take note of the products and services in such exclusive advertisements. This lack of information could create obstacles that impede people of color from making good consumer decisions.

Where minority consumers are disadvantaged because they are targeted with overwhelming numbers of ads for unhealthy products, and assuming that exposure to such advertising leads to consumption of the unhealthy products, the FTC could argue that the harm associated with target marketing and other race-based advertising is unavoidable. Consequently, the FTC could establish the consumer injury prong of the unfairness test because many of the unavoidable harms at issue in race-based target marketing are health-related, are likely to cause significant harm to large numbers of consumers, and may prevent consumers from making informed transactions in the marketplace.

Next, the FTC may determine whether race-based target marketing and other advertising practices violate public policy. The Supreme Court has recognized that the First Amendment protects the rights of consumers to receive commercial information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.[273]

Presently, minorities in the U.S. do not enjoy the benefits of the free flow of commercial information. Instead, as previously described, people of color are excluded, underrepresented, or stereotyped in mainstream advertising. This advertising practice violates public policy

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271. So-called "mini-FTC Acts" are state statutes modeled after the FTC Act. *See* Mangini v. R.J. Reynolds Tobacco Co., 22 Cal.App. 4th 628 (Cal. Ct.App. 1993).

272. FTC Policy Statement on Unfairness, *supra* note 263.

273. *See* Virginia State Bd., 425 U.S. at 765.

because it impairs the ability of minorities to receive commercial information.

Furthermore, federal and state legislatures and courts across the country have determined that it is in the public interest to eliminate racial discrimination and other vestiges of slavery. As previously mentioned in Part IV, the Supreme Court, in *Brown v. Board of Education*, articulated the modern view that segregation based on race violates the equal protection rights of Black Americans. Since then, the policy against segregation and discrimination has become well-established in all sectors of American life. Therefore, the FTC could prove that advertising that excludes or segregates minorities meets the second prong of the unfairness standard.

This argument is more difficult to make when people of color are targeted with a disproportionate amount of information concerning tobacco and alcohol products in contrast with the White population. Perhaps targeted-marketing that promotes unhealthy products to minorities could be said to increase alienation caused by other forms of racism and thus undermine governmental efforts towards racial integration in America. While it is possible that bombardment by these advertisements may impair the rights of minorities to make consumer choices and may violate public policy, those assertions would be extremely difficult to prove.

An advertiser whose conduct discourages people of some races—but not others—from patronizing his or her businesses could be pursued for engaging in an unfair act or practice. A reasonable argument can be made that such discriminatory conduct as excluding or underrepresenting people of color in advertisements meets the FTC's unfairness criteria.

C. *Guidelines for Target Marketing and Other Race-Based Advertising Practices*

How can we foster a business culture that encourages openness to new information and multicultural consumers? How can companies ensure that their advertising and marketing efforts demonstrate respect for all consumers?

Advertisers have an interest in effectively reaching all consumers to achieve profitability. As this article has argued, companies may not be aware that their advertising sends subtle messages to minority consumers. Therefore, guidelines that attempt to minimize the racist effects of advertising must focus first on understanding multicultural communities and their needs. Thorough research of minority markets must be undertaken to determine the effectiveness in reaching and selling to these

audiences.[274] Advertisers should focus on the potential contributions of the minority community to their revenue based on accurate data. As we have seen, many advertising decisions are made based on stereotypical notions about minorities.[275] Business and advertising professionals who educate themselves will outperform those who make assumptions about large segments of the U.S. market. Increasing the numbers of people of color who make advertising decisions clearly has the potential to ameliorate a company's ability to tailor messages attractive to minorities. In addition, the advertising industry should develop programs aimed at increasing the level of advertising literacy among children. Today, children are exposed to advertising in their schools and it behooves us to ensure that they learn to appreciate the nature of advertising and its ability to influence their thoughts and deeds.[276]

In addition to these general guidelines, specific recommendations modeled after existing regulations address the harms we have described. To combat the effect of ads that exclude, under-represent, or present stereotypical images of minorities, advertising should be discouraged from indicating a racial preference. Ads should be evaluated based on the perspective of a reasonable viewer or reader of color to determine whether an ad implicitly communicates an exclusionary message. The guidelines should denounce race-based advertising regardless of the advertiser's intent since we understand that inferential, not intentional, racism leads to the advertising practices we seek to eliminate.

As prescribed by the FHA, human models and actors in ads for all products and services should not be used to indicate exclusiveness on the basis of race, color, or national origin. Where models and actors are used in ad campaigns, they should be clearly definable as reasonably representing the demographic make-up of the surrounding community. In addition, advertising should be discouraged from portraying models and actors in stereotypical roles. As previously mentioned, while certain positive stereotypes are not harmful in and of themselves, the exclusive use of stereotypes in portraying racial and ethnic minorities can be. Guidelines should encourage people of color to be presented in a

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274. The American Advertising Foundation & the American Advertising Federation, suggests conducting annual brand consumer audits that would examine variables such as actual sales volume, market share by consumer segment, awareness and recall, and comparisons with competitors' performance. *See* American Advertising Foundation & American Advertising Federation, *Principles and Recommended Practices for Effective Advertising in the American Multicultural Marketplace, available at* http://www.aaf.org/multi/principles.pdf.

275. Similarly, "tickets and searches [of black drivers] are being carried out by individual officers at individual agencies, all infected by a national racism that primes them to assume higher levels of drug criminality among African Americans and Latinos even though White Americans consume illegal drugs in proportion to their share of the population." Derrick Z. Jackson, *Road Racism*, BOSTON GLOBE, Jan. 8, 2003, at A19.

276. *See* Douglas Kellner, *Reading Images Critically: Toward a Postmodern Pedagogy* 170:3 J. EDUC. 31 (1988).

variety of social roles. For example, ads should feature Black family men who are not athletes or rap stars. Similarly, Hispanic-American models and actors should be featured in non-family settings whereas depictions of Asian Americans should include them outside work in social and family interactions. Furthermore, guidelines should include a list of words, phrases and symbols referring to individuals based on race, color, or national origin that discourage consumers from patronizing a business and that may not be used in advertising. For example, FHA regulations prohibit the use of such words as "white, colored, or Jewish home" as well as references to specific churches or country clubs that are known to cater to particular racial groups.[277] In addition, condemning "no ethnic" dictates would enable people of color to hear and view advertising for products that have been targeted to date solely to the White masses.

The CRA's regulations provide a good model. Advertisers could be evaluated based on their entire advertising and marketing campaigns and on their sales record as a whole. The American Advertising Federation (AAF) could assume responsibility for measuring and reporting the effectiveness of advertisers' efforts to reach multicultural communities. In assessing an advertiser's attempt to attract consumers of all races, the AAF would consider what media were used to reach different segments of the market as well as the types of ads that were utilized. Perhaps a certain percentage of advertising could be geared toward people of color or, in the alternative, a certain percentage of sales could be made to minority consumers. The AAF could propose that these percentages reflect the population of the advertiser's community. Industry self-regulation would allow marketplace controls to eliminate race-based advertising practices. Advertisers would be compelled to comply with AAF guidelines for fear of being exposed as insensitive to racial and ethnic consumers.

While Americans of all races have the right to spend their money as they wish, guidelines that encourage advertisers to consider and to respect people of color who live in our communities will assist businesses in valuing "a dollar in the hands of a Negro" as they do a "dollar in the hands of a White man."[278] Today, shoppers of all colors expect to be treated fairly in consumer transactions that often begin with advertising. Our laws promote equality and social justice, safeguard individual liberties, and prohibit some forms of discrimination, but advertising is ubiquitous—"it is the air that we breathe."[279] And if the messages we receive are inferentially racist, we absorb them and

277. FAIR HOUSING COUNCIL OF GREATER WASHINGTON, FAIR HOUSING ADVERTISING MANUAL, *available at* http://www.equalrightscenter.org.

278. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

279. Jhally, *supra* note 130, at 78.

incorporate them into our own individual value systems without even noticing. As a result, our cultural communications system can undermine the values of our democracy if we are not vigilant in identifying and correcting behavior that is unfair to certain segments of our community.