Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater

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I. INTRODUCTION

The issue of color-blind casting is a fresh and intriguing topic against the vast backdrop of employment discrimination law. The essence of this discussion is the clash between employees’ equal employment opportunity interests and employers’ artistic freedom in hiring practices. The issue of color-blind casting has rarely been litigated, even though the general issue of racial discrimination in employment has been litigated extensively. Perhaps actors are reluctant to bring racial discrimination claims against their employers because they perceive theater and art as independent from the rest of the world, and thus, immune from the reaches of the law.

This issue warrants a fresh look because minority employment opportunities and artistic freedom are at stake. Perhaps, there have not


4. See Heekyung Esther Kim, Note, Race as a Hiring/Casting Criterion: If Laurence Olivier Was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim?, 20 HASTINGS COMM. & ENT. J. 397, 400 (1998) (stating that employment discrimination in theater “may warrant some sort of governmental regulation, or at least some viable legal relief,” because of the economic effect it has on actors and actresses).
been enough opportunities for minority actors to voice their dissatisfaction with employment opportunities in the theater.\(^5\) Even the entertainment industry recognizes a need for diversity in the theater world, as theater is often a reflection of society.\(^6\) Today's employment scene boasts a colorful melange of nationalities, with men, women, the disabled, the elderly, and racial minorities working side by side. However, for the most part, the theater continues to appear homogeneously white.\(^7\) For years critics have clamored for more racial minority representation in the entertainment industry.\(^8\)

One could dismiss the issue of color-blind casting, saying society has more important things to discuss other than the entertainment industry. The issue is an important topic worth exploring in a legal light. In a country that focuses so zealously on its entertainment celebrities, “there is an insufficient number of minorities in film and television and the current minority representation fails to accurately reflect the diversity of contemporary society.”\(^9\) This can have serious repercussions for society, including diminishing racial identities for minorities, discouraging children from participating in the entertainment industry, and decreasing employment opportunities for minorities.\(^10\)

\(^5\) See generally John Wirt, Miss Saigon: Asian-American Actor Lands Plum Role in Musical About Vietnam, SUNDAY ADVOC. (Baton Rouge), May 4, 1997, (Magazine) at 19 (stating that the issues of minority casting should be brought to light to give more opportunities to minorities).

\(^6\) See Newman, supra note 3, at 57 (noting that legal issues in the performing arts industry are “somewhat taboo”); Hartigan, supra note 3, at 61 (reporting that Dennis DeLeon, then-commissioner of New York's Commission on Human Rights, recognized a history of racial discrimination in the theater industry).

\(^7\) See Newman, supra note 3, at 55 (noting that Actors' Equity, the actors' union, conducted a study revealing that 90% of all plays in the United States had all-white casts and these productions were hosted in cities that had at least a 50% minority population); Diane E. Lewis, Outside a Closed Circle, BOSTON GLOBE, Jan. 8, 1991, at 51 (“The art world is like an incestuous family. If the people who control the system don't socialize with people of color or have them in the work force in appreciable numbers, then they are certainly not going to bring them into the galleries.”).

\(^8\) See Newman, supra note 3 at 55.

\(^9\) Kim, supra note 4, at 399.

\(^10\) See Patricia M. Worthy, Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue, 18 HASTINGS COMM. & ENT. L.J. 509 (1996). Children are especially “vulnerable to media images because they lack real world experience and therefore lack the necessary basis for comparison.” Id. at 534. Social scientists have claimed that the self-concept of African-American children are harmed by the lack of African-American representation on television. See id. at 535. Social scientists have also found that “the television roles in which Blacks are cast communicate to Black children the negative value society places on them.” Id. Furthermore, research shows that “the self-esteem of [African-American] children may preclude them from achieving self-actualization or 'impede their ability to realize their personal and academic potential in American society.'” Id. at 536.
Like exploring the facets of a diamond, this Note addresses many sides of the issue from an employment law perspective. This Note examines actors as employees who should be hired on their merits and not solely on the color of their skin. Essentially, this Note analyzes how Title VII of the Civil Rights Act of 1964 ("the Act") addresses and may apply to actors. On the other hand, this Note also discusses the employers’ perspective and whether exceptions, such as the bona fide occupational qualification exception ("BFOQ") and the business necessity defense, apply to the theater. Theater is vastly different from other sources of employment because it involves art and illusion, which are generally controlled by appearance. Therefore, it may be a business necessity to hire actors based on their appearance.

First of all, what is theater? Basically, theater is the business of entertaining and enlightening the audience by taking it to another time and place. Props, dialogue, and costumes play significant roles in the process of making the stage seem like a different world. In fact, with today’s heightened technology, productions are becoming known for their fancy props. Phantom of the Opera is known for its crashing chandelier, and Miss Saigon is known for its hovering helicopter. Broadway scenery and props provide a $20 million and $30 million market for technology and engineering firms. If so much emphasis is placed on using technical props to create an illusion on stage, perhaps it follows that the appearance of the actors is included in that process.

II. THE MISS SAIGON CONTROVERSY

The most publicized controversy revolved around the selection of a British actor for a Eurasian role in Miss Saigon. In 1989, Miss Saigon,
a musical written by the creators of Les Miserables, opened in London and was brought to Broadway in 1990 by producer Cameron Mackintosh.20 In London, British actor Jonathan Pryce played the half-French and half-Vietnamese role of “the Engineer.”21 The controversy began when Actor’s Equity (“Equity”), a union representing American stage actors, rejected Mackintosh’s application to allow Jonathan Pryce to repeat his role in the Broadway production.22 In response, Mackintosh canceled the show.23 Because Miss Saigon was a great source of employment, (offering 182 jobs, which were mostly minority roles), Equity reversed its vote and allowed Pryce to play the part of the Engineer.24

David Henry Hwang and B.D. Wong, Tony award winners for M. Butterfly, were the ones who brought the controversy to Equity’s attention.25 Their major concern was the lack of roles available to Asian actors.26 Equity’s initial decision was celebrated by the Asian-American theater community, but also sparked a national debate on the issue of color-blind casting.27 Another concern was that casting Pryce would condone the “offensive and demeaning” practice of “yellow face.”28 Similar to the “black face” practices of the minstrel shows, yellow face uses makeup in a grotesque and exaggerated manner to parody and degrade the physical characteristics of an Asian.29

20. See Wirt, supra note 5 at 19; Mabel Ng, Note, Miss Saigon: Casting for Equality on an Unequal Stage, 14 HASTINGS COMM. & ENT. L.J. 451, 454 (1992).


22. See Megan Rosenfeld, ‘Miss Saigon’ Broadway Bound, WASH. POST, Sept. 19, 1990, at C1. Actor’s Equity has the authority to deny a work permit to a foreign actor, which could restrict the actor’s ability to deny a work permit to a foreign actor, which could restrict the actor’s ability to obtain a visa. See id. Actor’s Equity and its British counterpart are protective of their memberships, and constantly preclude each other’s performers from working in their respective countries. See id.


24. See Rosenfeld, supra note 22.

25. See Sheppard, supra note 1, at 268.

26. See id.

27. See Kari Granville & Don Shirley, Actors’ Equity Says White Can Portray Eurasian, L.A. TIMES, Aug. 17, 1990, at A4. The Miss Saigon controversy brought the discussion of color-blind casting to the national arena and began the debate of how equal employment principles could fit in theater. See id.

28. Chang, supra note 18, at A12 (defining “yellow face” as the practice of an actor portraying an Asian role using “exaggerated makeup, stilted accents and cliched mannerisms”).

29. See id. For example, in the “black face” practices of the minstrel shows, white actors would paint their faces black and apply huge white lips to their faces to poke fun at African-Americans. See, e.g., Robert Tabscott, Seeing Evil in Black-Cork Minstrels, ST. LOUIS POST-DISPATCH, Aug. 4, 1993, at B7.
However, Equity’s original decision to prohibit Pryce from performing as the Engineer in *Miss Saigon* was also criticized as contradictory and hypocritical. This decision seemed to stress that minority-specific roles be performed by an actor of the same race. The few available racial minority roles would be preserved for minority actors. Equity also encourages color-blind casting, a practice which allows actors to play any role, regardless of race, unless race is germane to the character or play. Thus, roles that are traditionally cast for Caucasians should be open to minority actors, giving them more employment opportunities. Equity’s approach to color-blind casting seemed inconsistent, implementing it only when it was favorable to minorities. This hardly seems fair and is possibly at odds with Title VII. Critics have argued that, “[y]ou can’t encourage the casting of an African-American as a Caucasian and forbid a Caucasian to play an Asian.”

The controversy spurred Equity to reverse its original position and allow Pryce to play the part of the Engineer. Alan Eisenberg, Equity’s executive secretary, apologized on behalf of the union and termed Equity’s position on color-blind casting as “distorted and misconstrued.”

In the end, the show went on, and *Miss Saigon* employed many Asian-American actors. In this instance, color-blind casting prevailed. However, almost a decade later, the debate continues as more minority actors enter the theater and as racial discrimination law evolves.

III. COLOR-BLIND CASTING

As previously discussed, color-blind casting is viewed as a technique to create more equal employment opportunities for actors. Also defined as “nontraditional casting,” Equity formally defined it as the “casting of ethnic and female artists in roles in which race, ethnicity, or gender is not germane to the character’s or the play’s development.”

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31. See id.
33. See id.
37. Id.
38. See id.
40. Id.
The concept of casting actors in roles regardless of their race is prevalent throughout the history of theater, with many actors having portrayed characters different from themselves.41

Sometimes typical white roles are purposely played by minority actors to make a point. For example, all African-American productions of Hello Dolly and The Three Sisters tell traditionally white tales from the African-American perspective.42 Hollywood also engages in color-blind casting, for example; Yul Brynner played the King of Siam in The King and I,43 and Denzel Washington became Richard III in Much Ado About Nothing.44

Color-blind casting was not intended to compromise the artistic integrity of the production.45 In fact, productions that implement race as part of their central story line should not employ color-blind casting.46 This Note will discuss flexible ways to allow color-blind casting without compromising the production's artistic integrity.47

The Non-Traditional Casting Project ("NTCP") is a non-profit advocacy organization, whose main mission is to discuss and resolve racial problems in theater, television, and film.48 It is the product of the joint efforts of Equity, the Dramatists Guild, the Society of Stage Directors and Choreographers, the League of American Theatres and Producers, and the League of Resident Theatres.49 One of NTCP's main concerns is the limited number of employment opportunities available to

43. See Mel Gussow, Striding Past Dragon Lady and No. 1 Son, N.Y. TIMES, Sept. 3, 1990, at A11.
44. See Hartigan, supra note 42.
45. See Newman, supra note 32, at 57.
46. See id.; see also Ken Narasaki, Letter to the Editor, S.F. CHRON., Aug. 16, 1990, at E5 ("The architects of Equity's [nontraditional] casting policy agree that [nontraditional] casting should not be employed where race is an issue, which it most certainly is in an interracial love story like 'Miss Saigon.'").
47. See infra Part IX.C.
49. See Newman, supra note 32, at 56.
minority actors.\textsuperscript{50} While NTCP respects the artistic license of the producer and director, it also pushes for inclusive hiring standards and balanced representations of minorities by facilitation and mediation.\textsuperscript{51} So far, the NTCP has held national conferences, seminars, and compiled rosters of minority artists.\textsuperscript{52} 

Color-blind casting remains consistent with the premise that the actor has accomplished the job by effectively portraying someone else. So why should actors like Jonathan Pryce be forced to play characters that are similar to themselves in race? Such a requirement might crimp the actor’s ability to grow by limiting flexibility in portraying different characters.

Many critics of color-blind casting doubt that it is adequate enough to improve the opportunities available for minority actors.\textsuperscript{53} Conceptually, because color-blind casting promotes casting regardless of the actor’s race, a Caucasian could be cast in a part intended for a minority actor. Technically, that could also deprive minority actors of race-specific roles that they themselves match. Color-blind casting also ignores the fact that the way actors look seriously affects the way their characters are represented. For example, would color-blind casting force a director to have a multiethnic cast when the play calls for characters of just one race? While the \textit{Miss Saigon} controversy was brewing, Joanna Merlin, co-chair of NTCP stated, “However strongly Equity feels they must condemn the casting of Jonathan Pryce... I believe their vote seriously threatens freedom of artistic choice. How can anyone legitimately dictate who will or will not be cast in a show except the creative team?”\textsuperscript{54} 

On the other hand, some critics fear that proponents of artistic integrity will use color-blind casting to further exclude minorities.\textsuperscript{55} It was meant to open previously closed opportunities for minorities, but in practice, minorities are still playing stereotypical roles.\textsuperscript{56} Although

\begin{footnotes}
\item[50] See id.
\item[51] See Jensen, \textit{supra} note 48.
\item[52] See id.
\item[55] See Ng, \textit{supra} note 53, at 461.
\item[56] See id. Minorities are often typecast in certain roles. For example, Latinos and African-Americans are often cast as gangsters or prostitutes, or used to fill insignificant roles. See Chas. Floyd Johnson \& Diane Kerew, \textit{Minorities in Television} (visited Mar. 24, 1999) <http://www.caucus.org/what/qindexes/sum93/minorities.html>. Asian-American women are often cast as subse-
color-blind casting is a step in the right direction, it has yet to be perfected to improve employment opportunities.

IV. RACE-SPECIFIC CASTING

In some instances, the race of the actor may be relevant in casting decisions with respect to the role the actor plays. Race-specific casting places actors in racially-defined roles, such as "characters in a period play, historic figures, members of a nuclear family, and characters whom a playwright has specified to be of a certain race."

Interestingly, not all artists prefer color-blind casting, with some believing that certain stories should be told as accurately as possible. As a result, race-specific casting is used to select actors for roles according to their race. At the University of California at Los Angeles, angry Chicano students walked out of a student production casting a Caucasian female as a Chicana artist. Such protests highlight the lack of employment opportunities for minorities in theater. The scarcity of roles for minorities may warrant the application of federal anti-discrimination law.

V. THE CIVIL RIGHTS ACT OF 1964

Congress passed the Civil Rights Act of 1964 to remedy the racial discrimination that had long shamed this nation. Passed in the midst of the civil rights movement, the statute was implemented in response to racial inequality. Before the passage of the Act, African-Americans had been emancipated from slavery for over a 100 years, but were still

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58. Id.
59. See Janet I-Chin Tu, Playwright August Wilson, Now Settled in Seattle’s Misty Nest, Writes About the Black Experience Like No Other Storyteller, SEATTLE TIMES, Jan. 18, 1998, at 12. Tony Award winning playwright, August Wilson, opposes color-blind casting and prefers that African-Americans tell their own stories. See id.
60. See Sheppard, supra note 57, at 275.
61. See John Digrago, Seven Walk Out Over, DAILY BRUIN ONLINE (May. 22, 1996) <http://www.dailybruin.ucla.edu/db/issues/96522/news.play.html>; see infra Part IX.A.
64. See H.R. REP. No. 88-914, at 7 (1963) (stating that, “the opportunity for every individual, regardless of the color of his skin, to have access to places of public accommodations ... is so distinctive in its nature that its denial constitutes a shocking refutation of a free society”).
denied certain fundamental rights. Congress enacted the Act as a catalyst to spur the elimination of racial discrimination. Indeed, no piece of legislation can attempt to eliminate all racial discrimination, but the Act "will commit our Nation to the elimination of many of the worst manifestations of racial prejudice."

Congress passed Title VII of the Act to deal with employment discrimination. The congressional intent behind Title VII is to provide formal procedures to eliminate employment discrimination based on race, color, religion, or national origin. In Griggs v. Duke Power Co., the Supreme Court examined the legislative objective of Title VII, stating that Title VII was not designed to guarantee employment for minorities. Instead, Title VII was meant to "remov[e] artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

A. Unlawful Employment Practice Defined – Title VII

The prevailing federal anti-discrimination section continues to be Title VII. The relevant section states:

It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

In applying this statute to Broadway theater, casting actors according to their race seems blatantly violative of this rule. A decision to reject an actor based on race seems discriminatory on its face. However,

65. See id. at 2.
66. See id.
67. Id.
71. See Griggs, 490 U.S. at 429-30.
72. See id. at 430.
73. Id at 431.
refusing to audition an actor because the part requires the actor to be of a certain race exists in the theater world. The casting director selects actors that have a certain look, and race is often part of that consideration. This brings up the issue of whether casting an actor according to race qualifies as a BFOQ.  

B. The Bona Fide Occupational Qualification

The BFOQ exception, found in Title VII of the Act, reads as follows:

it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ... 

Race-specific casting seems to violate Title VII on its face and cannot be justified because the BFOQ exception does not exempt employment practices based on race. Courts have stated that the BFOQ exception was not meant to engulf the rule established in § 2000e-2(a)(1). The Equal Employment Opportunity Commission ("EEOC") and Congress interpret the BFOQ exception narrowly. The words, "reasonably necessary to the normal operation of that particular busi-

75. See Jim Sollisch, Need for Affirmative Action Still Exists, DET. NEWS (April 4, 1996) <http:ldetnews.com/EDITPAGE/9604/04/comment2/comment2.htm> ("If you're in a position to hire an engineer, let's say, and the script in your head reads engineer as a 'white male,' you will look for a white male. It's not that you would discriminate against a qualified African-American candidate - it's that you wouldn't be in a position to consider an African-American candidate.").  

76. See id.  


78. Id.  

79. See id. § 2000e-2(a)(1); see also Milwaukee County Pavers Ass'n, v. Fiedler, 992 F.2d 419, 422 (7th Cir. 1991) (stating that there is a BFOQ for sex discrimination, but not for racial discrimination); Malhotra v. Cotter & Co., 885 F.2d 1305, 1308 (7th Cir. 1989) ("Title VII's defense of [BFOQ is] ... available in cases of discrimination on the basis of sex or national origin, [but] is unavailable where discrimination is based on race, color, or ethnicity."); Miller v. Texas State Bd. of Barber Exam'rs, 615 F.2d 650, 652 (5th Cir. 1980) (stating that because "race is conspicuously absent from the [BFOQ] exception; ... the bare statute could lead one to conclude that there is no exception for either intentional or unintentional racial discrimination").  

80. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971) (stating that the BFOQ should be interpreted narrowly).  

81. See id.
ness" were carefully drafted so that the BFOQ would not become a loophole that employers could exploit to validate employment discrimination. Each of those terms implies an objective, rather than a general subjective standard.

The term “necessary” has been defined as requiring a “business necessity test.” The BFOQ will apply when the “essence of the business operation would be undermined . . . .” “Occupational” has been defined as a requirement that affects employees’ ability to perform their jobs. When employers want to invoke the BFOQ exception, they must demonstrate that the employment practice is related to the job, relates to the employee’s ability to do the job, and relates to the essence of their business. An employer must prove that one of the employee’s characteristics that is used as a basis for an employment decision is related to that employee’s ability to perform, and that those job-related activities are a part of the essence and success of the business. The EEOC has interpreted Title VII as allowing sex as a BFOQ in hiring actors and actresses if it is necessary for the purpose of authenticity. Employers can hire only women if the job requires the physical characteristics of a woman’s body, such as modeling brassieres.

Again, the BFOQ exception does not apply to race, color or ethnicity. One can hazard a guess that Congress could not conceive of any situation in which race could be a valid qualification for a job. Even though race is not a BFOQ for authenticity purposes, perhaps appearance may qualify under the exception. Senators Joseph Clark and Clifford Case explained that a casting director does not need the BFOQ exception to hire someone who fits the physical characteristics of a role. They stated that:

83. See Diaz, 442 F.2d at 387.
84. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (emphasizing that the language of the BFOQ exception “prevents the use of general subjective standards and favors an objective, verifiable requirement”).
85. Diaz, 442 F.2d at 388.
86. Id.
87. See Johnson Controls, 499 U.S. at 201.
88. See id.
89. See id.
90. See 29 C.F.R. § 1604.2(2) (1997).
92. See supra note 79 and accompanying text.
93. See 110 CONG. REC. 7217 (1964) (reporting comments by Senators Joseph Clark and
[a] director of a play or movie who wished to cast an actor in the role of a Negro could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be non-Negro. Therefore, the act would not limit the director’s freedom of choice.94

Some actors’ appearances do not conform to the stereotypical conception of their ethnicity. If race is not grounds for hiring an actor, perhaps appearance is. The senators went on to say that if a movie company was making a movie about Africa, it could hire extras of a certain race or color to make the movie more authentic.95 This statement seems to imply that discriminating according to appearance while casting actors may not violate Title VII.

VI. EQUAL RIGHTS UNDER THE LAW – § 1981

Section 1981 does not explicitly address employment discrimination, but prohibits discrimination in making and enforcing contracts.96 Employment involves contractual relationships which can be used to establish a claim for employment discrimination based on race.97 Section 1981(a) reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.98

However, in Patterson v. McLean Credit Union,99 the Supreme Court ruled that § 1981 does not prohibit racial discrimination in the workplace or in other instances after the formation of a contract.100 The Court held that “racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not

Clifford Case regarding the BFOQ exception).  
94. Id.  
95. See id.  
97. See id. § 1981(a)  
98. Id.  
100. See Patterson, 491 U.S. at 171.
apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.\textsuperscript{101}

Congress overruled \textit{Patterson} by amending the Act in 1991 to broadly define the phrase, "make and enforce contracts,"\textsuperscript{102} to "[include] the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."\textsuperscript{103}

In \textit{Ferrill v. Parker Group, Inc.},\textsuperscript{104} the court held that § 1981 "broadly prohibits intentional discriminatory conduct which interferes with the terms and conditions of an employment, or other, contract."\textsuperscript{105} The \textit{Ferrill} court stated in dicta that its decision would probably prevent employers from hiring actors and actresses based on race.\textsuperscript{106} "It might even go so far as preventing the exclusive hiring of black actors to play such roles as Othello."\textsuperscript{107} The court then stated that "nevertheless, this is the state of the law and this court has found no authority to the contrary."\textsuperscript{108} Section 1981 is distinct from Title VII, but the analysis for determining intentional interference with an employment contract is the same.\textsuperscript{109} To establish a prima facie case under both Title VII and § 1981, the plaintiff must jump over the same hurdles.\textsuperscript{110}

VII. THE BUSINESS NECESSITY DEFENSE

The business necessity doctrine evolved from the Supreme Court’s decision in \textit{Griggs v. Duke Power Co.}\textsuperscript{111} The \textit{Griggs} court held, "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but [are] discriminatory in operation. The touchstone is

\begin{thebibliography}{9}
\bibitem{Id.} Id.
\bibitem{42 U.S.C § 1981(a).} 42 U.S.C § 1981(a).
\bibitem{42 U.S.C. § 1981(b); H.R. REP. NO. 102-40(II), at 2, reprinted in 1991 U.S.C.C.A.N. 694, 694 (stating that the 1991 Act "overrules ... Patterson ... [by] restoring the broad scope of Section 1981 ... [by] ensuring that all Americans may not be harassed, fired, or otherwise discriminated against in contracts because of their race").}
\bibitem{Ferrill, 967 F. Supp. at 474.} Ferrill, 967 F. Supp. at 474.
\bibitem{See id. at 475.} See id. at 475.
\bibitem{Id.} Id.
\bibitem{Id.} Id.
\bibitem{See id. at 474 (“Even though the statutes and remedies are distinct, the analysis for determining whether a defendant intentionally interfered with an employment contract under [section] 1981 is the same as that employed under Title VII.”).} See \textit{Ferrill}, 967 F. Supp. at 474.
\end{thebibliography}
business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."  

"The legislatively created [BFOQ] exception does not apply to racial discrimination but the judicially created business necessity doctrine does." The BFOQ exception exempts intentional and unintentional discrimination, but "the business necessity doctrine is apparently limited to practices which are facially neutral but discriminatory in effect." It is questionable whether the business necessity doctrine should be limited to intentional discrimination. This limitation is not explicitly stated in the Griggs opinion. The Supreme Court has stated that the business necessity defense is more lenient on the employer than the BFOQ exception.

The Supreme Court's decision in Griggs placed the burden of proof on the employer in disparate impact cases. That was the standard set in 1971, which was effective in removing barriers to women and minorities in the workplace. It is more practical to place the burden of proof on the employer, because the employer controls the hiring process, selects the employment practice used to make hiring decisions, and balances the costs and benefits in making those decisions. And not only is it practical, but placing the burden of proof on the employer is consistent with McDonnell Douglas Corp. v. Green.

However, the Supreme Court lightened the burden of proof for the employer in Wards Cove Packing Co. v. Atonio. Under Wards Cove, the standard shifted the burden to the employee, requiring him to prove that the discriminatory practice was not linked to a business objective.

112. Griggs, 401 U.S. at 431.
113. Miller v. Texas State Bd. of Barber Exam'rs, 615 F.2d 650, 653 (5th Cir. 1980) ("For example, the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice. Special assignments might also be justified during brief periods of unusually high racial tension." (citing Baker v. City of St. Petersburg, 400 F.2d 294, 301 (1968))).
114. Id.
115. See id.
116. See id.
118. See Griggs, 401 U.S. at 432.
121. 411 U.S. 792, 802 (1973) (establishing the framework for a prima facie case of discrimination which placed the burden of proof on the employer); see infra Part VII.
123. See Wards Cove, 490 U.S. at 659-60.
Wards Cove emphasized that the burden of proving discrimination must remain with the plaintiff at all times.\textsuperscript{124} Wards Cove also redefined the burden of proof structure to require the employer to carry the burden of production, and the employee to carry the burden of persuasion.\textsuperscript{125} Because this decision limited the civil rights protections that were available under Griggs, Congress responded by overruling Wards Cove and reinstating Griggs.\textsuperscript{126}

With the passage of the Civil Rights Act of 1991, Congress reaffirmed the Griggs burden of proof structure in disparate impact cases.\textsuperscript{127} Congress explained that, “an unlawful employment practice based on disparate impact is established when a complaining party demonstrates that an employment practice results in a disparate impact, and the respondent fails to demonstrate that such practice is required by business necessity.”\textsuperscript{128} The employer’s good faith or intent is irrelevant because as long as the employment practice is discriminatory and unrelated to measuring job qualifications, it is illegal.\textsuperscript{129}

After the employer fulfills the burden of establishing a business necessity, the burden of production falls back on the plaintiff.\textsuperscript{130} Once the employer uses the business necessity defense to justify an employment practice, which has a significant adverse impact on minorities, the employee then has the right to show the existence of other employment practices available that would not have such an impact on minorities and would satisfy the employer’s legitimate business interests.\textsuperscript{131} The Fifth Circuit discussed, in dicta, the possibility that business necessity would be a valid defense for a director engaging in race-specific casting.\textsuperscript{132} “For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.”\textsuperscript{133}

\begin{itemize}
  \item 124. See id. at 659.
  \item 125. See id.
  \item 127. See id.
  \item 128. Id.
  \item 129. See Griggs, 401 U.S. at 432.
  \item 130. See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980) (stating that after defendant has met this burden, plaintiff must demonstrate that this “proffered reason was not the true reason for the employment decision”); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 256 n.10 (8th Cir. 1985) (“However, if the employer carries the burden of production, the presumption of illegal discrimination drops from the case, and the plaintiffs must show that the employer’s proffered reasons were merely a pretext.”).
  \item 132. See Miller, 615 F.2d at 654.
  \item 133. Id.
\end{itemize}
VIII. HOW TO DEMONSTRATE A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER TITLE VII

Because the issue of discrimination in the theater has not been decided by the courts, a hypothetical would assist in applying Title VII factually. Suppose a Hispanic actor, Jose, auditions for the main role that has no specified race, but is traditionally played by a Caucasian actor. The role is the lead part of a captain on a ship, and the production is a musical. Jose is experienced and qualified in acting, dancing, and singing. He has played many parts requiring all three skills; most notably the lead role in West Side Story, which is traditionally cast with a Hispanic actor. After his audition, the casting director says, “Sorry, you just don’t have the look for the role of the captain.” The director continues to search for an actor to fill the role. Jose suspects that his race is the only reason for his rejection and seeks legal counsel. This Note will now address if Jose has a valid cause of action under Title VII.

First, to prove a prima facie case of racial discrimination, Jose must fulfill all of the elements of the McDonnell Douglas formula.134 Those elements are: (1) the plaintiff must belong to a racial minority, (2) he must have applied for and be qualified for the job for which the employer was seeking applicants, (3) despite qualifications, the actor was rejected, and (4) after the rejection, the position is still open and the employer continued to seek applicants from persons of the complainant’s qualifications.135 In this hypothetical, all of the elements of the prima facie case seem to be fulfilled, since Jose is a member of a racial minority, he answered the casting call and was qualified for the part in terms of acting ability, was rejected, and the casting director is still looking for someone else to fill the role.

The established prima facie case leads to a presumption of discrimination, compelling the court to engage in a process of burden shifting.136 The burden then shifts to the employer to give a nondiscriminatory reason for rejecting the applicant.137 The employer must offer evidence to raise a genuine issue of fact as to whether or not there was a legitimate reason for rejecting the applicant.138 In this hypothetical, the employer could argue that the actor did not fulfill all of the qualifica-
tions required for the job. The director could say that having a certain look is essential in casting, and it is a legitimate business justification that the actor look a certain way, which this particular applicant did not. Perhaps the director imagined the role to characterize an aged sailor with a white beard and pale skin. Because theater involves creating a certain illusion, the director can argue that the actor’s appearance is essential to the business, and therefore, appearance is legitimate hiring criteria. The hypothetical casting director could argue that the role of the captain should be played by a dignified looking actor, and Jose just does not have that appearance.

The employer must only proffer nondiscriminatory reasons why the applicant was rejected. The employer does not need to be motivated by these reasons. This could be instrumental in justifying the casting director’s employment decisions. However, the employer is required to produce a nondiscriminatory reason that was available at the time the decision was made. The employer is not required to be motivated by that reason, but the reason must be available during the decision making process.

The employer’s burden is light because the employer is only required to offer nondiscriminatory reasons for rejecting the plaintiff. The employer is not required to prove such nondiscriminatory reasons. In the hypothetical, the casting director could just offer the reason that he is not casting according to “race” but “appearance.” The casting director is not discriminating against a particular race, but just selecting actors according to the production’s needs. Once the employer provides evidence of a legitimate, nondiscriminatory reason for refusing to hire the plaintiff, the presumption of discrimination is rebutted.

139. See McDonnell Douglas, 411 U.S. at 802.
140. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (stating that “[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons”).
141. See Turner v. AmSouth Bank, 36 F.3d 1057, 1061 (11th Cir. 1994) (explaining that the employer must “produc[e] a reason that was available to it at the time of the decision’s making”).
142. See id.
143. See Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994) (“This burden is ‘exceedingly light’; the defendant must merely proffer [nongender] based reasons, not prove them.” (quoting Perryman v. Johnson Prod., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983))).
144. See id.
145. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (holding that once the defendant meets this burden of production, “the presumption raised by the prima facie case is rebutted”) (quoting Burdine, 450 U.S. at 255).
The plaintiff then has the chance to show by a preponderance of the evidence that the employer had a discriminatory intent. The plaintiff must show that the discriminatory reason more likely than not motivated the employer to reject the applicant. If the employer refused to use legitimate, nondiscriminatory reasons in its employment decisions, the trier of fact can infer intentional discrimination. This does not guarantee that the plaintiff will win the case.

Jose could rebut the director's argument, (which was that he is only casting according to "appearance" and not "race") by saying that the director's concept of a "dignified look" does not include Hispanic-Americans. Because Hispanic-Americans are sometimes cast in gangster settings, the casting director's image of a Hispanic-American may convey violence rather than dignity. Jose could argue that the director is basing the decision on the negative stereotype of Hispanic-Americans, and not on Jose's individual qualifications.

If Jose's qualifications are equal to those of a Caucasian actor, the casting director is not required to hire Jose over the Caucasian actor since Title VII does not promote preferential treatment. The employer has the discretion to choose among candidates for the job, as long as the decision is based on lawful criteria. If Jose does not get the part of the captain because another more qualified Caucasian actor was chosen, Title VII does not entitle him to judgment against the employer. Even if the court finds that the employer misjudged the qualifications of the applicants, that does not subject him to liability under Title VII. This may be probative of whether the employer used discriminatory reasons in making the decision.

Under the McDonnell Douglas framework, the court is required to award judgment to the plaintiff if any reasonable person would find a prima facie case of discrimination, and the defendant failed to show
evidence that there was a nondiscriminatory reason to refuse hiring the plaintiff.\textsuperscript{157} If the defendant has failed to meet its burden, but reasonable people disagree on whether the prima facie case is established, then a trier of fact is required to resolve this factual issue.\textsuperscript{158}

After the plaintiff has established a prima facie case of racial discrimination, he or she may be entitled to bring claims of either disparate treatment or disparate impact.\textsuperscript{159} Disparate treatment exists when an employer treats some employees better than others based on race.\textsuperscript{160} To establish a prima facie case of disparate treatment, the plaintiff must demonstrate that he or she applied for the position that he or she was qualified for, but was rejected under circumstances that imply racial discrimination.\textsuperscript{161}

When an employer uses employment practices that disproportionately favor different groups of employees, then the employees can bring a disparate impact claim.\textsuperscript{162} Employment practices with a disparate impact are those that are facially neutral, but that, for example, exclude women and minorities in practice.\textsuperscript{163} In such cases, the employer is required to justify such practices by showing a business necessity.\textsuperscript{164} To establish a prima facie disparate impact case, plaintiff must show that a facially neutral employment practice has a significant adverse effect on a specific group.\textsuperscript{165} Once that is done, the burden shifts to the employer to show that the practice is justified by business necessity and has an overt relationship to the job.\textsuperscript{166}

The Supreme Court defines the difference between disparate impact and disparate treatment claims in \textit{International Brotherhood of Teamsters v. United States}.\textsuperscript{167} Proof of discriminatory intent is critical in disparate treatment cases because they arise in situations where the employer treats a group less favorably because of race.\textsuperscript{168} Proof of discriminatory intent is not required in disparate impact cases because they

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\textsuperscript{157} See Hicks, 509 U.S. at 509.
\textsuperscript{158} See id. at 509-10.
\textsuperscript{159} See \textsc{Kathanne W. Greene, Affirmative Action and Principles of Justice} 60 (1989).
\textsuperscript{160} See id.
\textsuperscript{161} See \textit{Burdine}, 450 U.S. at 253.
\textsuperscript{162} See \textsc{Greene, supra note 159}, at 60.
\textsuperscript{165} See \textit{Burdine}, 450 U.S. at 253.
\textsuperscript{166} See id. at 254.
\textsuperscript{167} 431 U.S. 324 (1977).
\textsuperscript{168} See \textit{Teamsters}, 431 U.S. at 335 n.15.
\end{flushleft}
usually involve facially neutral employment practices that treat one group more harshly than another.  

IX. THE CURRENT DEBATE ON COLOR-BLIND CASTING

Even though it has not been brought before the courts, the issue of racial discrimination continues to percolate in the theater world and media. In 1990, the Miss Saigon controversy was the spark that ignited the flame and it continues to be the most notable example of alleged racial discrimination and color-blind casting in the theater. As society approaches the brink of the twenty-first century, the debate continues to grow. Since the Miss Saigon controversy, color-blind casting continues to be discussed by actors, directors, and journalists.

A. A Recent University Reaction to Color-Blind Casting

Color-blind casting seems to be the politically correct approach, yet many artists, including minorities are against it. In 1996, at the University of California at Los Angeles, seven Chicano and Chicana students walked out of a play depicting a Chicana artist’s life. The

169. See id.
170. See Michael Killian, Equal Opportunity Still Escapes Actors, CHI. TRIB., Aug. 13, 1998, at 1. Minority representation in the theater is slowly becoming more diverse. See id. However, critics are still not satisfied. See id. Many prominent artists complain that pop culture continues to perpetuate stereotypes. See id. In the theater casts, there may be a sprinkling of minorities, but minorities rarely land the lead roles. See id. Sharon Jensen, executive director of NTCP stated, “This is a fluid issue... We’re in a different place now than we were [five] or [ten] years ago, and hopefully we’ll be in another place in another five years. It’s a process of continuing, and I hope of opening up.” Id; see, e.g., Michael Riedel, ‘Charlie Brown’ & the Great Nonwhite Way, N.Y. POST, Feb. 4, 1999, at 66. B.D. Wong, one of the leading protesters over the casting of Jonathan Pryce in Miss Saigon, is now playing the role of Linus in You’re A Good Man, Charlie Brown on Broadway. See id. Riedel writes of the interesting irony that an Asian is playing a white role when ten years ago he complained of a Caucasian playing an Asian role. See id. B.D. Wong finds nothing wrong with his taking the role of Linus. See id. “With [Miss Saigon] we wanted to make the point that Asians were under-represented on Broadway. But I don’t think I’m taking a job away from a white actor. Besides, I think I’m more like Linus than most white people. I really fit the part.” Id.
171. See Kilian, supra note 170, at 1.
174. See id.
cause for the walkout was the casting of a Caucasian actress in the role of the Chicana artist, Frida Kahlo, who is well known for her art spawned from her Mexican heritage and life struggles.\textsuperscript{175} The protesting students felt that Kahlo must be played by a Chicana actress because racial identity was a prominent emphasis in Kahlo’s life.\textsuperscript{176} One protester claimed that not only was Kahlo’s life misrepresented, but some actors were ignored in the casting process.\textsuperscript{177} The director, Ruben Amavizca, said he cast the role according to merit and refused to make casting decisions purely based on race.\textsuperscript{178} Theater student Heidi Hernandez described the controversy by saying, “It’s just as much . . . discrimination to cast someone just because they are Hispanic . . . .”\textsuperscript{179} However, the definition of color-blind casting is casting actors without regard to race when race is not germane to the character.\textsuperscript{180} In this situation perhaps color-blind casting was misapplied because race may have been germane to the play.

\textbf{B. August Wilson’s Position on Color-Blind Casting}

The debate took an interesting turn as August Wilson, one of the nation’s most prominent African-American playwrights, faced off with artistic director Robert Brustein.\textsuperscript{181} Brustein works for the American Repertory Theatre in Cambridge, Massachusetts, and serves as a critic for the \textit{New Republic} as well.\textsuperscript{182} Since the summer of 1996, when Wilson castigated color-blind casting in a national conference, the two have been debating the issue and continue to represent the two sides of the national debate.\textsuperscript{183}

Wilson’s position is that African-American actors who take white roles become “Uncle Toms,” who compromise their cultural identity.\textsuperscript{184}

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\item \textsuperscript{175} See id.
\item \textsuperscript{176} See id.
\item \textsuperscript{177} See id.
\item \textsuperscript{178} See Digrado, supra note 173.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} See supra notes 39-41 and accompanying text.
\item \textsuperscript{181} See Janet I-Chin Tu, \textit{Playwright August Wilson, Now Settled in Seattle’s Misty Nest, Writes About the Black Experience Like No Other Storyteller}, SEATTLE TIMES, Jan. 18, 1998, at 12.
\item \textsuperscript{182} See id.; Mary Carole McCauley, \textit{Putting Race Center Stage}, MILWAUKEE J. SENTINEL, Feb. 27, 1997, at 1.
\item \textsuperscript{183} See Tu, supra note 181.
\item \textsuperscript{184} See McCauley, supra note 182; Cheryl I. Harris, \textit{Finding Sojourner’s Truth: Race, Gender, and the Institution of Property}, 18 CARDOZO L. REV. 309 (1996). Harriet Beecher Stowe’s \textit{Uncle Tom’s Cabin} has been lauded for its “antislavery tone.” Id. at 368. On the other hand,
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He argues that when white theaters produce black plays, it is similar to the old days where the slaves sang and danced for their masters. Wilson believes that if an African-American actor plays a white role, the result is diluted black art. In the summer of 1996, Wilson stated that, "[t]o mount an all-black production of [A Death of a Salesman] or any other play conceived for white actors as an investigation of the human condition through the specifics of white culture, is to deny us our own humanity, our own history, and the need to make our own investigations from the cultural ground on which we stand as black Americans." Wilson's adamant stance on this issue must be analyzed in the context of his work.

This Pulitzer Prize-winning playwright, August Wilson, has taken it upon himself to write the story of the African-American experience in this century. At one point, he was one of the most produced playwrights in America. Benjamin Mordecai, associate dean of the Yale School of Drama, states that Wilson "has an incredible ear for the poetry and dignity of the African-American experience that he has lived through. He writes of a very specific culture in a very specific place, but the themes are quite universal." Wilson's plays tell the stories of black migration, the postwar economic boom leaving blacks behind, and the civil rights movement.

Brustein, on the other hand, feels that Wilson's argument would lead to segregation in the theater, echoing the "separate but equal" era that civil rights activists fought so hard to dispel. One critic has stated that Wilson "looks back with almost nostalgic fondness on the segregated communities of earlier decades." However, Wilson argues, "[i]f you look back at black America in the [forties] and [fifties], you'll find

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Stowe's "abolitionist position is undermined by her adherence to romantic racialist myths in which Blacks, though spiritually endowed, are childlike and intellectually deficient." Id. at 372. In fact, many blame Uncle Tom's Cabin for perpetuating racial stereotypes of "the faithful, bumbling, passive and feminized Uncle Tom" and inspiring the black face practices of the minstrel shows. Id. at 373.

185. See McCauley, supra note 182.
186. See Tu, supra note 181.
187. Id.
188. See id.
189. See id.
190. See id.
191. Tu, supra note 181.
192. See id.
193. See McCauley, supra note 182.
194. Tu, supra note 181.
a thriving black community that is culturally and economically self-sufficient. . . ."\textsuperscript{195}

However, many facets of the debate have been glossed over. Montgomery Davis, artistic director of the Milwaukee Repertory Theater, suggests that, "The issue has been oversimplified in the debate . . . . It's much more complex. People are defining identity in terms of their heritage, as opposed to their individuality—an individuality tempered by their heritage."\textsuperscript{196}

Other critics say Wilson's approach will stunt the growth of black theater.\textsuperscript{197} If African-American actors are relegated to selecting only black roles, it will be even more difficult for them to find work, and harder for them to develop their talent.\textsuperscript{198} Bill Jackson, an actor, teacher, and former artistic director of Hansberry-Sands, Milwaukee's all black theater stated, "There's a danger to black people from our kind, making all our hills and valleys into one flat plain."\textsuperscript{199}

Another criticism of Wilson's approach is its inapplicability to artists of more than one ethnic heritage.\textsuperscript{200} If Wilson feels that African-American actors should be restricted to black roles, where do actors of both African-American and Caucasian heritage work? And if Wilson's position is extended to other minorities, how specific could the ethnic matching get? If Asians were restricted to Asian roles, how narrow would the ethnic requirement be? Could Laotians work there? South Vietnamese? Perhaps \textit{Miss Saigon} would then be restricted to just Vietnamese actors, because although Asia spans a myriad of countries, the play must be as specific as possible. According to David Frank, a British actor, the underlying assumption of Wilson's position is that one cannot identify with someone different, which does not leave much room for the imagination and art.\textsuperscript{201} If taken to the extreme, this approach towards casting could become tedious and ridiculous in application, since the point of acting is to be someone that you are not.

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\textsuperscript{195} Id.
\textsuperscript{196} McCauley, supra note 182.
\textsuperscript{197} See id.
\textsuperscript{198} See id.
\textsuperscript{199} Id.
\textsuperscript{200} See id.
\textsuperscript{201} See McCauley, supra note 182.
An interesting approach to color-blind casting is the "photo negative" approach, which is the reversing of colors in a production where the race of the actors is important to the story line. A 1997 Washington, D.C. production of Shakespeare’s *Othello* starring Patrick Stewart coined the phrase, "photo negative production" to describe this practice. *Othello* centers around the issue of racial separatism, where the lead role is black and the other roles are white. In the past, if a Caucasian wanted to play the role of *Othello*, they would use makeup to blacken their faces. However, because of the denigrating implications of black face, such practices are met with disdain. Stewart had set his sights on the role, but felt constrained by the binds of political correctness. So he conceived the idea to make the role of Othello white and the society that rejects him black. Thus, the racial separation element is still intact, and the “images of racial hostility flip back and forth.” This production of *Othello* represents color-blind casting at its best; cultural awareness is preserved, minority actors get their roles, and the plot is still presented effectively. When directors and actors are willing to be flexible and open-minded, productions will not suffer, but flourish like this production of *Othello*, which was sold out four months before it concluded.

X. COLOR-BLIND CASTING IN THE THEATER TODAY

Recently, more productions explore multiethnic possibilities with color-blind casting and ethnic themes. George C. Wolfe’s *Bring in ‘Da Noise, Bring in ‘Da Funk* on Broadway is currently a successful production. Many did not anticipate that its hip-hop, rap-tap theme would appeal to audiences, but *Bring in ‘Da Noise, Bring in ‘Da Funk*...
Other Broadway productions that primarily feature African-Americans are Rent, Ragtime, and The Lion King, which are all successful and artful. As for the Asian-Americans, Miss Saigon continues to serve as a rich source of employment, but it is not satisfying for some wishing to portray Asian culture on stage. Tom Kouo, who formerly played the lead role of “Thuy” in Miss Saigon, stated:

I’m grateful for Miss Saigon for the opportunities it gave me . . . . But in the end, it’s still written by two French guys who don’t really understand who they’re writing about, no matter how hard they might want to. Being in the show, you realize that you’re not represented here. You’re out there performing, speaking words written by people who don’t know what you really say, how you really say it.

Another former “Thuy” at Miss Saigon, Welly Yang pooled the collaborative efforts of Asian-American performing talent and produced Making Tracks. Making Tracks is “an interdisciplinary work which presented the rich contributions of [Asian-Americans] throughout American history, from railroad workers to new-age engineers building the information superhighway—not your typical Broadway theater fare.” Making Tracks is currently being performed in universities throughout the nation, and “[f]or a group of performers who made their marks playing oriental thugs and prostitutes, Making Tracks is, by contrast, ‘in-your-face’ with [Asian-American] energy.”

It appears that color-blind casting is becoming more accepted on Broadway. African-American Angela Bassett played opposite Caucasian Alec Baldwin in Shakespeare’s Macbeth, and African-American Kimberly Hester played as Guggenheim’s French mistress in Titanic. If critics say that color-blind casting causes the audience to stretch their imaginations more than possible, the artists retort that theater is designed to do that. B.D. Wong, who played Charlie Chaplin, said, “If

213. See id.
214. See id.
216. Id. at 79.
217. See id.
218. Id.
219. Id.
220. See Pacheco, supra note 211.
221. See id.
222. See id.
people come up to me and say, 'Look, Chaplin wasn’t Asian.’ I tell them, ‘Well, he didn’t sing and dance either.”

Despite the successes of color-blind casting, opportunities for minorities are still not completely adequate. “If we don’t have a wide diversity of ethnic representation, we feel that we’ve failed . . . . Of course, if your play is about race prejudice, that’s different. But most musical theater, particularly, is escapist, heightened reality.” Wolfe commented on the state of the theater today by stating:

There has been this proliferation of roles, but it’s no breakthrough . . . . The commercial theater, which is always [twenty] years behind the rest of the country, is simply catching up. I can’t jump up and down about that. There are [African-Americans] in every single aspect of America—why not in the commercial theater too?

XI. COLOR-BLIND CASTING IN TELEVISION

The social impact of color-blind casting is expanded as television now uses more multicultural casting. Jeffrey Mahon, professor of Ministry, Media, and Culture at the Iliff School of Theology in Denver, points out that even if television looks “more black and white than rainbow,” it has come a long way in terms of diversity. It seems that racial diversity in television is more important, since television is so pervasive and enters almost every home.

The Affirmative Action Department of the Screen Actor's Guild discussed the issue of color-blind casting on television with actors. Actor Raymond Forchion stated:

It has been my experience that casting directors tend to think in very traditional terms . . . . I read characters all the time that I

223. Id.
224. See id.
225. Pacheco, supra note 211.
226. Id.
feel I would absolutely be right for, but because the word, ‘Black’ is not in front of the character description, I would never be considered for the role.230

Other minority actors are frustrated by the stereotypical roles that they are called to play, solely because they represent a certain race.231 Actress Sumi Sevilla Haru says, “Because [Asian-Pacific-American] women are almost [nonexistent] in the media, it is no wonder that they are an oddity in real life to many Americans. If they do not appear on screen, they are usually subservient sex objects who do nothing to move the plot.”232

Media scholar George Gerbner conducted a study on women and minorities in television in collaboration with the American Federation of Television and Radio Artists and the Screen Actor’s Guild.233 The study covered ten years in the news, prime time, and daytime television.234 The study found that racial minorities were only represented by [thirteen percent] of the characters on prime-time television and [five percent] in children’s programming.235 Children grow up watching television, and when they see a mostly white cast, minority children wonder why they are not represented on the screen.236

The most recent multicultural breakthrough on television is pop diva Whitney Houston’s rehash of Rogers and Hammerstein’s Cinderella, which aired on November 2, 1997.237 The classic fairy tale is commonly played by an all white cast, reflecting the European tradition of the tale.238 Houston’s production contains a cast reflecting all colors of the rainbow. Brandy, an African-American teen actress and singer, plays Cinderella, and Bernadette Peters, a Caucasian Broadway star, plays her stepmother with two biological daughters, played by a Caucasian and an African-American.239 The part of Prince Charming is played

230. Johnson & Kerew, supra note 229 (statement of Raymond Forchion).

231. See id.

232. Id.


234. See id.

235. See id.


238. See Mason, supra note 228.

239. See Rochlin, supra note 237, at 24; Mathew Gilbert, Rainbow Cast, No Pot of Gold in ‘Cinderella’, BOSTON GLOBE, Oct. 31, 1997, at C1 (“The DNA shakeup works, in that after a few
by Asian-American Paolo Montalban, with Whoopi Goldberg, an African-American comedienne, and Victor Garber, a Caucasian, as his parents. Even if the genetic permutations are impossible here, the story is still effectively told. The production has been praised for using its multiracial casting to tell the universal rags to riches story of romance and fulfilled dreams. Producer Houston employed this multiracial approach to point out that the Cinderella story universally speaks to children of all colors and promotes social harmony.

XII. COLOR-BLIND CASTING IN FILM

Using multicultural casting to defy genetics is also being employed on the silver screen. Steven Spielberg’s 1997 summer blockbuster, The Lost World, cast African-American Vanessa Lee Chester as Caucasian Jeff Goldblum’s daughter. Screenwriter David Koepp felt that the best way to handle an interracial plot line is not to address it and leave it up to the audience to ponder. Goldblum feels that interracial families are accepted without an explanation in the real world, so why shouldn’t movies do the same?

XIII. CONCLUSION

Ever since the Miss Saigon controversy, the issue of color-blind casting in the theater continues to be hotly debated. The underlying issue is a showdown between the law and art: equal employment opportunity versus artistic freedom. Although the issue has not reached the courts, proponents and critics pepper the theater, journalism, and legal fields with various arguments, which all have merit.

Ultimately, theater is an illusion. It is the job of the actors to play someone that is different from them, and to ask that they only play someone of their own race would stunt their growth as actors and limit their employment opportunities. Indeed, many actors feel that the law

minutes you don’t really notice the racial discontinuities.

240. See Rochlin, supra note 37, at 24, 30; Gilbert, supra note 239.
241. See id.
245. See id.
246. See id.
should not restrain art. Artistic license is a valued part of this country and should be respected in the theater. If the law forces a director to cast certain actors without regard to their race, it can be argued that the law is making artistic decisions. Unfortunately, the reality is that minority actors have few opportunities to work in the theater.

Color-blind casting should always be encouraged when race is not germane to the character of a play. The germaneness requirement is similar to the business necessity defense in that a casting director might hire an actor based on appearance, and not race, for the purposes of authenticity. Because of the difficult issues involved in color-blind casting, it is not certain if an actor would succeed with a Title VII claim. One thing is clear, the uncertainty of color-blind casting makes it essential that the legal profession considers all perspectives in this continuing debate.

Bonnie Chen*

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248. See id.


250. See id. at 56.

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