

# Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms

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## INTRODUCTION

Imagine the prototypical young starving artist working on a novel that he hopes will flower into his masterpiece. Scraping by with a mundane day job, he uses his evenings and every spare moment plotting the storyline, crafting the language and sculpting his characters with great care and deliberation. Suppose he sets the story in a Civil War battlefield, a contemporary corporate boardroom or a police force, and all of the primary characters are white males. If the government attempted to apply an antidiscrimination law to force the artist to include female characters and people of color, it would strike most people as bizarre. The state's interest in infusing an abstract and personal piece of fiction with more diverse representations appears rather weak, if not wholly antithetical to the First Amendment,<sup>1</sup> and the intrusion on artistic integrity appears extreme.

But now imagine that the writer turns the story into a script and, through an agent, sells it to movie studio Twentieth Century Fox. Bullish on the writer's script, Fox sets the budget at \$100 million, casts the film with white male actors, as specified in the script, and pays the star (say, Tom Hanks) \$25 million. Now envision that writers replicate this same

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1. *Cf. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (“The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.”).

process a hundred times each year, and most such big-budget films either exclude women and people of color, or employ them in marginal roles paying a mere fraction of the star's multi-millions. At this point, the impact on equality should be apparent, yet the threat to artistic freedom remains strong. The casting process thus lies at the nexus of two quite different doctrinal regimes: (1) a First Amendment rule protecting artistic freedom, and (2) employment regulation banning hiring decisions based on impermissible factors. When viewed through the lens of artistic freedom, casting announcements parroting the script's sex and race preferences may strike us as reasonable and unoffensive. But when we place them in the context of employment discrimination law, we can see the highly anomalous and problematic nature of such practices.<sup>2</sup> Title VII expressly prohibits posting job advertisements that indicate a preference for applicants of a particular race and/or sex.<sup>3</sup> Despite this statutory ban, the film industry regularly uses discriminatory casting announcements or "breakdowns" to cast actors,<sup>4</sup> and my research did not turn up a single published decision in which a court adjudicated an actor's Title VII claim of race or sex discrimination.<sup>5</sup>

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2. See, e.g., Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 169-70 (2004) ("These days discrimination rarely takes the form of a per se refusal to hire women or men because of their sex . . ."); ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.01, at 8-7 (2d ed. 2005) ("Employers are, on the whole, too sophisticated to profess their prejudices on paper . . ."). But see Yuracko, *infra*, at 176 n.24 (noting formal exclusion of women in cases involving Toledo, Ohio police department and in the bookbinding industry). Beyond employment, antidiscrimination norms have not fully eroded racial preferences in realms that society deems very personal, such as dating, marriage and adoptions. See, e.g., R. Richard Banks, *Intimacy and Racial Equality: the Limits of Antidiscrimination*, 38 HARV. C.R.-C.L. L. REV. 455 (2003) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)).

3. See 42 U.S.C. § 2000e-3(b) (2005); see also *id.* at § 2000-2a; *id.* at § 2000e-2(a)(1).

4. A company called Breakdown Services "breaks down" scripts provided by casting directors into descriptions of the characters and transmits such descriptions, called "breakdowns," to talent agents. See *infra* Part I.

5. The only published decision on sex discrimination in casting addressed an equal protection claim. In *Cook v. Babbitt*, 819 F. Supp. 1 (D.D.C. 1993), a female Civil War enthusiast claimed that National Park Service (NPS) personnel denied her the opportunity to portray a male soldier in a recreation it produced for the public. See *id.* at 4. The case turned on whether the NPS employed a sex classification or applied sex-neutral standards of historical accuracy that Cook failed to satisfy. Cook argued that she effectively concealed her sex but the NPS categorically barred her from consideration. See *id.* at 6. NPS countered that Cook's costume was not historically accurate and failed to conceal her sex. See *id.* at 8. It did not defend "the use of gender as a proxy for an important aspect of historical authenticity in casting dramatic roles in public education programs." *Id.* at 5. Consequently, although the district court ruled for Cook, it did so based on factual determinations specific to the case, including a finding that NPS personnel ignored historical accuracy problems presented by male actors but applied a harsher standard to Cook based on her sex. See *id.* at 27-28.

There is also a relevant unpublished summary order, *Jenkins v. Metropolitan Opera Association*, 2000 WL 713412 (2d Cir. 2000). In that case, the Second Circuit held that an African-American opera singer was not discriminated against in violation of Title VII because he was not qualified for the position for which he had auditioned. In rejecting the race claim, the court relied on evidence that all four judges at plaintiff's audition "independently noted significant deficiencies in his singing voice."

The case law and statutory guidelines provide no easy answer for what Robert Post has described as a “puzzle” of casting’s de facto exemption from Title VII enforcement.<sup>6</sup> A cryptic comment in EEOC Guidelines, which interprets Title VII’s Bona Fide Occupation Qualification (“BFOQ”) exception, purports to authorize sex discrimination in casting insofar as it is “necessary for the purpose of authenticity or genuineness.”<sup>7</sup> Title VII makes no exception for race though, and even as applied to sex discrimination, the guidelines run afoul of most Title VII precedent. First Amendment law also reveals complex and contradictory lines of authority. The Supreme Court held that generally applicable laws, such as Title VII, may be applied to expressive organizations like the press without triggering heightened free speech scrutiny, suggesting that the entertainment industry can be regulated by antidiscrimination laws.<sup>8</sup> More recent cases, however, created exceptions to antidiscrimination laws for the Boy Scouts and a parade group notwithstanding the contrary earlier precedent, muddying the waters on who can be held accountable under Title VII.<sup>9</sup>

This Article provides the first extended critique of the potential legal justifications for discriminatory casting, including First Amendment defenses.<sup>10</sup> In distilling the precedent, I illustrate that current law would support a finding that at least some race and sex classifications in breakdowns violate Title VII and do not receive First Amendment

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*Id.* at \*1; *cf.* *Ingels v. Westwood One Broadcasting Serv.*, 129 Cal. App. 4th 1050, 1074 (Ct. App. 2005) (rejecting caller’s claim that he was discriminated against based on age when calling into a radio program).

6. See Robert Post, *The Logic of American Antidiscrimination Law*, in ROBERT POST, *PREJUDICIAL APPEARANCES* 1, 48 (2001) (“[T]he continuing salience of race in society, coupled with Title VII’s uncompromising suppression of race as a ground of decision making, renders the plight of the movie company genuinely puzzling.”).

7. 29 C.F.R. § 1604.2(a)(2).

8. See, e.g., *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103 (1937).

9. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

10. A handful of works, mostly student notes, have examined certain aspects of the entertainment industry’s discriminatory practices, but their scope has been narrow and their analysis has not focused on the First Amendment. See, e.g., Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293 (2003) (discriminatory practices on broadcast TV); Gina Browne, Comment, *Target Hiring To Reach a Target Audience*, 23 LOY. L.A. ENT. L. REV. 125 (2002) (discussing age discrimination suit by writers for television programs); Bonnie Chen, Note, *Mixing Law and Art: the Role of Anti-discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515 (1999) (discriminatory practices in theatre); Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 520-21 (2001) (considering whether Congress should enact a statutory exception for the entertainment and news industries and discounting First Amendment concerns); Lois L. Krieger, Note, *“Miss Saigon” and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theatre*, 43 SYRACUSE L. REV. 839 (1992) (examining particular Broadway casting controversy).

protection. I also argue that courts should so hold in order to encourage the industry to take antidiscrimination norms and regulations seriously and devise processes of self-regulation.

After laying the groundwork in this introduction, I explain the industry's casting practices in Part I and situate them in the film developmental process. Part II sets forth the theoretical framework for this exploration. Part III describes the employment harms of discriminatory casting. In Part IV, I outline the parameters of one specific intervention, a hypothetical lawsuit by an actor against a studio's use of race and sex classifications in hiring breakdowns. I then analyze several defenses that the studio would likely assert: (1) an affirmative statutory defense that the race and/or sex breakdowns constitute a Bona Fide Occupational Qualification or "BFOQ" exempted under the guidelines; (2) a First Amendment argument that regulation causes an undue economic burden; and (3) a creative freedom First Amendment defense. Part V concludes.

Although the First Amendment requires treating casting decisions with a degree of deference that Title VII would not ordinarily afford employers, our constitutional commitment to free speech does not exact a wholesale abandonment of antidiscrimination requirements. The courts can draw reasonable lines in regulating hiring in the entertainment industry to prevent harmful discrimination and protect free speech ideals simultaneously. For example, a court could determine that Title VII prohibits industry decision makers from using race-/sex-based breakdowns except where a ban would impose a substantial burden on the narrative.<sup>11</sup> Alternatively, a court might ban race and/or sex classifications in all breakdowns, but recognize that the First Amendment protects the ultimate casting decision. Although I explore the costs and benefits of both of these proposals, I ultimately recommend the former, a ban on discriminatory breakdowns with exceptions where a ban would impose a substantial burden on the narrative. Reducing or eliminating race and sex classifications as complete bars to consideration for certain roles would expand the pool of actors given the opportunity to audition, thereby broadening employment opportunity for excluded groups. Courts can respect both equality and artistic freedom by creating procedural obstacles to discrimination and incentives for casting decision makers to think critically about whether and where in the process such discrimination is

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11. For examples of roles in which the race was changed, consider that Laurence Fishburne in *The Matrix* and Danny Glover in *Lethal Weapon* were cast in roles originally written for whites. See Dan Georgakas & Kevin Rabalais, *Fifty Years of Casting: An Interview with Marion Dougherty*, CINEASTE, June 5, 1998, at 26, 30; Terry Lawson, *Matrix Reflects Current Reality: Diverse Casting No Accident*, MILWAUKEE J. SENTINEL, May 5, 2003, at 6B. Marion Dougherty, the casting director who persuaded the studio to cast Glover, explained that "[it] didn't change the script." Dan Georgakas & Kevin Rabalais, *Fifty Years of Casting: An Interview with Marion Dougherty*, CINEASTE, June 5, 1998, at 26. This type of casting contrary to the script remains exceptional. See *infra* Part I.

necessary, while preserving substantial creative discretion in the ultimate casting decision.<sup>12</sup>

Some judges, and some readers, may resist treating race- and sex-based breakdowns as illegal discrimination. We can expect judges and the public to be particularly skeptical about banning sex-based breakdowns. The industry's use of sex-based breakdowns is more pervasive than race, in part because sex is more likely to be integral to the storyline. Moreover, Title VII reflects social and legal uncertainty about the legitimacy of taking sex into account. The special BFOQ exception applies to sex discrimination, but not race. Even when the BFOQ has not been at issue, courts enforcing Title VII have vacillated from firmly rebuking all disparate treatment of women to authorizing certain gender conventions that the court viewed as harmless. This judicial ambivalence reveals the gap between Title VII's broad promise of equal employment opportunity and the reality of continuing differential treatment that has become naturalized and goes largely unchallenged. Indeed, when it comes to casting, an entire industry effectively disregards Title VII. This examination of casting discrimination therefore provides a reminder that society's tastes for certain race and gender-based conventions, such as the expectation that women—but not men—appear frontally nude in film, temper Title VII's capacious language and confine its impact.

In this Article, I present one potential intervention that could help equalize opportunity in Hollywood. I do not mean to suggest that this kind of Title VII individual disparate treatment lawsuit, which would focus on banning discriminatory breakdowns, is the only strategy for diversifying employment and the representations we see in film. For instance, one could imagine a proposal that the government subsidize underrepresented

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12. In focusing on the legal issues, I will not attempt to explain all of the practical forces that keep actors from suing for discrimination at a rate similar to those in other industries. However, the clubby, relationship-driven nature of the industry, its unbridled creative culture and the threat of losing employment opportunities for contravening community norms all seem to form part of the answer. I also focus on the use of race and sex in breakdowns because these are paradigmatic traits in antidiscrimination law, although breakdowns also specify other traits, such as age. I deal exclusively with films that depict live actors, which is not to deny that theater, television, animation, music and video games are rife with interesting issues. Although theater producers have (at least recently) been more daring in their casting choices, and theater audiences seem to have embraced nontraditional casting, I do not rely on this trend because of the significant differences between the demographics and sensibilities of the audiences for Broadway/off-Broadway theater (which appeal to a more regional, educated and sophisticated crowd) and big-budget movies (which depend on drawing in many millions of diverse people throughout the country in order to recoup escalating budgets). I do not address the regulation of casting in television because the courts have treated broadcast television as distinct from film for First Amendment purposes. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 759 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969). *Pacific*, the principal opinion permitting greater regulation of broadcast television, has been roundly criticized. See, e.g., David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994). Because film receives stronger First Amendment protection than television, however, my argument could be extended to television.

filmmakers or those of any race whose films will tell stories centered on women and people of color. In addition, one might explore ways of putting greater pressure on Hollywood studios to hire more diverse executives, in hopes that these decision makers would in turn increase employment opportunities for underrepresented groups. Further, in addition to the disparate treatment lawsuit focused on breakdowns, actors might obtain relief from pattern and practice and disparate impact claims under Title VII. These strategies would of course entail various costs and benefits, which I will not explore in depth here.<sup>13</sup> But a clear virtue of the proposal I put forward is that it builds on the most overt and vulnerable evidence of discrimination, race and sex-specific breakdowns. Moreover, it works within the boundaries of current law, namely Title VII and the First Amendment. As such, it requires neither Congress to pass additional legislation, nor courts to revise established doctrine in order to reach particular outcomes.

## I

### THE CASTING PROCESS

#### A. *Casting Decision Makers*

The collaborative nature and multilayered, interdependent structure of casting can obscure the source of discriminatory hiring decisions in the entertainment industry. The decision makers in a typical studio-developed and -financed film include the following, ranging from most influential to least: (1) studio executives; (2) producers; (3) director; and (4) casting director.<sup>14</sup> As the above ranking indicates, the term “casting director” misleads because this position confers little ultimate decision-making authority. The casting director, a position with secretarial origins,<sup>15</sup> assembles the pool of actors from which the roles will be cast and coordinates communications among the various decision makers. By contrast, the entity providing the film’s financing, typically a studio, ultimately makes the decisions.<sup>16</sup> Any person in this decision-making chain

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13. Government subsidies could be challenged as a form of affirmative action in tension with the Equal Protection Clause. See *Metro Broad. v. FCC*, 497 U.S. 547, 600-01 (1990) (upholding FCC diversity regulations over First Amendment challenge), *overruled in part on other grounds by Adarand Constr. v. Pena*, 515 U.S. 200 (1995). In the absence of clear evidence of discriminatory intent or a specific policy creating a disparate impact, the underrepresentation of people of color and/or female executives at a particular studio would not by itself provide grounds for liability under Title VII.

14. There may be several executives and producers involved and a team of casting employees working under a casting director.

15. Erin Hill, a scholar who has worked as an assistant to casting directors and talent managers, says that in some situations casting directors are treated as “glorified secretaries.” Interview with Erin Hill, in Los Angeles, Cal. (Oct. 11, 2005). Despite the subordinate and feminized nature of this job, some casting directors have significant influence and try to diversify the casting process.

16. See, e.g., Interview with Reuben Cannon, former casting director and producer of *Diary of a Mad Black Woman*, in Los Angeles, Cal. (Sep. 29, 2005).

might exclude an actor or an entire category of actors based on race or sex-based considerations, yet this discrimination would normally remain concealed from the excluded applicants and the public. For instance, a casting director might say that she submitted an Asian-American actor but a producer or executive vetoed her. Consequently, to the extent that discrimination influenced the casting decision, an outsider might find it very difficult to locate the origin of that discrimination, except where the discrimination appears on the face of the breakdown.

The race and sex classifications in the breakdown usually stem from someone who does not formally make casting decisions—the writer. Writers often specify the character’s sex and race in the script, particularly for the lead roles. The terms of the standard industry contract give the writer no power over casting, and enable the casting decision makers to depart from his description of a character.<sup>17</sup> Still, many casting decision makers adhere to the writer’s character description, absent a strong justification for rejecting it.<sup>18</sup> This presumption may be a root cause of the lack of diversity in casting. The Writers Guild of America’s 2005 report found that women made up just 18% of film writers.<sup>19</sup> People of color accounted for about 6% of the writers compared with 29% in the present-day general population.<sup>20</sup> Hence, primarily white male decision makers buy

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17. See ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATING AND DRAFTING GUIDE § 3-44.1 (Donald C. Farber ed., 2003) (standard option agreement granting purchaser “all rights to make any and all changes and adaptations of the Literary Property”); cf. PETER BART & PETER GUBER, SURVIVING FAME AND (MIS)FORTUNE IN HOLLYWOOD 65 (2002) (“Once a first draft screenplay has been written, other writers-sometimes as many as thirty-five as in *The Flintstones*-are brought in to reshape it.”). Only the most powerful writers retain some contractual right to veto changes or at least be consulted before the studio makes significant alterations. See BART & GUBER, *supra*, at 74.

18. See Dana Calvo, *Applying the First Light Coat*, L.A. TIMES, Nov. 20, 1999, at F1 (“[M]any casting directors feel committed to the race agreed upon by the writers and studio executives, almost all of whom are white.”); Interview with Jane Jenkins, Casting Director, *Apollo 13*, in Burbank, Cal. (Jan 26, 2006); Interview with David Ginsburg, in Los Angeles, Cal. (August 23, 2005) (stating that casting that does not match the script’s race and sex description is “exceptional”). Mr. Ginsburg, currently the director of UCLA School of Law’s Entertainment and Media Law and Policy Program, is an experienced producer, entertainment executive and lawyer. Increasingly, projects begin production without an approved script, and the script is constantly being re-written during production. See BART & GUBER, *supra* note 17, at 74. Thus, sometimes casting precedes the writing, and powerful actors, once cast, may influence the content of the script.

19. See Dave McNary, VARIETY, Oct. 12, 2005 (discussing WGA report by Prof. Darnell Hunt, director of the Ralph Bunche Center for African-American Studies at UCLA); see also WILLIAM T. BIELBY & DENISE L. BIELBY, THE 1998 HOLLYWOOD WRITERS’ REPORT EXECUTIVE SUMMARY 39 (1998). Professor Lauzen reports that the number is 13% for the top 250 grossing films in 2003. See Lisa Hirsch, *Slender Gender Gain*, VARIETY, Nov. 18, 2004, at 12. According to casting director Jenkins, “men write the majority of the product in this town, and they write what they want to see and that doesn’t usually include 50-year-old actresses.” Allison Hope Weiner, *Saving Face*, ENT. WKLY., Dec. 10, 2004, at 41, 42 (internal quotation marks omitted).

20. McNary, *supra* note 19. These numbers were virtually the same as those from the 1997 WGA report, suggesting little progress in diversifying writers. See Bielby & BIELBY, *supra* note 19, at 37, 39. The racial breakdown of writers is as follows: 95.1% White, 2.7% African American, 1.4% Latino, 0.6% Asian, 0.1% Native American.

scripts from primarily white men, who tend to write lead characters who are white men.<sup>21</sup> Because writers tend to draw on personal identity and experience, in line with the industry directive to “write what you know,” the description of the lead as a white man may not even appear to a writer as a conscious choice.

The primary concern in the casting process, which the studio often addresses before hiring a director or casting director, is guaranteeing an audience and financial returns for the film.<sup>22</sup> The studio generally seeks to hire an actor predetermined as “bankable” to provide this guarantee, often an “offer-only” actor who expects not to undergo an audition.<sup>23</sup> Consequently, the studio neither holds an audition nor issues a breakdown that might announce a race or sex preference for many leading or major supporting roles. This lack of auditions and breakdowns does not indicate nondiscriminatory hiring; it may just conceal it further. For example, the studio may, because of race, send the script and make an offer to Russell Crowe, but not consider Denzel Washington.<sup>24</sup> These are some of the most important casting decisions, yet they are largely hidden from public view and protected from Title VII scrutiny because of the difficulty in pinpointing the discriminatory motive.

Sometimes, however, the film’s concept or an acclaimed director, like Steven Spielberg, provides the box office guarantee, or other financial and artistic considerations militate in favor of casting an unknown lead actor, or one who at least has not proved he can “open” a film.<sup>25</sup> These opportunities to play a lead tend to go to white actors,<sup>26</sup> because the industry executives believe actors of color lack the universal appeal to sustain such an expensive project.<sup>27</sup> The casting director will generally conduct auditions

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21. See Interview with Reuben Cannon, *supra* note 16 (noting that at important casting meetings “everybody in the room is white”).

22. See *id.*

23. See Arthur De Vany & W. David Walls, *Uncertainty in the Movie Industry: Does Star Power Reduce Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 288 (1999); See Interview with Jane Jenkins, *supra* note 18. The studio normally casts this actor in a lead role, but such an actor might also be cast in a supporting role (e.g., Robin Williams’ role in *Good Will Hunting*).

24. See Allison Samuels, *Will It Be Denzel’s Day?*, NEWSWEEK, Feb. 25, 2002, at 54; Interview with Reuben Cannon, *supra* note 16 (noting that most of Washington’s roles are written for black actors).

25. Spielberg’s film *Munich* lacked an A-list lead, yet the director’s Oscar-winning record led investors to provide the \$70 million budget. See Box Office Mojo, <http://www.boxofficemojo.com/movies/?id=munich.htm> (last visited Jan. 16, 2006).

26. For instance, Scarlett Johansson was plucked from independent films like *Lost in Translation* and *Ghost World* to star in the big budget thriller, *The Island*. See also Sharon Waxman, *Maybe the Stars Have Gotten Small After All*, N.Y. TIMES, Jan. 1, 2006, at 2-1 (discussing rise and fall of Orlando Bloom in *Lord of the Rings*, *Kingdom of Heaven* and *Elizabethtown*).

27. See Interview with Reuben Cannon, *supra* note 16 (stating that studios “will take a bet on an unknown white actor in a lead,” but not an actor of color); see also Kevin Chappell, *Taye Diggs and Michael Michele Open Up About Kevin Hill, Hollywood and Being Sex Symbols*, EBONY, May 2005, at 156 (quoting Taye Diggs on the racial “double standard”: “Young White actors are given opportunities



and issue a breakdown for such roles. Where a breakdown specifies a race or sex preference, it would constitute evidence of discrimination.

After securing the lead role, the studio turns to casting the major and minor supporting roles. At this point, the studio's involvement usually starts to diminish because its interest in casting correlates with the importance of the role.<sup>28</sup> The studio hires a director, who hires a casting director, and the two work together closely in assembling actor choices for approval by the producers and executives. Most casting directors rely on a company called Breakdown Services to parse a script into descriptions of the characters and transmit these "breakdowns" to talent agents.<sup>29</sup> The agents then decide which of their actors fit the breakdown and submit those names and sometimes their photographs to the casting directors. Breakdown Services restricts access to its listings to approved agents and managers, contractually binding them not to give the breakdowns to actors.<sup>30</sup> Still, some actors manage to obtain the breakdowns informally and attempt to persuade their agents to submit them for particular roles.<sup>31</sup> Even if the breakdown specifies a race, an agent might occasionally submit an exceptional client who does not match the racial preference.<sup>32</sup> This appears to happen less frequently with respect to sex.<sup>33</sup>

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that Black actors are not. We have to prove that we have a place. People aren't going to step aside and let us have our turn. They want us to have our hands out, begging for parts.") *But cf.* Interview with Jane Jenkins, *supra* note 18 (suggesting that opportunities for an unknown actor to star in a big-budget film are so rare that it is hard to draw conclusions about the impact of race).

28. *See, e.g.*, Interview with David Ginsburg, *supra* note 18.

29. *See* Interview with Jane Jenkins, *supra* note 18 (stating that most scripts provide descriptions of main characters and casting directors simply hand script over to Breakdown Services); Breakdown Services, Who We Are, <http://www.breakdownservices.com/us.html> (last visited Jan. 16, 2006) ("Breakdowns are complete synopses of the characters contained within scripts. Our staff writers read scripts provided by casting directors and create approximately 30 television and feature film Breakdowns every day.").

30. *See* Breakdown Services, Casting Information Agreement, <http://www.breakdownservices.com/agreement/agrce.html> (last visited Jan. 16, 2006).

31. *See* Interview with Erin Hill, *supra* note 15.

32. Institutional pressures prevent many actors from making such requests. For instance, an unknown actor would not want to anger her agent. *See* Interview with Erin Hill, *supra* note 15. As an assistant to casting directors, Hill reviewed the breakdowns daily, but she does not recall a single instance where an actor urged her bosses to submit the actor for a role of a different race or sex. *See id.* Moreover, few of these requests are successful. *See* Interview with Reuben Cannon, *supra* note 16 (estimating that 85-95% of agents will not submit a black client for a role that does not say "black"). When the identity is changed, the part is usually very small and often unnamed, such as "judge" or "police officer." *See* Interview with Erin Hill, *supra* note 15; Interview with Jane Jenkins, *supra* note 18.

33. *See* Interview with Jane Jenkins, *supra* note 18 (stating that sex is "written in stone 90% of the time" and the casting of an actor who does not match the script happens "very, very, very rarely"); *but cf.* Interview with Reuben Cannon, *supra* note 16 (suggesting that decision makers are more likely to change the role's sex to female than to change race).

B. *A Close Examination of Casting Practices*

When a breakdown contains race and/or sex classifications, the often concealed systemic discrimination becomes manifest. The industry closely guards breakdowns, perhaps recognizing their apparent illegality. Nonetheless, interviews with several casting professionals and an analysis of all film breakdowns during three months of 2006 reveal the prevalence of sex and race classifications in role specifications.<sup>34</sup> We examined every breakdown over a three-month period, from Thursday, June 1, 2006 to Thursday, August 31, 2006. Although the breakdowns included casting notices for a wide variety of media, we analyzed only feature-length films. The only film roles which were not analyzed were those for stunt people or extras. For each role that was being cast, the following information was compiled: (1) date of the casting notice; (2) title of the film; (3) name of the character being cast; (3) sex of the character (Male, Female, or not identified); (4) race of the character (White, White implied, Black, Latino, Asian, Native American, Middle Eastern, or Native American);<sup>35</sup> and (5) whether the role required nudity.

Although both race and sex factor heavily into the casting process, the breakdowns treat each trait differently. Sex specification usually appears first after the character's name. For instance, one listing stated: "Mickey. Male. Caucasian late 40's." This common sequencing suggests that sex forms the foundation of a character more than the traits that follow, such as race and age. Ninety-four percent of the roles in the breakdown sample contained sex designations. Fifty-nine percent of the roles were designated male roles, and 35% were designated female.

The breakdowns' treatment of race is more varied and complex, but race remains a prevalent specification in the listings. My analysis revealed that 45.2% of the listings specified a particular race, including 5.4% that used racial code words signifying to the average reader that the role was intended for a white actor. Examples included adjectives like "Wasp" and "pale skinned" that exclude many actors of color. Alternatively, some listings requested a "type" by aligning the role with an actor of a particular race. One breakdown omitted race for a few listings yet referred to "Gina

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34. Several people with experience as casting directors or assistants to casting directors confirmed this practice. See Interview with Robi Reed-Humes, Robi Reed & Associates (*Antwone Fisher, Do the Right Thing*), in Los Angeles, Cal. (Aug. 5, 2003) (estimating that 90% of breakdowns designate a preferred race and/or sex); Interview with Reuben Cannon, *supra* note 16; Interview with Jane Jenkins, *supra* note 18; Interview with Erin Hill, *supra* note 15.

35. If the breakdown made no mention of race, either explicit or implicit, it was categorized as "race not specified." If it made mention of race, but only to explicitly specify it was open to all groups, it was categorized as "open to all ethnicities." If it asked for a combination of racial groups (i.e., only Black or Latino actors), it was categorized as a "combination" with the various acceptable ethnic groups recorded.

Gerson,” “Mickey Rourke,” and “Chazz Palminteri”—all white actors—as “prototypes” for three different roles.<sup>36</sup>

A total of 22.5% of the listings identified the race as white; 8.1% identified the character as black; 5.2% as Latino; 4.3% as Asian American; and .5% as Native American.<sup>37</sup> Another 8.5% of the listings were race-conscious in a more inclusive way, stating that the role was “open to all ethnicities.” But the use of even this inclusive description reveals and perhaps perpetuates an additional problem: many deem a character to be white if a listing does not state “open to all ethnicities” or otherwise describe the character as a person of a non-white race. As an *L.A. Times* article explains, “[C]asting directors and agents agree that each character in the Breakdowns is assumed to be white, but sometimes . . . casting directors get emphatic by adding ‘Caucasian.’”<sup>38</sup> Thus, for many, a white racial designation is the default, a racial preference so deeply entrenched that the role description need not even state it.<sup>39</sup> Sometimes a studio will cast actors who do not match the race and/or sex stated or assumed in the script or breakdown, but only in “exceptional” situations, as when the studio wants to cast a particular major star.<sup>40</sup> Several casting directors criticize industry decision makers for failing to think beyond narrow race- and gender-based assumptions, especially where there is no arguably compelling reason requiring the casting of a male or white actor, such as historical accuracy.<sup>41</sup> As one producer and former casting director said, “The problem is not lack of roles, it’s lack of imagination, lack of

36. These examples are from a preliminary smaller sample of breakdowns rather than the three-month sample.

37. In addition, 2.9% of the listings indicated the role was for a combination of races (such as for blacks and Latinos), and 1.7% indicated the role was for actors of Middle Eastern descent.

38. Calvo, *supra* note 18, at F1. In addition to the *L.A. Times* analysis, two casting professionals (one black, and one white) agreed that a listing without a racial designation is assumed white. See Interview with Erin Hill, *supra* note 15; Interview with Reuben Cannon, *supra* note 16. One other professional, who is white, stated that such a listing would mean the same thing as “open to all ethnicities.” See Interview with Jane Jenkins, *supra* note 18.

39. Cf. Barbara Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969-72 (1993) (noting that “the white person has an everyday option not to think of herself in racial terms at all” and labeling “the tendency for whiteness to vanish from whites’ self-perception the transparency phenomenon”). This assumption seems more likely to be at work when a breakdown mentions race only for non-white roles or when a role is deemed “open to all ethnicities.” It is more difficult to discern the race of unspecified characters when the breakdown includes listings designating characters as white and other characters as non-white or “open to all ethnicities,” and yet fails to mention race for other characters. There are few listings that fall into this latter category.

40. Interview with Reuben Cannon, *supra* note 16; See Interview with Jane Jenkins, *supra* note 18 (noting that casting contrary to the script is rare and she has less opportunity to do so when casting big-budget films).

41. See Interview with Jane Jenkins, *supra* note 18 (stating that agents fail to submit actors who do not match breakdowns “as often as they could or should”); see also Interview with Reuben Cannon, *supra* note 16.

courage.”<sup>42</sup> Studios all too often follow the path of least resistance, simply abiding by traditional and exclusionary thinking.

The breakdowns do not provide a complete reflection of the actors that actually appear in commercially released films. Although the breakdowns indicate the frequency with which race and sex are mentioned in casting notices, they do not always clearly describe the nature of the role (i.e., lead, supporting or bit part). Further, the breakdowns’ descriptions do not always match the actors that are actually cast, and the size and nature of roles often change by the time the film is released. Moreover, not all films that are cast earn a commercial release in theatres—some are never released, and many others go straight to DVD. We wanted to determine the race and sex demographics of the primary roles in films that were commercially released in recent years. In order to get a better snapshot of actual casting practices in films that make it to theaters, we subscribed to the Internet Movie Database or “IMDB-Pro.”<sup>43</sup> People in the entertainment industry widely consult IMDB-Pro, which was bought by Amazon.com, for information on casting, box office gross, budget and other information.<sup>44</sup> We extracted from IMDB-Pro data all films that were released in theatres in 2004 and 2005. We focused on the top three billed roles, expecting that this data would typically capture the lead role, the love interest (if any) and at least one primary supporting role.

Raw text data files of actors and actresses were downloaded from the IMDB ftp site<sup>45</sup> using the software program *Moviedb-3.24* running on Red Hat Linux 9.0.<sup>46</sup> The files are organized so that each row contains the name of the individual, the title of the project, the type of project (movie, TV, video game), the release year and often the individual’s order in the cast. These were extracted from the files using *Microsoft Access* and *SPSS*. The data were then combined into a single file, non-movie titles were excluded, the relevant years were selected (2004 or 2005) and actors who were in the top 3 positions were kept. We excluded films that reported a commercial gross less than \$1 million because many of these films were likely released only at film festivals but not in a broader commercial setting, and there was scant information on the actors in these small films. We also excluded foreign films, as their casting is not subject to Title VII. Contributors to IMDB are directed to enter the cast listings in the same order as the

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42. Interview with Reuben Cannon, *supra* note 16; see also Interview with Erin Hill, *supra* note 15 (characterizing problem as “obtuseness”).

43. IMDB-Pro, <http://pro.imdb.com/> (last visited Sept. 3, 2006).

44. See, e.g., Chris Warren, *The Credit File: Every Day 400,000 People Seek—Or Submit—Information at the Internet Movie Database, How Did It Become Industry Standard?*, LOS ANGELES MAG., July 1, 2002, at 36.

45. IMDB FTP Site, <ftp://ftp.fu-berlin.de/pub/misc/movies/databasc/> (last visited Sept. 3, 2006). “Ftp” stands for file transfer protocol.

46. For more information, see IMDB, Interfaces, <http://www.imdb.com/interfaces/> (last visited Sept. 3, 2006).

production lists them.<sup>47</sup> While these figures are faulty in some instances (for example, when the production lists the cast alphabetically), IMDB-Pro checks all information for accuracy,<sup>48</sup> and in most cases they are accurate. Obvious errors were corrected in the data cleaning process by checking the cast order with the credits listed on the movie's poster.

After compiling the database of films, we reviewed the list of all actors who received billing among the top three actors in at least one film. We reviewed photos on IMDB-Pro and used our personal knowledge of actors to classify the actors by race. To the extent we were uncertain, we consulted actor biographies on IMDB-Pro and conducted Google image searches. In addition to tracking White, Black, Latino, Asian, and Native-American actors, we created a category for multiracial actors. A number of famous actors who may not be widely perceived as nonwhite (*e.g.*, Keanu Reeves, Cameron Diaz) fit into this category. We also classified each film based on whether it had a substantial theme of one or more of the following: (1) Racial theme; or (2) Historical setting (insofar as it may have justified specifying the race or sex of the top three lead roles). This review was necessarily subjective and was not comprehensive because it would have been impractical to obtain and watch the hundreds of films in the database. Another limitation is that we did not attempt to determine which films had a substantial gender theme as this was too difficult to do without watching the entire film. However, at least one of the people working on the project had seen a good number of the films. In addition to this personal knowledge, we reviewed trailers for the films, which were accessed through IMDB-Pro, in order to ascertain themes. If we thought there could be a theme but were not sure after viewing the trailer, we read the "Plot Summary" under the "Storyline" tab in IMDB-Pro. If we were still unsure, we read reviews of the film.<sup>49</sup> We erred on the side of identifying a theme where it was arguable.

This Part has described the casting process and the ways in which race and sex factor into the casting process. Although race and sex can limit employment opportunity at many stages of the process, the evidence of such discrimination is most overt—and most vulnerable to a Title VII suit—when the decision makers use a discriminatory breakdown. The next

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47. See IMDB, What Kinds of Credits Are Eligible To Be Included in the Database?, [http://www.imdb.com/help/show\\_leaf?resumeeligible](http://www.imdb.com/help/show_leaf?resumeeligible) (last visited Aug. 30, 2006) ("Whenever possible, and with a few exceptions, we list credits exactly as they appear on screen.")

48. See IMDB, When Will My Update Be Added?, [http://www.imdb.com/help/show\\_leaf?resumeprocessingtimes](http://www.imdb.com/help/show_leaf?resumeprocessingtimes) (last visited Aug. 30, 2006) (explaining criteria for rejecting submitted data); see also Warren, *supra* note 44, at 36 (stating that in addition to automated fact checking, the site consults with public records, studios and the Writers Guild of America).

49. The websites used for reading reviews included [www.reelviews.net](http://www.reelviews.net) and [www.MRQE.com/lookup](http://www.MRQE.com/lookup).

Part lays the theoretical foundation for my analysis of the legality of using discriminatory breakdowns.

## II

### THEORETICAL FRAMEWORK

#### A. *Colorblindness vs. Anticaste*

In my analysis of the phenomena of sex- and race-based discrimination in casting, I draw on an anticaste or antisubordination conception of equality similar to that developed by Owen Fiss and Cass Sunstein.<sup>50</sup> This principle strives to eliminate systemic disadvantages that relegate a specific group to perpetual second-class citizenship.<sup>51</sup> Strands of this anticaste conception of equality appear in the Supreme Court's Title VII<sup>52</sup> and Equal Protection precedent<sup>53</sup> and compete with the colorblindness model. Although in recent years the Court has more frequently endorsed the colorblindness conception,<sup>54</sup> its recent decision in *Grutter v. Bollinger* suggests the endurance of the anticaste model.<sup>55</sup> Anticaste scholars have tended to focus on the conception of equality embodied in the Equal Protection Clause, but we ought not overlook the indispensable role that state and federal statutes have played in reducing racial and gender caste. A world without Title VII, the Equal Pay Act and the Pregnancy Discrimination Act, to name just a few examples—a world in which the government could not discriminate, but employers and private associations were given free rein to exclude undesirables—would resemble the highly

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50. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-29 (1994); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), reprinted in MODERN CONSTITUTIONAL THEORY: A READER 505 (John H. Garvey & T. Alexander Aleinikoff eds., 1999); see also Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998).

51. See Sunstein, *supra* note 50, at 2436.

52. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (holding that Title VII, despite its language, permits affirmative action); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (holding that Title VII bars policies fair in form but that have a disparate racial impact and are not job-related); see also *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993) (refusing to interpret Title VII to burden small immigrant-run and African-American-run businesses, which are often "the first rung on the ladder of American success").

53. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (discussing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954) and *Loving v. Virginia*, 388 U.S. 1 (1967)); see also Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996), reprinted in MODERN CONSTITUTIONAL THEORY: A READER, *supra* note 50, at 727 (analyzing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

54. See, e.g., Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006).

55. 123 S. Ct. 2325, 2340-41 (2003) (construing Equal Protection Clause to facilitate construction of a diverse set of societal leaders).

stratified society that the Civil War Amendments intended to abolish.<sup>56</sup> In this sense, equality-based statutes and the Equal Protection Clause work in synergistic accord, furthering a common vision of an integrated society.<sup>57</sup>

My anticaste conception opens the door to a proposal that permits race and sex to be considered under limited circumstances. From an anticaste perspective, race and sex classifications in breakdowns are not inherently harmful. Rather, the harm stems from their concrete socioeconomic ramifications. A colorblindness rationale, by contrast, would expect casting decision makers simply to ignore race and sex. In the casting context, such an expectation would be both unrealistic and unworkable. In my view, taking race and sex into account is not inherently wrong, but using such traits to assign actors positions in the industry's caste system violates Title VII's opposition to segregation and subordination. It is the use of race and sex to assign people of color and women to low-paying and often marginal roles that is most problematic. Race and sex classifications that are integral to the storyline (as in a race relations drama like *Crash*), however, may not be injurious from an anticaste perspective. This conclusion flows in part from Supreme Court cases such as *United Steelworkers of America v. Weber*, a Title VII decision that allowed the consideration of race in order to eliminate "old patterns of racial segregation and hierarchy."<sup>58</sup> An anticaste-based attack on discriminatory casting seeks not a blanket elimination of all consideration of race and sex, but rather aspires to clear the path for each individual to be able to compete for the most central and lucrative roles in film free from the confines of stereotypical assumptions.<sup>59</sup>

Whereas a colorblindness model might focus on the individual harm of being classified by race or sex, my view of discriminatory casting recognizes that these practices inflict broader, systemic harms, even if they are not the direct target of the proposed Title VII lawsuit. In addition to the

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56. See Sunstein, *supra* note 50, at 2435 (stating that the "Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy" and instigated "an attack on racial caste").

57. Cf. William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237-42, 1269 (2001). (describing the Civil Rights Act of 1964, including Title VII, as quasi-constitutional law). Moreover, developments in civil rights protections at the state level have impacted federal law, and Title VII doctrine has influenced equal protection jurisprudence. See, e.g., Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356, 368 n.5 (2001) (observing that states led the way in fighting disability discrimination, which created a consensus culminating in the ADA); see also Mary Anne Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 95 & n.116 (1995) (noting how Supreme Court appears to have incorporated sexual stereotyping rationale of Title VII cases into its equal protection gender jurisprudence); see also Eskridge & Ferejohn, *supra*, at 1241-42 (identifying Title VII's impact on the Romer decision).

58. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

59. Cf. *Grueter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

individual harms that discriminatory hiring inflicts on actors, which I detail in the next Section, discriminatory hiring in entertainment projects particular images and meanings worldwide, uniquely shaping norms and beliefs throughout society.<sup>60</sup> From this position of influence, Hollywood has continually produced distorted and marginal images of outgroups,<sup>61</sup> causing identity harms and skewing social interaction.<sup>62</sup> In light of persistent de facto social segregation, the many white Americans who live and work in predominantly white environments may obtain their primary (mis)understanding of people of color from depictions by Eddie Murphy,

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60. See, e.g., DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY 5 (1998) (“Through regular entertainment programs as well as through news and public affairs publications and shows, the media’s presentations are prime, pervasive presences in people’s lives and have profound impacts on their perceptions of the world, images of leaders, notions about appropriate style and behavior, and other basic aspects of our culture.”); see also Ken Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 95 (“The freedom of expression is the freedom to contribute to social definition of other people, and to contribute to our own self-definition as well.”).

61. See Jane Rhodes, *The Visibility of Race and Media History*, in GENDER, RACE AND CLASS IN MEDIA 37 (Gail Dines & Jean M. Humez eds., 1995) (stating that racial stereotypes were “employed liberally in early motion pictures”); see also Stuart Hall, *The Whites of Their Eyes: Racist Ideologies and the Media*, in GENDER, RACE AND CLASS IN MEDIA, *supra*, at 20-22 (arguing that even if depictions of the most crude archetypes, such as the Mammy, have subsided, “their traces are still to be observed, reworked in many of the modern and up-dated images” in contemporary media). Like much racism, this “very ancient grammar” has simply gone underground. Hall, *supra*, at 22. The phenomenon whereby socially dominant groups debase subordinate groups by depicting them as oppositional Others has historical roots deeper and broader than black-white relations and the modern entertainment industry. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY 103, 112-13 (Kimberlé Williams Crenshaw et al. eds., 1995); Jan Nederveen Pieterse, *White Negroes*, in GENDER, RACE AND CLASS, in MEDIA, *supra*, at 23-27; Rhodes, *supra*, at 33 (discussing how “American society responded to the existence of Africans, Asians, and indigenous people by erasing their cultures and substituting images that supported a system of racial dominance and control”).

62. See, e.g., Paul E. McGhee & Terry Frueh, *Television Viewing and the Learning of Sex-Role Stereotypes*, 6 SEX ROLES 179, 183 (1980) (finding that children who were heavy television watchers “were significantly more likely than light viewers to attribute to each sex the psychological characteristics typically associated with males and females by adults”); Ann Beuf, *Doctor, Lawyer, Household Drudge*, 24 J. COMM. 142, 144 (1974) (finding that 67% of children who were heavy television viewers “selected stereotyped careers for themselves” compared to 50% for moderate viewers); Sherryl Browne Graves, *Television and Prejudice Reduction: When Does Television as a Vicarious Experience Make a Difference?*, 55 J. SOC. ISSUES 707, 716 (1999) (describing studies finding an increase in positive attitudes toward African Americans and Latinos among children who watched racially diverse educational programs, such as *Sesame Street*); see also Anupam Chander & Madhavi Sunder, *The Right to Mary Sue*, 95 CALIF. L. REV. \_\_\_\_ (2007) (reviewing relevant studies). Such stereotypes can become so embedded that they structure the way we perceive entertainment, even preventing viewers from remembering counterstereotypical portrayals. One study asked children to watch a short film of a doctor and nurse. The authors varied the sex of the doctor and nurse to create four different male/female combinations. They found that all children who viewed the stereotypical male doctor-female nurse dyad correctly remembered it, but 53% of those who viewed a female doctor-male nurse dyad reported that the doctor was male and the nurse female. See Glenn D. Cordua, Kenneth O. McGraw & Ronald Drabman, *Doctor or Nurse: Children’s Perception of Sex Typed Occupations*, 50 CHILD DEV. 590, 591 (1979).



Lucy Liu, or Queen Latifah.<sup>63</sup> Although the proposed Title VII lawsuit pragmatically focuses on the direct harms suffered by actors, the ramifications of such a lawsuit could ultimately help erode the social stratification exacerbated by much casting in contemporary film.

### B. *Balancing Speech and Equality*

Despite these considerable harms, I recognize that those who prioritize the First Amendment may resist using legal pressure to diversify casting. The First Amendment, they might say, automatically trumps antidiscrimination laws, such as Title VII, which are mere statutes.<sup>64</sup> Because entertainment companies are private actors, they are not violating the Equal Protection Clause, and thus there is no tension between competing constitutional rights. Some civil rights advocates, on the other hand, might point to the commercial nature of contemporary film to question whether it is truly “speech” and argue that equality concerns in the employment context override somewhat marginal First Amendment claims. To be sure, these are both tenable positions. My point of departure, however, assumes a serious commitment to speech and equality and recognizes that casting discrimination implicates both values. Moreover, my effort to balance speech and equality is not novel. The Supreme Court has balanced speech and equality interests in a number of cases.<sup>65</sup> The goal

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63. See Graves, *supra* note 62, at 715 (“White children, especially those living in rural settings, use television as a primary source of information to learn about different racial/ethnic groups.”); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1539-40 (2005) (noting significance of “vicarious” racial experiences in light of “persistent racial segregation”); cf. Karst, *supra* note 60, at 115-16 (“The subordination of black Americans (or any other group) is crucially affected by the images of the Other tucked away in the heads of the dominant group—and often in the heads of those who are subordinated.”).

64. Cf. Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223, 235 (1996); DAVID E. BERNSTEIN, *YOU CAN’T SAY THAT: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 12-13 (2003). These scholars tend to downplay the extent to which current First Amendment doctrine involves balancing of competing interests, including interests that are not constitutional values. Existing First Amendment doctrine “almost inevitably reflects a complex effort to balance competing interests, to promote a multiplicity of values, and to reach practically and symbolically acceptable results.” Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 23 (1994); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 792 (1988) (“The ‘balancers’ are right in concluding that it is impossible to escape the task of weighing the competing interests . . .”).

65. In several cases the Court has allowed impingements on First Amendment interests where the state’s goal was to advance gender or racial equality. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (holding that any abridgement of U.S. Jaycees’ First Amendment associational interests created by a state antidiscrimination ordinance was justified by the state’s compelling interest in prohibiting gender discrimination); *Metro Broad. v. FCC*, 497 U.S. 547 (1990) (upholding FCC diversity regulations over First Amendment challenge), *overruled in part on other grounds by Adarand Constr. v. Pena*, 515 U.S. 200 (1995); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting law firm’s claim that First Amendment allowed it to discriminate against female candidate for partner); *Runyon v. McCrary*, 427 U.S. 160 (1976) (rejecting private school’s claim of First Amendment-based exemption from § 1981’s ban on race discrimination in contracting because “the Constitution places no value on

of this project is likewise to explore ways to negotiate the tension between speech and equality norms, within the scope of the prevailing constitutional regime, without simply sacrificing one value or the other.<sup>66</sup>

### III

#### THE HARMS OF RACE AND SEX DISCRIMINATION IN CASTING

In exploring the harms actors suffer from casting discrimination, I specifically address the employment context, rather than the broader social impact of stereotypical or marginal depictions of women and people of color in film, since it is these individual harms with which Title VII is most directly concerned. Women and people of color who pursue an acting career experience two interrelated employment injuries: economic harms and identity harms. First, women obtain less work than men, and people of color receive less work than white actors, especially in leading, more lucrative roles. The most plentiful roles for these outsider groups are supporting and bit parts, which afford less pay and less prestige. The film industry marginalizes such actors on account of race and sex, making it harder for them to earn a living from their craft. Second, because the roles designated for women and people of color tend to be othered, these actors often suffer substantial identity harms. Devon Carbado and Mitu Gulati have written about the identity harms caused by employers outside the entertainment industry generally preferring African Americans (and other people of color) who perform their race in a way that is “racially palatable” or not “too black.”<sup>67</sup> These general employer preferences incentivize people of color to discard or mute cultural aspects of their identity, such as hair styles and accents that might reveal divergence from a white norm, in order to move up the professional ladder. Hollywood takes a very different view. The stereotypical characterization of many non-white film roles requires actors to “black up” their identities and performances rather than mute racial salience. In a similar fashion, the industry requires female actors to “sex up” their identities, emphasizing physical attractiveness,

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discrimination . . . it has never been accorded affirmative constitutional protections”) (quoting *Norwood v. Harrison* 413 U.S. 455, 470 (1973)). *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), represents the other extreme, in which the First Amendment claim trumped the interest in eradicating sexual orientation discrimination. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Although the Court has attempted to balance speech and equality, it has not done so in a very clear or principled fashion.

66. One way in which I attempt to alleviate the tension between equality and speech is to focus on the employment harms of discriminatory breakdowns rather than the representational harms of films. Under First Amendment doctrine, government generally cannot regulate based on the content or communicative impact of speech. *See, e.g., R.A.V.*, 505 U.S. at 386. For instance, the Supreme Court held that states cannot single out race and sex-based “fighting words” “based on hostility—or favoritism—towards the underlying message expressed.” *Id.* As I argue more fully below, regulating conduct, even if it imposes incidental burdens on speech, is more acceptable.

67. *See, e.g., Devon Carbado & Mitu Gulati, Working Identity*, 85 CORNELL L. REV. 1259, 1298 (2000).

conforming to expectations of femininity, and often appearing nude.<sup>68</sup> Whether the employer preference requires muting the employee's racial or gender identity or exaggerating it (as in the casting context), identity harms are imposed on people of color and females, but not on white and male employees. Moreover, actors must grapple with an identity dilemma: to the extent that they refuse to portray stereotypical roles because of self and group-respect, outsiders' economic harms are exacerbated. Accepting stereotypical roles conversely reduces the economic disparity but increases the identity harm. Outsiders must continually negotiate this trade-off.

#### A. Economic Harms

Casting director Jane Jenkins explains that "there's definitely less work statistically and it's definitely harder for minority actors to get good [agent] representation and to get work."<sup>69</sup> Female actors also compete for fewer roles, especially "women over 40 [who] are as much a minority as any ethnic group."<sup>70</sup> These disparities have historical roots. According to Charles Ramírez Berg, films have always fixated on "the great white hero."<sup>71</sup> "In order to prop the protagonist up, characters of cultural/ethnic/racial/class backgrounds different from the hero's are therefore generally assigned sundry minor roles: villains, sidekicks, temptresses, or the 'other man.' Principally, they provide opportunities for the protagonist to display his absolute moral, physical, and intellectual preeminence."<sup>72</sup> As a result of this structure, even stories ostensibly about "minority" experiences tend to revolve around white people.<sup>73</sup> In casting actors of color, industry decision makers assume that most actors of color carry limited appeal to "mainstream"—i.e., white—audiences, which makes casting them in lead roles financially risky.<sup>74</sup> Similarly, women

68. 92.3% of the roles that featured nudity in the breakdowns sample were set aside for women, while just 7.7% were designated for men; see also LARSON, *supra* note 2, § 43.03, at 43-35 ("[E]xploitation of sex, whether in theatres, night clubs, strip-tease joints, movies, or magazines has until recently almost exclusively taken the form of displaying the female body.").

69. Interview with Jane Jenkins, *supra* note 18.

70. *Id.*

71. CHARLES RAMÍREZ BERG, *LATINO IMAGES IN FILM 67* (2002).

72. *Id.*

73. See A.O. Scott, *Blacks Being Themselves, Not Symbols*, N.Y. TIMES, Jan. 19, 2003, at 2-10 ("Even the characters played by [Halle] Berry and [Denzel] Washington, in 'Monster's Ball' and 'Training Day,' respectively, were to some degree still subservient to their white counterparts, whose struggles were dramatically central. Ms. Berry's role was to tame the demon of racism in the heart of a middle-aged white prison guard played by Billy Bob Thornton, while Mr. Washington . . . was a demon sent to test the innocence of a young white policeman played by Ethan Hawke."). Other familiar examples of white male centrality include *Amistad* and *The Last Samurai*.

74. See, e.g., JESSE ALGERON RHINES, *BLACK FILM/WHITE MONEY 6* (1996) ("[T]here is . . . no doubt that because they are not white, Black men and women are generally relegated to the margins of the film industry."). Studios are more comfortable casting actors of color, such as Jennifer Lopez, despite their popularity, when they include a white star to ensure "mainstream" appeal. See Patrick Goldstein, *Marketing the Color Black: Strategies for 'Crossover' Films Fail to Stifle Charges of Racism*, L.A. TIMES, Apr. 18, 1989, at 6-1 (A MGM executive stated, "It was clear to us that with two

contend for lead roles more in the low-budget, feminized genres, such as romantic comedies or horror films, and are assumed to have limited appeal to young male viewers.<sup>75</sup>

The success of exceptional actors, such as Oscar winners Denzel Washington and Halle Berry, sometimes masks the continuing racial and gender disparities. Yet even these most famous actors complain of discrimination, including exclusion from many roles.<sup>76</sup> These stars' current success tends to distract from their years of hard work trying to break out of the industry's narrow racialized and gendered expectations, shouldering increased burdens that white male actors do not have to bear.<sup>77</sup> Sandra Oh, a Korean-American female actor who finally gained mainstream success in the film *Sideways* and TV hit *Grey's Anatomy*, explained: "I know that I don't get jobs in film by auditioning. I'm not blonde. . . It's very difficult for my agents. They say to me, 'I have a hard time getting you in,' and all I want is a shot."<sup>78</sup> Although the most successful female actors and actors of color do not face a level playing field, less established actors encounter even greater obstacles to finding good work. Gabrielle Union (*Bad Boys 2*) declared: "After Halle Berry does her films and [Queen] Latifah does her films, it's left to all the black, Latino and Asian actresses to fight over a couple of roles."<sup>79</sup> When the wave of low-budget black romances (*e.g.*, *The*

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leading characters being black, it would be hard for us to make [*The Mighty Quinn*, a 1989 film starring Denzel Washington] a broad-based picture. . . . Our previews told us it was much easier to attract a black audience than a non-black one—though once we got them into the theaters, they *all* enjoyed the film.").

75. Conventional Hollywood wisdom holds that young women will go to "boy"-skewing movies, but boys will not go to "girl" movies. Thus, movies that target female viewers tend to write off the lucrative young male demographic. See Interview with Jane Jenkins, *supra* note 18.

76. Denzel Washington has stated that sometimes he is not offered roles that go to comparable white actors. See Samuels, *supra* note 24, at 54. One of Washington's directors, who is white, agrees: "Most roles are written disproportionately for white actors, and that's the truth of the matter," says Ed Zwick, who directed Washington in 'Glory,' 'Courage Under Fire' and 'The Siege.' 'Denzel isn't going to get the roles that Russell Crowe gets. He can't be in 'The Insider' or 'Gladiator,' and that's very limiting to an actor like him.'" *Id.*; see also Michael Fleming, *Halle's Second Act*, V LIFE, Sept. 2005, 62, 67, 85 (stating that "[Halle] Berry and [her manager] have fought long and hard against traditional limits placed on actresses of color to get her this far"); Interview with Reuben Cannon, *supra* note 16 (stating that some question whether Berry can green-light major films).

77. For instance, Wesley Snipes initially faced difficulty because "studio executives . . . would never hire anybody 'darker than Denzel.'" Lorenza Munoz, *A Star Cools Down: Action. Drama. Comedy. Wesley Snipes Sizzled. And Then . . . He Didn't*, L.A. TIMES, Aug. 1, 2004, at E1. Benjamin Bratt, who is of Peruvian Indian heritage, was told that he could not be cast in the epic *Troy* [set in Asia Minor] because he was "too 'brown.'" Elaine Dutka, *Overcoming a Question of Color*, L.A. TIMES, June 13, 2004, at E19.

78. Hilary de Vries, *All That Korean Rage, Unbottled*, N.Y. TIMES, Oct. 17, 2004, at 2-12, 2-20. Oh's big breaks came from her then-husband, Alexander Payne, who cast her as a woman with a black child and white mother in *Sideways*, and from one of the few black women to run a major network TV show, Shonda Rimes. See Matthew Fogel, *'Grey's Anatomy' Goes Colorblind*, N.Y. TIMES, May 8, 2005, at 2-16.

79. Ta-nehisi Coates, *The Color of Money*, N.Y. TIMES, July 10, 2005, at 2-1.

*Best Man*, *Brown Sugar*) faded—despite being consistently profitable<sup>80</sup>—the leads of those films, including Union, found work in racially integrated films to be scant and turned to lower-status, largely supporting roles on television.<sup>81</sup>

Statistical data confirm these anecdotal reports by female actors. A study of the top one hundred films in 2002 by Professor Martha Lauzen found that “[s]eventy-seven percent (77%) of clearly identifiable protagonists were male and 16% were female.”<sup>82</sup> Screen Actors Guild (SAG) data reveal that in 2003, male SAG members worked almost twice as many days in lead roles as female SAG members worked. The gender disparity was actually slightly greater for supporting parts.<sup>83</sup> My independent analysis of the top three lead roles in all commercially-released films during 2004 and 2005 that grossed at least \$1 million showed similar underrepresentation. Studios cast men as the lead in 73% of the films released in 2005, a gross overrepresentation of the American male population (which is roughly 49%). The gender disparity in 2004 for first leads was similar (70% male; 30% female). Gender diversity increased as the importance of the role decreased. For both 2005 and 2004, women secured 44% of the second-billed roles, which is often the “love interest” (the protagonist’s wife or girlfriend). In 2005, they obtained 40% of the third-billed roles, and in 2004, 37% of such roles.

Although SAG does not track days worked or income earned by race of actor, their casting reports reveal racial disparities.<sup>84</sup> According to SAG’s 2003 casting report on film, lead roles broke down racially that year as follows: white 79.9%, black 10.3%, Latino 4.4%, Asian 1.9%, and Native American 0.4%.<sup>85</sup> My analysis of 2005 films revealed similar results, illustrating that nearly 82% of the lead actors, those billed first in the film’s credits, were white.<sup>86</sup> Blacks made up almost 11% of leads,

80. See Interview with Reuben Cannon, *supra* note 16 (stating that very few black films lose money). These films tended to be profitable because they were made on much lower budgets than mainstream films (often less than \$20 million), and black audiences reliably attended them.

81. Coates, *supra* note 79, at 2-1 (quoting Union as explaining: “I opted for some TV. There [is] just not a ton of work in film.”). Omar Epps (*House*), Nia Long (*Third Watch*), and Mekhi Phifer (*ER*) are among the film stars that shifted to supporting television parts.

82. Martha M. Lauzen, *The Celluloid Ceiling, Behind the Scenes and On-Screen Employment of Women in the Top 250 Films of 2002: Executive Summary 2* (2003) (unpublished manuscript, on file with author).

83. See 2003 SAG Casting Data, <http://www.sag.org/Content/Public/03castingdatarpt.pdf> (last visited Jan. 30, 2006).

84. SAG’s membership roughly reflects the racial representation of working actors as described in the text. SAG’s active members are 81% white, 12% black, 4% Latino, 2% Asian and 1% Native American. See E-mail from Elaine Gram of SAG to Russell Robinson, Aug. 28, 2006 (on file with the California Law Review).

85. See *id.*

86. These statistics were derived from IMDB.com, the Internet Movie Database, which is widely regarded as a definitive source of industry information as to films, casts and box office grosses.

slightly less than their representation in the general population (13%). All other minority groups were significantly underrepresented among first leads, based on U.S. Census Bureau data.<sup>87</sup> Latinos made up a mere 1% of such leads, compared to 13% in the general population. Asians and Asian Americans made up 2%, compared to 4%. There were no Native American leads.<sup>88</sup> Multiracial actors were cast in more roles (4%) than either Latinos, Asians or Native Americans. Notably, many of these multiracial actors (e.g., Keanu Reeves, Cameron Diaz, Vin Diesel) are perceived by many viewers as white. The racial distribution of the supporting actors (second- and third-billed) in my analysis was similar.<sup>89</sup> The 2004 data reveal similar patterns. The first lead roles were distributed as follows: white 82%, black 12%, Latino 2%, Asian 1%, multiracial 2%, and Native Americans 0%.

Where race and gender intersect, different patterns emerge. African-American men accounted for 78% of African Americans in the top three lead roles in 2005 and 71% in 2004. The picture is more mixed with respect to other people of color. Multiracial women were more likely to be cast in 2005 (63%) and 2004 (58%) than multiracial men. Latinas made up just 42% of Latino/a leads in 2005 but 67% in 2004. Asian women made up 71% of the Asian leads in 2005, but there were no Asian female leads in 2004. It is difficult to draw firm conclusions with respect to Asian women and Latinas because the sample contains just two years, there are significant variances between 2004 and 2005 and in general the numbers of Asians and Latinos are very small. For instance, 2004 may be more representative than 2005 because 2005 was unusual in that it included the Asian-female driven *Memoirs of a Geisha*. Professor Lauzen's study remarked that in general, "[m]oviegoers were just as likely to see a [lead] female Asian character as a female other worldly character, such as an extra-terrestrial."<sup>90</sup> Despite the empirical limitations, these numbers on

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87. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, <http://www.census.gov/prod/2004pubs/04statab/pop.pdf>. I recognize that a court might use a different baseline if it were adjudicating a "pattern or practice" Title VII claim. Determining the proper baseline is somewhat complex. Although the Supreme Court has at times looked to general population racial demographics, see *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338-340 (1977), precedent also suggests that a court must consider whether the general public has the qualifications for and interest in the job at issue. See, e.g., LARSON, *supra* note 2, § 9.04; EEOC v. Sears, 839 F.2d 302 (7th Cir. 1988). In evaluating a "lack of interest" defense, the court may consider whether the employer's discrimination has reduced interest among those subject to discriminatory policies. See *Sears*, 839 F.2d at 366 (Cudahy, J., concurring in part and dissenting in part). A court might also use Los Angeles and New York demographics, where most acting jobs originate, and these cities are more racially diverse than the national statistics.

88. Native Americans make up 1% of the general population. See, e.g., U.S. Census Bureau, Overview of Race and Hispanic Origin, <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

89. The significant differences were that African Americans gained some ground among second leads (15%) but dropped to 10% among third leads. Latinos experienced an uptick among second (3%) and third (4%) leads.

90. Lauzen, *supra* note 82, at 2; see also Susan Dominus, *Why Isn't Maggie Cheung a Hollywood Star?*, N.Y. TIMES MAG., Nov. 14, 2004, at I13 ("It's nearly impossible . . . to name a studio film in

gender may be read to confirm reports of black women having great difficulty obtaining lead roles, particularly in big-budget films, and more recently, losing roles to Latinas.<sup>91</sup> Because of prevailing stereotypes, it also seems likely that multiracial women (e.g., Halle Berry, Jessica Alba), and to a somewhat lesser extent, Latinas and Asian women are more likely to have access to sex symbol roles than black women.

Even when women and people of color secure roles, they may be paid less for their work. The industry creates hierarchical tracks and assigns individuals to the various tracks based on race and sex. A handsome white male has access to the leading man track, the most central and lucrative. He can anchor action films with budgets of \$200 million or higher. A lead in a big budget film (say, Ben Affleck) can make \$15 million or more,<sup>92</sup> while a comparable lead in a black film (say, Taye Diggs) may make as little as \$150,000—1% of the salary of the former.<sup>93</sup> Younger women are likely to be assigned to “the girlfriend” track, peripheral roles that pay much less. A male “star’s salary may be 25 to 50 times that of his putative leading lady.”<sup>94</sup> These actors are positioned on separate job tracks (big-budget leading man; African-American leading man; the girlfriend). As such, these actors cannot compete for any role they may desire. In keeping with the industry’s practice of typecasting, each actor is typically only considered for jobs that replicate his or her prior roles. Of course being locked into leading man roles in big-budget films is not the same as being locked into black films or subsidiary love interest roles. The former track

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which an Asian-American actress plays the leading role, or the love interest, or even the love interest’s best friend, outside of specifically Chinese films like ‘The Joy Luck Club.’”). In contrast to about a dozen male actors of color (primarily African Americans) who are household names, only Jennifer Lopez, Halle Berry and Queen Latifah have attained that privileged status. See Stephanie Zacharek, *Invisible Women*, SALON, Mar. 18, 2002, <http://www.salon.com> (“[T]here are more movie stars—actors who can carry top billing in a film—among contemporary black male actors than among their female counterparts. Denzel Washington, Will Smith, and Eddie Murphy lead the pack; others, like Samuel L. Jackson, Laurence Fishburne, Wesley Snipes, Chris Rock and Martin Lawrence are less luminary but are nonetheless instantly recognizable to most moviegoers.”).

91. See, e.g., Allison Samuels, *Why Can’t A Black Actress Play the Girlfriend?*, NEWSWEEK, Mar. 14, 2005, at 52 (discussing studio’s refusal to cast an African-American female actor opposite Will Smith in the hit *Hitch*). The studio cast Eva Mendes, a Latina, in an apparent attempt to avoid audience resistance to casting a white woman. See Tom Carson, *Skin Flicks*, GQ, June 5, 2005, at 119 (citing *Hitch* as an example of “Hollywood’s favorite way of dabbling in cross-racial sexuality without scaring moviegoers—the Latina Option.”). It opted not to cast an African-American love interest because, in the words of actor Nia Long, “two black characters equals a black film and not just a movie about two people.” Samuels, *supra*, at 52. Mendes acknowledges that “[c]ertainly I’ve benefited, because I’ve got to work with Ice Cube, Denzel and Will.” *Id.*

92. See IMDB, Salary, <http://pro.imdb.com/name/nm0000255/personal#salary> (last visited Nov. 9, 2004) (listing Affleck’s salary for *Paycheck* as \$15 million).

93. See Interview with Robi Reed-Humes, *supra* note 34 (discussing salaries of African-American actors in urban films).

94. Richard Corliss, *Babes in Boyland*, TIME, July 14, 2003, at 56. Further, playing the girlfriend in a big hit is unlikely to pay off (beyond securing more girlfriend roles) for an actor because she is not perceived as the main draw of audiences. See *id.*

ranks at the top of the film industry, with status and pay that vastly exceed those of the lower rungs of the industry. In this way, the industry maintains a race- and sex-based caste system.

### B. Identity Harms

The second injury outsider actors experience is identity harm. Actors of color in film rarely portray characters who just happen to be, for instance, Native American or Latino. Instead, studios cast them specifically because of their race and expect them to perform it, often in line with negative traits historically ascribed to their group.<sup>95</sup> Minstrel performances on stage and in song, which were “exceptionally popular” during the second half of the nineteenth century, provided the template of racial stereotypes from which early filmmakers drew.<sup>96</sup> The gross distortion of African-American representations in early films shows up in their physicality. White actors would play African American characters and “black up” by smearing burnt cork onto their faces, typically leaving wide white circles around their lips to create caricatures of the fleshy lips associated with black people.<sup>97</sup> Both the dark complexion and the unusually large lips of the blackface actors belied the actual appearances of many African Americans, yet the exaggerated version formed the prototype for future black roles.

*Birth of a Nation*, the first blockbuster film, illustrates race and sex othering in its crudest form. The racial polemic<sup>98</sup> featured white men playing “looming bucks menacing weakened whites,” including the blackfaced Gus’s pursuit of “the innocent, youthful, white Flora . . . stalking her as camera shots shift rapidly back and forth between her spontaneous, joyful wanderings in the woods and his prowling chase.”<sup>99</sup> The black man signified aggressive hypersexuality, which the

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95. As *New York Times* critic A.O. Scott observed: “[T]he movies have largely treated black people as symbols of social pathology—as clowns and criminals and as agents for the moral advancement of white people.” Scott, *supra* note 73, at 2-10. Thomas Edison, who “initiated mass film viewing with the introduction of the large-screen projector in New York City on April 23, 1896,” produced films like *The Watermelon Contest* and *Ten Pickaninnies*, which presented African Americans as “human objects for viewer amusement,” simpletons that were perpetually the butt of jokes. RHINES, *supra* note 74, at 14. In a different context, Ken Karst made a similar point about racial representations: “the Other is not a person but a projected abstraction: the white, looking at someone who is black, tends to see not the person but the image of blackness.” Karst, *supra* note 60, at 124; see also Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1167-68 (2000).

96. See, e.g., SUSAN GUBAR, RACECHANGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE 56 (1997).

97. See *id.* at 79.

98. “*Birth of a Nation* was advertised upon its release as a film that would ‘work audiences into a frenzy . . . it will make you hate.’” Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. FORUM 243, 243 (1991).

99. GUBAR, *supra* note 96, at 57. The director instructed actor Walter Long, the white actor who played Gus, “to run doubled-over with a sort of ‘animalistic scuttle’ and to gargle with a bottle of hydrogen peroxide so as to create the effect of foaming at the mouth.” *Id.*



film portrayed as the ultimate threat to the construct of white female purity—Flora ultimately commits suicide rather than submit to the sexual advances of the animalistic Gus.<sup>100</sup> Other core African-American racial stereotypes include the “Coon,” “Tragic Mulatto” and “Mammy.”<sup>101</sup> Although these prototypes have evolved, and are now played by black actors instead of whites, the racial distortions live on in muted forms.<sup>102</sup>

Whereas African Americans are often cast to represent criminality or an “urban” experience, Latinos, Asian Americans and Native Americans are stamped as inherently “exotic” or “foreign.”<sup>103</sup> This manifestation of othering often requires actors to adopt different mannerisms, such as exaggerated accents. For instance, Latino actors who speak fluent English report being told to “fake a Spanish accent to be more convincingly Hispanic.”<sup>104</sup> Most current depictions of Asians fall into either the martial arts genre,<sup>105</sup> sexually submissive geishas or prostitutes,<sup>106</sup> “dragon ladies or Chinatown mafia molls or . . . mysterious fortunetelling women.”<sup>107</sup> Similarly, films rarely depict Native Americans unless they are wearing tribal gear or performing rituals.<sup>108</sup> According to Charles Berg, the “vast majority” of Latino depictions boil down to some variant of “six basic stereotypes: *el bandido*, the harlot, the male buffoon, the female clown, the Latin lover, and the dark lady.”<sup>109</sup> Perhaps the most enduring Latino

100. See *id.* at 58.

101. See DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 4-18* (4th ed. 2001).

102. Consider a few hit movies starring African-American actors: *Bad Boys 2* featured comic Martin Lawrence, rolling his eyes and hamming it up in the most coon-ish fashion, and Will Smith playing a “bad-ass” buck. Before that, we saw *Bringing Down the House* in which Queen Latifah rose to prominence by playing a ghetto girl, straight out of prison, who at one point gratuitously dresses up in a mammy’s uniform to serve the Steve Martin character’s white family and houseguest. Playing these bankable roles seems to be the price required of actors in order for them to gain access to the rare nuanced, complex role (see Latifah in *Chicago*), although there is no guarantee that movies refusing to serve up easily digestible stereotypes will succeed (see Denzel Washington’s sorely overlooked *Antwone Fisher*).

103. In her standup comedy film *I’m the One That I Want*, actor-comedian Margaret Cho, the first Asian-American lead actor in a television sitcom, poignantly riffs on how executives hired an “Asian consultant” to make suggestions such as adding references to chopsticks and having Cho’s character walk around without shoes. Similarly, the following casting call sparked controversy when it was posted on the UCLA Theatre Film and Television School’s listserve: “Casting beautiful Asian women for Warner Bros.’ *The Last Samurai* Premiere After-party to be held in Westwood on Dec 1st. Women will be dressed as village women from the film’s wardrobe department and mingle ‘in character’ through the party, helping to create the ambience of ancient Japan, circa 1870’s.”

104. Mireya Navarro, *Actors in All-Latino Cast Savor a ‘Historic Moment’*, N.Y. TIMES, Dec. 2, 2003, at E1.

105. Edward Lee, *Denigrating Asian Men*, TORONTO STAR, Aug. 4, 2003, at A17.

106. See Jae-Ha Kim, “*Geisha*” Raises Fears of Stereotypical Movie Roles, CHI. TRIB., Dec. 14 2005, at C1.

107. Dominus, *supra* note 90, at 115.

108. See generally S. Elizabeth Bird, *Gendered Construction of the American Indian in Popular Media*, J. COMM. (Summer 1999).

109. BERG, *supra* note 71, at 66, 78; See also *id.* at 68-78 (discussing each stereotype in depth).

stereotype, the Latin Lover, was created by the performances of one white man, Rudolph Valentino.<sup>110</sup>

For female actors, sexuality (or asexuality) forms the core of the othering of women. The norm of male centrality leads to the “underpersonification” of women,<sup>111</sup> who are reduced to roles defined in relation, often sexually, to a man, such as “the girlfriend,” “the wife,” “the mother,” and “femme fatale.” Whereas women like Bette Davis and Katherine Hepburn secured dominant roles in many early films,<sup>112</sup> the pendulum appears to have swung away from such strong, central female roles.<sup>113</sup> Given their designation as the love interest, women alone must routinely consent to nude scenes as a condition of casting.<sup>114</sup> In the three-month sample of breakdowns that we analyzed, 92.3% of the roles requiring nudity were designated for women. When women are not overtly sexualized, they tend to be asexual (and often shrewish) mothers.<sup>115</sup>

Although physical appearance retains high importance for almost all actors, attractiveness matters disproportionately for women.<sup>116</sup> Only women become presumptively unattractive and evaporate from lead roles

110. Valentino established this character in a famous scene from *The Four Horsemen of the Apocalypse* (1921) and went on to play romantic Others in *The Sheik* (1921), *Son of the Sheik* (1926) and *Blood and Sand* (1922). See *id.* at 76.

111. See, e.g., Karst, *supra* note 60, at 128 (describing “[s]exuality and maternity” as the “focal points” of the “under-personification” of “real women”) (quoting D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND THE HUMAN MALAISE* (1976)).

112. See, e.g., Richard Corliss, *Girls Just Wanna Have Guns*, *TIME*, Apr. 22, 2002, at 58.

113. See, e.g., Dave Karger & Missy Schwartz, *A Few Good Women*, *ENT. WKLY.*, Dec. 2, 2005, at 14 (“The lack of solid roles for women in Hollywood has been decried for decades. Yct things have arguably worsened recently, and that’s with production at four of the six traditional major studios overseen by women.”).

114. See Amy Wallace, *And The Oscar Does Not Go To . . .*, *N.Y. TIMES*, Mar. 23, 2003, at 9-1 (“[A]ctresses often need not apply if they won’t appear naked in films . . .”). Women who won Oscars for roles that entailed nudity include Halle Berry (*Monster’s Ball*), Gwyneth Paltrow (*Shakespeare in Love*) and Holly Hunter (*The Piano*). Beyond the realm of Oscar, Demi Moore secured an at-the-time unprecedented \$12.5 million paycheck for starring in *Striptease*. Sharon Stone made her name with a scene from *Basic Instinct* in which she famously uncrossed her legs. It is difficult to think of male actors whose careers have been similarly defined by nudity. Male frontal nudity is considered controversial and often censored by the Motion Picture Association of America, which determines movie ratings. See Cesar G. Soriano & Jim Cheng, *Male Frontal Nudity in the Movies Uncovers an Old Debate*, *USA TODAY*, Nov. 19, 2004, at E1.

115. See Doris Bazzini et. al., *The Aging Woman in Popular Film: Underrepresented, Unattractive, Unfriendly, and Unintelligent*, 36 *SEX ROLES* 531, 541 (1997) (finding that “older females were perceived as less friendly, less intelligent, less good, possessing less wealth, and being less attractive.”).

116. For instance, several commentators have noted that beauty is a key factor in awarding Academy Awards to women, but not men. See, e.g., Tom O’Neil, *Hey Good-Looking, This One’s Not for You*, *N.Y. TIMES*, Jan. 2, 2005, at C1. The Academy seems to have a particularly hard time resisting women who cover their beauty for the sake of the performance and yet return gloriously to feminine form in time to pick up their awards (see Charlize Theron in *Monster*, Halle Berry in *Monster’s Ball*, Nicole Kidman in *The Hours*, Hilary Swank in *Boys Don’t Cry*).

around age forty.<sup>117</sup> Meanwhile, aging men such as Michael Douglas appear opposite nubile women young enough to be their daughters (say, Gwyneth Paltrow). The film presents these pairings as normal, even though older female-younger male depictions rarely appear and certainly not in such an unblinking fashion.<sup>118</sup>

This race- and sex-based stereotyping can harm actors in numerous ways. First, taking on a stereotyped identity that an actor loathes is a harm in and of itself. Each day the actor must shed her normal identity and embody a racial or gender prototype, the very image that she struggles against and tries to distance herself from in most other contexts.<sup>119</sup> Second, generally, white and/or male writers create these stereotypical female characters and people of color.<sup>120</sup> As a result, the outsider actor may perceive herself as the mouthpiece for someone not a member of her group who may actually be misrepresenting the group. Moreover, the actor's known racial and gender identity may imbue the writer's words with a false mantle of legitimacy in the eyes of the audience, particularly where the writer's identity remains unknown. Third, these identity harms may magnify when the film is released and the actor has to explain to her family and friends why she posed nude or why she accepted a role that perpetuates stereotypes. Fourth, since all actors are subject to the industry practice of "typecasting," playing a few stereotypical roles will lead to more stereotypical work and hinder the actor in obtaining future non-stereotypical roles.<sup>121</sup> Holding out for non-stereotypical work will likely mean that the actor works less, and many actors simply do not have the economic luxury of passing up parts, even stereotypical roles they would

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117. See, e.g., Weiner, *supra* note 19, at 42; Bazzini, *supra* note 115, at 541. Hence, male actors like Anthony Hopkins, Jack Nicholson, Clint Eastwood, Sean Connery and Morgan Freeman continue to top-line big-budget films and earn tens of millions of dollars for lead roles well into their sixties and beyond. Comparable female lead actors are almost nonexistent. The closest may be Susan Sarandon, who, at fifty-seven, continues to be viewed as sexy, against all odds. Sarandon nonetheless earns less and performs in more supporting roles than her male counterparts.

118. See Tom King, *Hollywood's Fountain of Youth*, WALL ST. J., Apr. 12, 2002, at W9 (reporting that Robert De Niro, who was then fifty-eight, nixed the casting of Reese Witherspoon, twenty-five, because he "felt like he could be her grandpa"); Interview with Robi Reed-Humes, *supra* note 34 (comparing careers of Jessica Lange and Clint Eastwood). Apparently this trend has not yet reached its nadir if the announced (but scuttled) pairing of Winona Ryder (thirty-two) and Sean Connery (seventy-three) is any indication. See Gregory Kirschling, *The Deal Report*, ENT. WKLY., July 18, 2003, at 17.

119. See Bird, *supra* note 108, at 63 (discussing incident where Native American female actor was told to redo a scene where she wept because expressing emotion was inconsistent with the stereotype of Native Americans as stoic).

120. See, e.g., Bielby & Bielby, *supra* note 19, at 25 ("Hollywood executives strongly believe that black writers can only write about African Americans, while white writers can write about the experiences of any racial or ethnic minority group. This same logic leads to the near exclusion of Latino, Asian-American and Native-American writers in Hollywood.").

121. See *id.* at 23 ("Typecasting is a basic business principle in Hollywood . . .").

prefer not to play. In this way, the economic and identity dimensions of casting put the outsider in a double bind.<sup>122</sup>

Finally, some identity harms uniquely affect female actors. First, they must negotiate an additional age-based “role trap.” Female actors who accede to industry norms emphasizing their beauty and sexual availability, rather than their acting chops, become locked in the pedestal/cage of such roles. As they age and can no longer play the “ingénue” or “girlfriend,” their employment opportunities wither along with their perceived attractiveness.<sup>123</sup> Meg Ryan, who became known for playing cute, perky roles,<sup>124</sup> is a cautionary example, while Jodie Foster managed to avoid the trap. While Foster established her reputation playing an FBI agent (*Silence of the Lambs*), a working class rape victim (*The Accused*), and an astronomer (*Contact*), Ryan became known for playing romantic-comedy leads (*When Harry Met Sally*, *Sleepless in Seattle*, *You’ve Got Mail*).<sup>125</sup> Because Foster’s career never hinged on her sex appeal, she has continued to star in high-profile films (*Panic Room*, *Flightplan*, *Inside Man*), a goal that has eluded Ryan. Second, because of the age-attractiveness double standard, women face greater pressure to resort to unhealthy means of maintaining a young, sexy appearance, including breast implants and other types of cosmetic surgery.<sup>126</sup> These identity pressures also entail financial costs and may actually create physical harms.

I have described the employment-related harms in order to give the reader a sense of why casting discrimination matters. Similarly, a judge might be less likely to carve out a broad exception for the film industry if it recognizes the concrete injuries that flow from casting discrimination. In the next Part, I focus on one particular Title VII lawsuit, a challenge to discriminatory breakdowns, recognizing that although it would not redress

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122. Actor Michael Michele, a black woman who has successfully negotiated this double bind, explains the dilemma: “I had to make a definitive choice early on in my career to play certain types of roles. . . . I would have probably worked more often, and perhaps larger roles, had I chosen . . . female roles that were an extension of the male characters. . . . I chose another path.” Being more selective ultimately enabled her to play non-stereotypical parts: “doctors, lawyers, [and] cops.” Chappell, *supra* note 27, at 156.

123. See, e.g., Bazzini, *supra* note 115, at 541 (study of twenty top-grossing films which found that “[e]ighty percent of characters over the age of 35 were male, whereas only 20% were female”); see also *id.* at 533 (discussing age discrepancy between men and women who won Oscars).

124. See Donna Freydkin, *Two Actresses After 40: One Struggles, One Succeeds*, USA TODAY, Feb. 18, 2005, at 12E.

125. It is true that Ryan played a few dramatic roles and Foster played an occasional romantic lead. But the point is that these roles (which were not as successful) were viewed as diversions from the actor’s central “type” and failed to dislodge the industry’s initial perceptions of each actor.

126. See, e.g., Stephen Holden, *Beyond Asian Stereotypes, This Comic Settles Scores*, N.Y. TIMES, Aug. 4, 2000, at E22 (recounting how executives pressured comedian-actor Margaret Cho to lose 30 pounds in two weeks, which led to kidney failure).

all of the harms discussed above, it nevertheless provides a useful starting point.<sup>127</sup>

#### IV THE TITLE VII LAWSUIT

##### A. *The Claim*

In this Section, I imagine how a Title VII lawsuit alleging disparate treatment based on a discriminatory breakdown might proceed, outlining a claim of sex discrimination and then assessing how a race claim would differ.<sup>128</sup> Imagine that an African-American female actor sues because she was denied the opportunity to audition for a film because all of the lead and supporting roles were designated in the breakdowns for either males or white females. Title VII specifically prohibits “an employer, labor organization, [or] employment agency” from “print[ing] or publish[ing] or caus[ing] to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color . . . [or] sex.”<sup>129</sup> In *Desert Palace Inc. v. Costa*,<sup>130</sup> the Supreme Court established the general framework for Title VII claims. To establish a prima facie case, the plaintiff must provide evidence that shows sex and/or race was a “motivating factor” for an

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127. There is doctrine suggesting that at least some of these harms are redressable under Title VII, even if they are not integral to the specific lawsuit examined in this Article. For instance, agreeing to hire but assigning actors to particular jobs based on stereotypes would likely violate Title VII. On its face, Title VII forbids an employer to “limit, segregate, or classify” an applicant or employee based on race or sex. 42 U.S.C. § 2000e-(2)(a)(2) (2005). *See also, e.g.*, *Bridgeport Guardians v. Delmonte*, 553 F. Supp. 601, 611 (D. Conn. 1983) (finding, among other violations, that assignment of black and Latino officers to poor, crime-ridden neighborhoods violated Title VII); *Knight v. Nassau County Civil Serv. Comm’n*, 649 F.2d 157, 162 (2d Cir. 1981) (finding that assignment of black employee to minority recruitment job “based on a racial stereotype that blacks work better with blacks and on the premise that Knight’s race was directly related to his ability to do the job” violated Title VII); *cf. Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999) (stating that § 1981 test for intentional discrimination is same as Title VII’s and holding that assignment of telemarketers by race violated the law).

128. Although I focus on Title VII, a plaintiff alleging race discrimination could also sue under Section 1981, which prohibits racial discrimination in contracting. *See* 42 U.S.C. § 1981(a)-(c) (2005). However, Section 1981 does not ban sex discrimination. *See id.* Like Title VII, it does not contain a BFOQ for race. *See Ferrill*, 168 F.3d at 468. One scenario that might prompt an actor to sue under Section 1981 rather than Title VII would be if the actor used a “loan out” corporation. Because of the various legal benefits attached to the corporate form, an entertainer may set up a corporation, which then provides the entertainer’s services. Under such arrangements, the studio would formally contract with the loan out corporation. A race-based refusal to contract with a corporation identified with a particular actor could give rise to liability under Section 1981.

129. 42 U.S.C. § 2000e-3(b) (2005). The statute defines “employment agency” as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.” *Id.* at § 2000e(c).

130. 539 U.S. 90 (2003).

adverse “employment practice,” such as failure to hire.<sup>131</sup> Because the studio, director, casting director and Breakdown Services collaborate in creating and posting breakdowns and casting the roles, the actor would likely sue all such parties, although the studio is likely to have the “deepest pockets” for paying out a judgment. Each defendant would have to qualify as an “employer” or an “agent” of an “employer” under Title VII.<sup>132</sup> A breakdown’s stated preference for male and white actors alone would likely show that an illegitimate motivating factor influenced the refusal to hire the plaintiff.<sup>133</sup> In light of this express classification, the plaintiff would not have to prove that the employer was motivated by animus.<sup>134</sup> Nor need she show that she would have obtained the job but for the sex- and race-based bar on auditioning.<sup>135</sup> The defendants may, however, invoke a limited affirmative defense that would prevent the actor from obtaining damages if the employer “would have taken the same action in the absence of the impermissible motivating factor”<sup>136</sup>—that is, that they would have denied the actor the job for legitimate reasons, such as acting ability or chemistry with co-stars.<sup>137</sup> However, simply by showing that sex or race played a role in the denial of the opportunity, the plaintiff could obtain an injunction against the further use of discriminatory breakdowns and the opportunity to recoup attorney’s fees.<sup>138</sup>

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131. See *id.* at 94; 42 U.S.C. § 2000e-2(m) (2005).

132. See 42 U.S.C. § 2000e(b) (2005) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .”). The statute simply defines an “employee” as “an individual employed by an employer.” *Id.* at § 2000e(f).

133. See, e.g., *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1340-41 (7th Cir. 1992) (distinguishing cases “involving a facially discriminatory employment policy . . . from the more typical disparate treatment case”); *Gerdon v. Cont’l Airlines*, 692 F.2d 602, 608 (9th Cir. 1982) (stating that “in some cases facially different treatment itself implies intent” to discriminate).

134. See *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

135. See 42 U.S.C. § 2000e-2(m) (2005) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*”) (emphasis added).

136. *Id.*; *Desert Palace Inc. v. Costa*, 530 U.S. 90, 94-95 (2003).

137. If somehow the actor was able to secure an audition, despite the breakdown, but suspected that she lost the role because she was the “wrong” sex or race, she would likewise have to overcome the studio’s showing that she would have lost the role even if sex or race had not been a factor in order to obtain damages. In the absence of a breakdown, she might not even be able to show that sex or race was a “motivating factor.”

138. See 42 U.S.C. § 2000e-5(g)(2)(B) (2005).

*B. Statutory Defense:*

*Sex or Race as a Bona Fide Occupational Qualification (BFOQ)*

*I. Sex-Based BFOQ*

The best statutory argument for avoiding liability altogether would be the Bona Fide Occupational Qualification (BFOQ),<sup>139</sup> which provides that sex may be considered when it is “reasonably necessary to the normal operation of that particular business or enterprise.”<sup>140</sup> When sex constitutes a BFOQ, Title VII permits employers to post ads indicating their preferences.<sup>141</sup> The BFOQ test is whether “the essence of the business operation would be undermined by not hiring members of one sex exclusively.”<sup>142</sup> The Supreme Court and lower courts have proclaimed the BFOQ provision an “extremely narrow exception to the general prohibition of discrimination on the basis of sex.”<sup>143</sup>

The EEOC provides just one example of a BFOQ, and it is casting. The guidelines state: “Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a Bona Fide Occupational Qualification, *e.g.*, an actor or actress.”<sup>144</sup> Though the EEOC provides only the thinnest of rationales for this example, a few courts have, with little additional analysis and in dicta, repeated this reference to acting as an example of a permissible sex-based BFOQ.<sup>145</sup> Although the lack of casting discrimination lawsuits cannot be entirely attributed to this isolated comment in the EEOC Guidelines, the reasoning behind this comment remains critical since even the case most supportive of the claim that sex-based casting violates Title VII, *Wilson v. Southwest Airlines*,<sup>146</sup> looks to the EEOC comment.

The EEOC’s embrace of authenticity as a BFOQ touchstone raises many questions and critiques. Mary Anne Case called it “bizarre that sex is considered a BFOQ, in the interests of ‘authenticity or genuineness,’ for the job of actor or actress . . . . After all, the very essence of this job is to be something one is not. All that a producer should be allowed to require is that the pretense be convincing.”<sup>147</sup> Actors generally do not face

139. The business necessity defense would not apply here because it applies only in disparate impact cases. See *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991).

140. 42 U.S.C. § 2000e-2(e) (2005).

141. *Id.* at § 2000e-3(b).

142. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

143. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *Johnson Controls*, 499 U.S. at 201; *Chambers v. Omaha Girls Club*, 834 F.2d 697, 704 (8th Cir. 1987); see also LARSON, *supra* note 2, § 43.01, at 43-3.

144. 29 C.F.R. § 1604.2(a)(2).

145. See, *e.g.*, *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1224 (9th Cir. 1971).

146. 517 F. Supp. 292 (N.D. Tex. 1981); See also *Diaz*, 442 F.2d at 389 (rejecting BFOQ argument for flight attendant position).

147. Case, *supra* note 57, at 12 n.23; LARSON, *supra* note 2, § 43.01, at 43-1 (stating that the “extremely narrow” BFOQ exception “usually refers to gender or gender characteristics as such, rather

authenticity requirements regarding many character traits; for example, an actor need not be gay or have a disability or pregnant in order to play a character with that trait. Indeed, good acting is often defined as the ability to pull off a role quite different from the actor's own identity.<sup>148</sup> As explained below, the history of cross-racial performances<sup>149</sup> demonstrates that even race has not uniformly been subject to an "authenticity" requirement.

Moreover, the rationales purporting to justify discrimination in casting run counter to the core reasoning of most BFOQ decisions. Southwest Airlines argued that its clientele desired feminine sex appeal. But *Southwest Airlines* and many other Title VII decisions, and the very same EEOC guidelines in all cases other than acting,<sup>150</sup> have repeatedly rejected customer preferences as a basis for a BFOQ.<sup>151</sup> The *Southwest Airlines* court attempted to explain the comment and distinguish acting from the flight attendant position at issue there: "In the example given in

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than to nonsexual traits that are associated with one sex either by widely prevalent stereotyped views or even by statistically provable evidence").

148. Movies frequently depend on viewers' accepting the legitimacy of numerous depictions that defy reality, such as when two straight actors play star-crossed gay lovers (*Brokeback Mountain*), an American actor plays a quintessentially British role (Renée Zellweger in *Bridget Jones's Diary*) or vice versa (Anthony Hopkins in *Nixon*), an actor well into her thirties or forties is hired to play a teenager (Barbra Streisand in *Yentl*) or a young star plays a character that ages into a senior citizen over the course of the film (as in many biographies of famous figures). See King, *supra* note 118, at W9. The TV shows *Friends*, *Will & Grace* and *Frasier* expected viewers to ignore that very pregnant cast members were playing thin, non-pregnant characters. (This discrepancy was most striking during *Friends*' final season when Courtney Cox's character Monica struggled with infertility while Cox was visibly pregnant.)

149. See *infra* notes 327-329.

150. See 29 C.F.R. § 1604.2(a)(2) (West 2006) (prohibiting the "refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers").

151. See, e.g., Diaz, 442 F.2d at 387 (refusing to rely on customer preferences for female flight attendants because that rationale could "emasculate" Title VII); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) ("[T]he need to accommodate racially discriminatory policies of other nations cannot be the basis for a valid BFOQ exception."); *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 603 (9th Cir. 1982) ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid."); *Sw. Airlines*, 517 F. Supp. at 302 n.25 ("If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order."); see also Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99, 107 (1983) (identifying reactions to "innate characteristics" and assumptions "based on hierarchical judgments about social groups" as preferences that are likely illegitimate). There is language in *Southwest Airlines* indicating that Southwest simply failed to provide sufficient evidence that its "Love" campaign was "reasonably necessary" to its success in the market, but the opinion ultimately seems to rest on a categorical rejection of profit-based justifications for discrimination. See *Southwest Airlines*, 517 F. Supp. at 302 n.25; LARSON, *supra* note 2, § 43.01, at 43-1 (noting that courts have rejected BFOQ arguments based on "statistically provable evidence"). An exception is *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), which held that using viewer surveys to evaluate newscaster Craft's appearance and add "feminine touches" to her image did not constitute discrimination. The court brushed aside Craft's claim that the underlying customer preferences were based on gender stereotypes. See *id.* at 1214.



§ 1604.2(a)(2), that of an actor or actress, the primary function of the position, its essence, is to fulfill the audience's expectation and desire for a particular role, characterized by particular physical or emotional traits. Generally, a male could not supply the authenticity required to perform a female role."<sup>152</sup> The "primary function" of most any job is to "fulfill the [clientele's] expectation[s] and desire[s]."<sup>153</sup> If the law simply catered to customer expectations, Title VII and the other civil rights laws enacted in the 1960's never would have been able to integrate workplaces, housing and places of public accommodation due to the pervasiveness of racist and sexist preferences and attitudes.<sup>154</sup> Because the law requires virtually all employers not to discriminate, no employer is hobbled with a competitive disadvantage.<sup>155</sup> So if courts override and reshape customer preferences in other contexts, why should they defer to them with respect to casting? The guidelines do not say.

The second justification provided by *Southwest Airlines* is that "[g]enerally, a male could not supply the authenticity required to perform a female role."<sup>156</sup> The key to understanding this conception of "authenticity" appears in the prior sentence, which tells us that the audience expects the actor to convey "particular physical or emotional traits." The rationale thus appears to be that generally women cannot authentically portray "masculine" traits, and men cannot portray "feminine" traits. But if this is the rationale it violates two interrelated maxims of antidiscrimination law. First, an individual woman cannot be precluded from a position because of overbroad assumptions that most women could not perform the job, such as lifting a certain weight.<sup>157</sup> Again, the guidelines provide inconsistent explanations in that they state at the outset: "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."<sup>158</sup> If this is the case, why should not Meryl Streep have the opportunity to prove that she can play a man, even if most women could not? Second, the alignment of sex with particular character traits

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152. *Sw. Airlines*, 517 F. Supp. at 301.

153. *Id.*

154. See Diaz, 442 F.2d at 386; See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 18-19 (2000) (stating that a broad construction of the BFOQ exception in the sex context would "entirely blunt" the "transformative thrust of Title VII"); see also Wertheimer, *supra* note 151, at 99, 101 (noting that customer reactions are implicated by "a wide spectrum of jobs and personal characteristics" because "many jobs in a modern society involve some form of interpersonal relations—advising, ordering, teaching, selling"). Despite such preferences, a "society may refuse to honor certain preferences in order to symbolize and promote its views about the sorts of characteristics that should (not) matter to the way its citizens think about each other." Wertheimer, *supra* note 151, at 111.

155. See Post, *supra* note 154, at 22 n.101.

156. 517 F. Supp. at 301.

157. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

158. 29 C.F.R. § 1604.2(a)(1)(ii) (West 2006).

constitutes gender stereotyping. Thus, to the extent that authenticity extends beyond physical differences, it runs into Title VII's prohibition on gender stereotypes.<sup>159</sup> The guidelines concede that a BFOQ cannot be based on "stereotyped characterizations of the sexes."<sup>160</sup> In sum, the EEOC carves out casting as an arbitrary exception to the normal requirement that an applicant be considered as an individual and not saddled with group-based stereotypes and the ban on catering to customer preferences. Importantly, the guidelines are not regulations and do not carry the force of law.<sup>161</sup> "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."<sup>162</sup> Courts may consult the guidelines, but also may reject them when their reasoning is weak or undercut by competing considerations.<sup>163</sup> In light of the unpersuasive reasoning behind the EEOC's proposed acting exception, courts should either reject the comment altogether or limit it to roles involving nudity because of physical differences, which a leading commentator calls the "clearest" justification for a BFOQ.<sup>164</sup> A Title VII exception limited to physical differences would be exceedingly narrow because a mere 2.06% of the roles in the three-month sample of breakdowns that we analyzed featured nudity. Moreover, over 92% of such roles were designated for women. Thus, a nudity-based exception would largely justify excluding men, not women.

Because the EEOC comment is not dispositive,<sup>165</sup> we must look into general BFOQ law for guidance. As Kimberly Yuracko explains, the courts have arrived at this general rule: They will accept sex preferences when the business sells *only* sexual gratification.<sup>166</sup> Otherwise, they have rejected

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159. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1999); *Rosenfeld v. S. Pac. Co.*, 444 F.2d at 1225 ("Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.").

160. 29 C.F.R. § 1604.2(a)(1)(ii) (West 2006).

161. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976), superseded by the Pregnancy Discrimination Act on other grounds (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

162. *Gilbert*, 429 U.S. at 141.

163. See, e.g., *id.* at 143-46 (rejecting EEOC Guidelines suggesting that denial of pregnancy benefits constitutes sex discrimination); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (relying on guidelines where they "appropriately drew from, and were fully consistent with, the existing case law").

164. See LARSON, *supra* note 2, § 43.02, at 43-4 ("The clearest [BFOQ case] is that in which a physical feature unique to one sex is essential to the performance of the job" such as a "wet nurse"); *id.* at § 43.04, at 43-55 ("The two major Supreme Court cases on sex as a BFOQ—*Dothard* and *Johnson Controls*—both turned on unique qualities of the female sex rather than typical characteristics."); cf. *Virginia*, 518 U.S. at 533-34 (stating that government can take physical differences into account without violating equal protection).

165. Even if the guidelines were controlling, they would not legitimate all sex discrimination in casting. The comment authorizes discrimination only when "necessary" for purposes of "authenticity or genuineness."

166. See Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 149-54 (2004).

BFOQ defenses.<sup>167</sup> In practice, this means that employers hiring strippers may take sex into account, but those that wish to use gender-specific sex appeal to help sell a product receive no statutory protection for their discrimination.<sup>168</sup> The key case is *Southwest Airlines*, in which the airline refused to hire male flight attendants and ticket agents based on a branding strategy that marketed female sexuality.<sup>169</sup> Naming itself the “Love Airline,” Southwest attempted to entice its primarily male business-executive clientele with hot pants-wearing female flight attendants serving “love potions” and “love bites” (drinks and snacks).<sup>170</sup> The women were hired to convey an “image of feminine spirit, fun and sex appeal.”<sup>171</sup> The court distinguished the flight attendant from the stripper because “Southwest’s primary function is to transport passengers safely and quickly from one point to another,” not provide sex appeal.<sup>172</sup>

The typical acting job seems closer to the flight attendant context. To be sure, sex appeal is an important factor in casting many acting roles, but it is rarely the only factor. An actor in a non-pornographic film does more than just provide sexual gratification; she must memorize and interpret lines and effectively portray the character. The narrowest interpretation of the EEOC comment would permit discrimination only insofar as nudity is required, which would align the acting BFOQ with the case of the stripper because in both cases the exception is tied to physical differences rather than gender stereotypes.<sup>173</sup>

Although the BFOQ test turns on business “essences,” courts rarely explain their underlying reasoning clearly. The essence-talk is not particularly illuminating in that the analysis tends to be conclusory and “essences” are pulled “seemingly out of thin air.”<sup>174</sup> Yuracko explores four

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167. See *id.* The other main strand of BFOQ cases, which would not be directly implicated by casting, is the privacy cases. Courts have permitted employers to respond to reasonable privacy expectations and consider sex in hiring private nurses and restroom attendants. There are also a few additional, unrelated cases, including *Chambers v. Omaha Girls Club*, 834 F.2d 697, 704 (8th Cir. 1987), which upheld the right of a club for girls to fire an unwed pregnant employee, and the Supreme Court cases, *Johnson Controls*, which involved health risks to pregnant employees, and *Dothard*, which involved prison security. *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

168. See Yuracko, *supra* note 166, at 149-50.

169. *Wilson v. Sw. Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981).

170. *Id.* at 294-95.

171. *Id.* at 294. The selective hiring policy buttressed an extensive advertising effort: “[u]nabashed allusions to love and sex pervade[d] all aspects” of the campaign, which encompassed “newspaper, magazine, billboard and television advertisements,” including an *Esquire* magazine cover photograph featuring an actual Southwest flight attendant. The ticketing system even included a “quickie machine” promising “instant gratification.” *Id.* at 294 n.4 (internal quotation marks omitted).

172. *Id.* at 302.

173. See *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights Appeal Board, 1971) (discussing stripper exception); *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (N.Y. Human Rights Appeal Board, 1971) (same).

174. Yuracko, *supra* note 166, at 160.

different potential understandings of the meaning of the “essence” of a business—inherent meaning, shared social meaning, employer-defined and customer-defined—and shows that none can fully explain why courts confer BFOQ exceptions on strip clubs but not on employers who sell other services and wish to add on gender-specific sex appeal.<sup>175</sup>

Yuracko identifies an anticaste conception of gender equality as the most coherent explanation of the BFOQ case law. The courts have “rigidly sequester[ed]” sex businesses, permitting discrimination in the narrow sector that sells primarily sex, such as Playboy Clubs, because the spread of sex-appeal requirements would serve to subordinate women and perpetuate the sex-segregated work world Title VII strives to abolish.<sup>176</sup> Policies that require women to “sex up” their appearances mark them as different from and inferior to the male “ideal worker” and “make it more difficult for women to compete effectively in the work world.”<sup>177</sup> They may even subject women to increased sexual harassment.<sup>178</sup> For instance, it seems likely that female actors who must appear nude and otherwise emphasize their sexuality are more vulnerable to harassment on the set. The courts have implicitly recognized that without some coherent limiting principle, all sorts of businesses could adopt sexualized branding, making

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175. The inherent essence theory fails because of the mutability and socially contingent nature of goods and modern businesses. *See id.* at 162. Within a particular industry, there is significant variation in business plans across various eras and regions, and there appears to be no easily identifiable “inherent” purpose of a business. *See id.* The shared meaning approach also fails. Most would agree that the essence of a janitorial services company is to provide cleaning services. Yet courts permit companies to assign women to clean female restrooms and men to male restrooms despite any belief that the sex of the custodian enhances cleanliness. *See id.* at 168. The employer-defined conception clearly cannot explain the consistent judicial rejection of discriminatory policies in the flight attendant cases and other cases where businesses wanted to brand themselves through exploiting the sexuality of female employees. *See id.* at 168-69. Finally, decisions refusing to let employers like Southwest Airlines sell female sexuality do not rest on judicial assessments that customers do not “really” want such services, but that customer desires are irrelevant to Title VII. *See supra* note 151. The customer-defined conception thus cannot explain the BFOQ case law. *See Yuracko, supra* note 166, at 171.

176. *See Yuracko, supra* note 166, at 184-85. But if these cases are really about substantive gender equality, one might ask, why do courts permit discrimination in the hiring of strippers or Playboy Bunnies, since these most sexualized jobs are perhaps the most demeaning to women? The narrow exception for the sex industry allows the courts to give some meaning and content to the BFOQ exception, which it must do because Congress created the exception. At the same time, this interpretation creates a clear boundary for sexualized jobs, which prevents their spread.

177. Yuracko, *supra* note 2, at 172, 230; Case, *supra* note 57, at 68 (“[C]onventionally feminine apparel has often been used as a mark of feminine subordination.”). For example, in an article on Valet of the Dolls, an L.A.-based all-female valet service, the owner explained that her business strategy entails marketing “fun, sexy, wild women” who are instructed to “be playful and make conversation with waiting guests,” rather than emphasizing the quick retrieval of cars. Janelle Brown, *Baby, You Can Park My Car*, N.Y. TIMES, Mar. 27, 2005, at 9-1. A male rival, dismissed his competition, saying “When people say that it’s cute, I tell them to buy a puppy . . . when you are dealing with people’s cars, it’s about your professional standards.” *Id.*; cf. EEOC v. Joe’s Crab, Inc., 220 F.3d 1263, 1269-70, 1283 (11th Cir. 2000) (discussing finding that fine dining restaurant preferred to hire men because “the highest level of food service is performed by men” in the “‘Old World’ European tradition”).

178. *See, e.g., EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981).

gender-specific sex appeal a qualification for nurses, secretaries and even lawyers.<sup>179</sup> Although such a rule would also allow employers to sexualize male employees,<sup>180</sup> and might seem superficially equal, it would not be in practice. Because more business owners are male and prevailing gender norms encourage men to commodify women, there would be a stronger demand for female sexuality than male sexuality, just as movie audiences appear to prefer to see female nudity more than male nudity.<sup>181</sup> This anti-caste interpretation of the BFOQ cases dovetails with the Supreme Court's reasoning in foundational gender discrimination cases under the Equal Protection Clause, such as *Mississippi University for Women v. Hogan*,<sup>182</sup> in which the Court held the state could not direct women to nursing, as opposed to traditionally male and higher-paying careers, such as medicine.<sup>183</sup> The casting breakdowns violate this rationale in consistently requiring women, but not men, to sexualize their identities in order to obtain work and directing them to marginal, less lucrative roles.

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179. Courts would have a hard time drawing the line in a few respects. First, based on what principle could a court permit a company to feature "sexy" waitresses or valets but not allow a doctor to hire "naughty" nurses? Second, if gender-specific sexuality traits are allowed, why not other gender-based traits? If a law firm can hire only sexually attractive female secretaries, it would seem to be able to market a macho brand of aggressive lawyering and hire only men. See Yuracko, *supra* note 166, at 74-75. The line-drawing problems become clearer once one recognizes that all work is performative, as Devon Carbado and Mitu Gulati have written. See, e.g., Carbado & Gulati, *supra* note 67.

180. An interesting question raised by these decisions is why the courts have not adopted an intermediate position. A court could permit a business to add sex appeal as a job qualification so long as it does so in an evenhanded manner. Businesses like Hooters restaurants could be required to have a section that caters to (heterosexual) men and another that caters to (heterosexual) women. Consequently, the business (perhaps renamed something like Hooters & Pecs) would offer equal employment opportunities to both men and women, although servers would be steered to different sections based on their sex. Cf. *United States v. Virginia*, 518 U.S. 515, 540 (1996) (suggesting that separate educational institutes could be constitutional if Virginia provided equally for her sons and daughters).

181. See, e.g., Yuracko, *supra* note 166, at 61 ("There is a much greater demand for the commodification and sale of female sexuality than there is demand for the commodification and sale of male sexuality."); LARSON, *supra* note 2, § 43.03, at 43-35 ("[E]xploitation of sex, whether in theatres, night clubs, strip-tease joints, movics, or magazines has until recently almost exclusively taken the form of displaying the female body."). 92.3% of the roles that featured nudity in the breakdowns sample were designated for women, and 7.7% were designated for men. In general, it seems likely that most male business owners would not be as comfortable marketing male sexuality. Although some might respond that the "one-sided sexual character" of such entertainment is explained by men being more "sexual" than women and thus generating a greater demand for female sexuality, such "preferences" are inextricably intertwined with the different ways in which the genders are socialized to think about sex and express their sexuality. Cf. LARSON, *supra* note 2, § 43.03, at 43-35.

182. 458 U.S. 718 (1982); see also *Gerdomb v. Cont'l Airlines*, 692 F.2d 602, 607 (9th Cir. 1982) (relying on *Hogan*, 458 U.S. at 718).

183. See *Hogan*, 458 U.S. at 729-30; see also *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985) (discussing allegation that station created new female anchor position to "'soften' its news presentation"); *EEOC v. Joe's Crab, Inc.*, 220 F.3d 1263, 1284 (11th Cir. 2000) (recounting allegation that female wait-staff applicants were directed to take-out section because "no women were hired to work in the main dining room").

However, a competing strand of Title VII case law reveals the fragility of the anticaste case law and provides a challenge to a claim of sex-based casting discrimination: cases holding that not all gender conventions constitute unlawful sex discrimination. Because a number of these decisions focus on female appearance and arise in arguably creative industries,<sup>184</sup> they might be particularly persuasive.<sup>185</sup> A recent example is *Jespersen v. Harrah's Operating Company*, a Ninth Circuit decision absolving Harrah's Casino of Title VII liability for requiring gender-specific grooming standards, including the mandate that women wear makeup, whereas men were expressly prohibited from wearing it.<sup>186</sup> The court ruled that the policy's facial distinctions between male and female grooming standards and "Jespersen's own subjective reaction"<sup>187</sup> that the makeup requirement was "degrading and intrusive"<sup>188</sup> were inadequate to establish that the policy violated Title VII.<sup>189</sup> Although some of the dissenters considered it a matter of common sense that requiring women to wear makeup imposed a gender-based burden that male employees avoided,<sup>190</sup> the majority determined that Jespersen failed because her evidence regarding the burden of buying and applying makeup was insufficient.<sup>191</sup> Despite this evidentiary claim, the court went on to deny that forcing women to wear make-up "make[s] women conform to a commonly-accepted stereotypical image of what women should wear."<sup>192</sup> The court thus rejected the finding of Judge Thomas, the dissenting judge from the underlying panel, who championed an anticaste conception of Title VII in concluding that the makeup requirement "rest[s] upon a

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184. Among these cases, the most clearly expressive defendant is the TV station sued by a female news anchor in *Craft*. Other cases involved a casino, which typically provides gaming and entertainment in addition to food and drink, and a restaurant, the design of which often includes creative aspects. See *Jespersen v. Harrah's Operating Company*, 444 F.3d 1104, 1107-08 (9th Cir. 2006) (casino); *Joe's Crab*, 220 F.3d at 1263 (restaurant).

185. One Ninth Circuit judge expressly rejected such a result, stating "Title VII does not make exceptions for particular industries, and we should not write them in." *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1085 (Thomas, J., dissenting).

186. See *id.* at 1083 (majority opinion). The Ninth Circuit reheard the case en banc and affirmed the panel decision. See *Jespersen v. Harrah's Operating Company*, 444 F.3d 1104 (9th Cir. 2006).

187. *Jespersen*, 444 F.3d at 1112.

188. *Id.* at 1118 (Kozinski, J., dissenting).

189. *Id.* at 1112-13 (majority opinion).

190. *Id.* at 1117 (Kozinski, J., dissenting).

191. *Id.* at 1112 (majority opinion). The Ninth Circuit *en banc* opinion barely acknowledged the evidence that Jespersen submitted. The earlier panel opinion had acknowledged her evidence but found it lacking because "Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to cost and time burdens that must be borne by female bartenders in order to comply with the makeup requirement." *Jespersen*, 392 F.3d at 1081.

192. *Jespersen*, 444 F.3d at 1112. The court did suggest that it would have ruled in Jespersen's favor if the policy had required women to dress in "sexually provocative" outfits and "stereotype[d] women as sex objects." *Id.*

message of gender subordination.”<sup>193</sup> Following these cases, a court addressing a casting discrimination claim might argue that it is generally accepted that a woman cannot play a man, and a man cannot play a woman, and this belief is not a stereotype.<sup>194</sup> Because the casting norm that permits an actor to play only his or her actual sex applies to both sexes, it might say, the standard is not discriminatory from a formal perspective.

These two competing strands of Title VII reasoning render murky the waters for a potential casting claim, and it remains unclear which line of reasoning would prevail. Courts have declined to impose rigid adherence to a norm of sex neutrality in employment.<sup>195</sup> For every broad proclamation that “Title VII prohibits the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . even where the stereotypes are benign or not grounded in group animus,”<sup>196</sup> language to the contrary surfaces, such as the dictum that the “primary thrust of Title VII . . . is to discard [only those] outmoded sex stereotypes posing distinct disadvantages for one sex.”<sup>197</sup> Untethered to a normative rationale such as the anticaste principle, the essence test produces uncertain results and draws arbitrary lines.<sup>198</sup> An anticaste conception of Title VII offers a

193. *Jesperson*, 392 F.3d at 1086 (Thomas, J., dissenting); see also *Carroll v. Tallman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028, 1033 (7th Cir. 1978) (holding that a bank’s requirement that only female employees wear a uniform was “demeaning to women” in light of “natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes”). The *Carroll* majority concluded that the bank’s justification, which was that only women were prone to engage in a “dress competition” resulting in inappropriate outfits, was based on “offensive stereotypes prohibited by Title VII.” *Id.*

194. *Cf.* *Yuracko*, *supra* note 2, at 188 (“In a gendered society, women and men simply cannot possess the same trait in precisely the same way.”).

195. See *Post*, *supra* note 154, at 18-20, 21; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 31 (1995) (“[T]he law reserves a large area for legitimate sex-based regulation—an area bounded by the notion of factually real and legally relevant sexual differences.”); *Case*, *supra* note 57, at 60-70 (discussing judicial resistance to claims that gender-specific grooming standards are sex discrimination under Title VII, despite the statute’s plain language).

196. *Joe’s Crab*, 220 F.3d at 1284; see also *Hopkins*, 490 U.S. at 250-51; *Gerdorn*, 692 F.2d at 603; *Carroll*, 604 F.2d at 1030.

197. *Craft*, 766 F.2d at 1215.

198. The Larson treatise’s analysis of the BFOQ exception mirrors the ambivalence of Title VII decisions in trying to explain BFOQ law. Larson suggests that the employer-defined conception of business essences should govern. Thus, he champions “topless restaurants” because “no one should tell [business owners] that they must hire an equal number of members of the other sex, for the simple reason that this would change the ‘product’ itself.” LARSON, *supra* note 2, § 43.03, at 43-35. He would also permit fancy restaurants to hire a “male only” wait staff because “it is difficult to see why the style of a restaurant, such as a ‘topless’ restaurant, operating on the ragged outermost edge of contemporary moral standards should enjoy full legal protection for its brand of sex discrimination in employment when the same protection is denied to a restaurant trying with equal devotion to keep alive an old-fashioned dining tradition requiring no greater sex discrimination than the topless restaurant.” *Id.* § 43.03, at 43-38. He would draw the line at Southwest’s sexy flight attendants because removing sex appeal from the “product” would not constitute an “essential change.” *Id.* § 43.03, at 43-44. But one could easily conclude that male waiters are not “essential” to a fine dining experience. If the employer

sounder rubric, as opposed to the under-supported ad hoc approach of some Title VII decisions on sex discrimination.

In sum, a court could hold that a BFOQ defense is limited to relevant physical differences between the sexes (the most narrow BFOQ holding). It might also adopt a broad view of “authenticity” that would embrace some gender stereotypes, or even treat sex-based casting as a harmless gender convention beyond the scope of Title VII prohibitions.<sup>199</sup> I advocate a different approach that acknowledges First Amendment concerns and focuses not on whether a female can “authentically” play a male, but on whether the sex of the character could be changed without doing substantial harm to the narrative.

## 2. *A BFOQ for Race?*

The BFOQ analysis changes when the allegation is race rather than sex discrimination. On its face, Title VII provides no BFOQ defense for race.<sup>200</sup> However, the BFOQ provision includes “national origin,” and it is possible that defendants could try to use this exception to justify racial discrimination in breakdowns. Race and national origin constitute distinct concepts under Title VII. The Supreme Court defined national origin as “the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>201</sup> Perhaps the studio might specify “English” or “Irish” as a code word for “white.” The BFOQ, however, requires that the trait (whether sex or national origin) be closely connected to the job.<sup>202</sup> If the film and/or role lacks a thematic connection to English identity, the national origin designation would not be “reasonably necessary.”<sup>203</sup> If studios did not actually screen applicants to ensure English origin (because they wanted to consider non-English white actors), the plaintiff could show that the national origin designation was a mere pretext for racial discrimination.<sup>204</sup>

A few courts have suggested without holding that Title VII could permit a BFOQ for race in certain contexts, like police forces and prison

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should have the liberty to design a restaurant to couple female sex appeal or male-oriented ambience with food, it is hard to see why he should not be able to sell the same with airline travel.

199. *Cf. Post, supra* note 154, at 32 (suggesting that courts are sensitive to specific industry contexts and that “the airline industry is not equivalent to the television business”).

200. *See* 42 U.S.C. § 2000e-2(e) (2005).

201. *Espinoza v. Farah Man. Co.*, 414 U.S. 86, 88 (1973); *see also* *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (holding that professor made out claim of racial discrimination under Section 1981, which does not ban national origin discrimination, where he alleged discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin).

202. *See* 42 U.S.C. § 2000e-2(e) (2005).

203. *Id.*

204. *Cf. Espinoza*, 414 U.S. at 92 (holding that Title VII does not bar discrimination based on citizenship but that employers cannot use citizenship test “as a pretext to disguise what is in fact national origin discrimination”).



security.<sup>205</sup> In dicta, some courts have attempted to justify racial discrimination in casting, invoking remarks in the Congressional Record suggesting creative ways for circumventing Title VII's ban on racial discrimination. During the debate, one senator raised the question of "a movie company making an extravaganza on Africa [which] may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible."<sup>206</sup> Senator Clark, a Title VII supporter, responded in a memorandum that "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 a non-Negro."<sup>207</sup> In fact, Title VII independently bars discrimination based on "color," with no BFOQ exception, and an advertisement requiring the applicant to "look like a Negro" would run afoul of that provision.<sup>208</sup> Thus, despite suggestions in some judicial opinions and parts of the congressional record, Title VII's clear language, the near universal condemnation of racial discrimination, and the slippery slope concern that a race exception could be used to justify illegitimate discrimination would likely prevent judicial invention of a race-based BFOQ. Still, the apparent urge to justify race-based casting demonstrates the tension between the maxim that antidiscrimination law declares race categorically irrelevant and the reality that some judges see social utility in and are inclined to protect certain race-based conventions.<sup>209</sup>

The distinctions Title VII draws between race and sex reveal important differences in the law's treatment of these traits. Conceivably, a court might authorize some or all sex discrimination in casting (using one of the analytical routes outlined above) and yet hold that Title VII bars all racial discrimination in casting. Thus, our hypothetical African-American female actor is more likely to be able to gain access to roles designated for white women than she is to gain access to roles designated for men. Equal protection doctrine contains a similar distinction. The Supreme Court subjects all racial classifications to strict scrutiny because it views them as

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205. See *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (permitting racial preference by government employer under Equal Protection Clause, but not resolving Title VII question); see generally Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004).

206. 110 CONG. REC. 7213, 7217 (1964).

207. *Id.*

208. See POST, PREJUDICIAL APPEARANCES, *supra* note 6, at 48 n.168. Relatedly, some commentators have suggested the possibility of amending Title VII to permit casting discrimination. See Frank, *supra* note 10; see also K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in ROBERT POST, PREJUDICIAL APPEARANCES 55, 62 (2001) ("[W]e ought to admit the possibility of a BFOQ in the case of race, as the federal law does not, because there seems nothing harmful, in a realist production, in requiring that we have actors who look—and sound—like people of whatever racial identity they are representing.").

209. See Post, *supra* note 154, at 16 (stating that antidiscrimination law is a "practical, ramshackle institution, full of compromise and contradiction").

almost always invidious.<sup>210</sup> Sex, by contrast, is subject to mere intermediate scrutiny, and this malleable standard of review sometimes veers toward rational basis review.<sup>211</sup> Even when the Court has most firmly denounced sex discrimination, it has reminded that there are “[i]nherent differences” between men and women which may justify differential governmental regulation and are even “cause for celebration.”<sup>212</sup> Moreover, the Court has occasionally validated social conventions that extend *beyond* actual physical differences between the sexes.<sup>213</sup>

Entertainment industry practices are produced by and confirm this societal and judicial ambivalence. The explicit and unapologetic references to sex in virtually every listing in the breakdowns we analyzed suggest that taking sex into account is viewed as normal, inescapable and perhaps even legal. The reliance on an unspoken assumption of whiteness in breakdowns points to an ambivalence about racial discrimination that does not appear to apply to sex. In some respects then, female actors—white women and especially women of color—may be subject to more adverse treatment than men of color. Yet because a measure of this adverse treatment of women is not viewed as discrimination, the societal consensus that would fully condemn the differential treatment is elusive. With respect to both race and especially sex there is a gap between what we *say* about the legitimacy of discrimination and the persistence of discrimination that goes unchallenged or unremedied. In light of *Southwest Airlines* and the other cases that rejected employer attempts to “sex up” their female employees, how can the Hooters restaurant chain continue not only to thrive but even expand into a Hooters airline and casino?<sup>214</sup> When the EEOC tried to force Hooters restaurants to hire men ten years ago, there was essentially a public revolt. Numerous media outlets across the country derided the EEOC for taking a “ludicrous” position,<sup>215</sup> “trivializing discrimination” and diverting resources from “real discrimination,”<sup>216</sup> and pursuing “a feminist vendetta.”<sup>217</sup> After Hooters employees led a march on Washington and the controversy prompted a congressional inquiry into the lawsuit, the EEOC

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210. See, e.g., *Adarand Constr. v. Peña*, 515 U.S. 200 (1995).

211. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001); see also Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 875-76 (2002) (discussing the “gap between the perceived illegitimacy of race discrimination and that of sex discrimination”). Intermediate scrutiny’s malleability allows it sometimes to resemble strict scrutiny in particular cases. See *United States v. Virginia*, 518 U.S. 515 (1996). I also acknowledge that even the meaning of strict scrutiny at times may vary from case to case. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

212. *Virginia*, 518 U.S. at 533.

213. See, e.g., *Nguyen*, 533 U.S. 53.

214. See Hooters, <http://www.hooters.com> (Feb. 10, 2006).

215. Editorial, *Don't Go if You Don't Like It*, *BOSTON HERALD*, May 3, 1996, at 28.

216. Op Ed, *Hooters Ruling Trivializes Discrimination*, *WIS. ST. J.*, Nov. 26, 1995, at 3B.

217. Editorial, *EEOC Gets Grip*, *COLUMBUS DISPATCH*, May 7, 1996, at 6A.

backed off, claiming a lack of funds.<sup>218</sup> In the end, society's enduring taste for discrimination trumped Title VII's statutory mandate. Similar forces could lead a judge to legitimate sex discrimination in the casting context.<sup>219</sup>

### C. *The First Amendment Defense*

Like Title VII analysis, the application of the First Amendment to casting is complex and requires reconciling seemingly contradictory lines of precedent. As an initial matter, it is clear that film is protected speech.<sup>220</sup> Nonetheless, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*<sup>221</sup> indicates that government can ban commercial speech that encourages discrimination. The actor would therefore likely make this case the cornerstone of her First Amendment argument. In *Pittsburgh Press*, the Supreme Court held that a local antidiscrimination ordinance did not violate the First Amendment in prohibiting newspapers from publishing job announcements with race and sex classifications, such as "Female Help Wanted."<sup>222</sup> The Court aligned the constitutionality of the Pittsburgh ordinance with a long line of cases holding that the press has no "special

218. See Adam Zagorin, *Sexism Will Be Served*, TIME, Oct. 13, 1997, at 65. Hooters is not alone in exploiting the sexuality of its employees, despite contrary case law. Past or present examples include a real estate company's desire to enhance its lobby by instructing female attendants to wear sexy themed outfits, *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981), a restaurant fostering an "Old World"—and all-male—European ambience, *Joe's Crab*, 220 F.3d at 1263, 1269-70, and a "Valet of the Dolls" parking service staffed by aspiring female actors who wear "lacey camisoles," "miniskirts" and if requested, costumes such as "naughty Santas, ski bunnies and burlesque dancers." Brown, *supra* note 177, at 9-1.

A race-based example is Abercrombie & Fitch's adoption of a blond, blue-eyed marketing image and attendant direction of sales clerk applicants who do not fit that image to behind-the-scenes janitorial jobs. See Steven Greenhouse, *Clothing Chain Accused of Discrimination: Lawsuit Says Abercrombie & Fitch Favors White Job Candidates*, N.Y. TIMES, June 17, 2003, at A21. The chain's advertising emphasized models who were "overwhelmingly white and who seemed to have stepped off the football field or out of fraternities or sororities." Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16. But in contrast to the Hooters incident, civil rights groups successfully sued Abercrombie, forcing it to pay a major settlement and agree to integrate its staff and advertisements. See *id.*

219. For example, one way of understanding the California Supreme Court's rejection of a sexual harassment lawsuit brought by a writer's assistant on the TV show *Friends* is that the court increased the plaintiff's required evidentiary showing in order to prevent similar suits from being brought against entertainment companies. See *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264 (2006).

220. Describing film as "a significant medium for the communication of ideas," the Court has protected film, like other artistic expression, primarily because it can shape public attitudes and opinions. See *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (invalidating a federal pornography statute that could have criminalized depictions of under-age sexuality in films like *American Beauty* and *Traffic*, even when the actor was over 18); *Kingsley Int'l Pictures v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959) (forbidding New York from conditioning the grant of a license to the film *Lady Chatterley's Lover* on agreement to delete three scenes that the state deemed "immoral").

221. 413 U.S. 376 (1973).

222. *Id.* at 379. The ordinance was similar to Title VII's prohibition on printing discriminatory advertisements, both of which permit sex designations when the employer can show a BFOQ. See *id.* at 378.

immunity” from general laws that everyone else must comply with, including employment regulations.<sup>223</sup> The Court noted that there was no showing that the ordinance was “passed with any purpose of muzzling or curbing the press” and no evidence that the ordinance “threatens [the newspaper’s] financial viability or impairs in a significant way its ability to publish and distribute its newspaper.”<sup>224</sup> The Court went on to categorize the advertisements as commercial speech, which at the time was deemed to lack First Amendment protection.<sup>225</sup> Given that the Court now subjects commercial speech regulation to intermediate scrutiny, defendants might try to dismiss the relevance of *Pittsburgh Press*. However, the case continues to be good law insofar as it determined such ads to be “classic examples of commercial speech” and “no more than a proposal of possible employment.”<sup>226</sup> A foundational principle in commercial speech doctrine remains that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about *lawful*

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223. *Id.* at 382 (quoting *Associated Press v. Nat’l Labor Relations Bd.*, 301 U.S. 103, 132 (1937)); see, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (holding that application of sales tax to cable television services did not violate First Amendment); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that reporters may be required to testify before grand jury pursuant to general criminal laws); *Associated Press*, 301 U.S. at 123 (applying labor law regulating newspaper’s employment decisions over First Amendment defense). The Supreme Court has also reaffirmed this principle in cases that struck down laws that were not generally applicable because they singled out the press or certain publications. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Rev.*, 460 U.S. 575, 582, 591-92 (1983). But see Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1293-1301 (2005) (arguing that “content-based as applied” laws should receive strict scrutiny even if such applications are pursuant to generally applicable laws).

Some scholars have expressed concern that “the First Amendment has to limit the legislature’s power to enact ‘general’ statutes that aim at prohibitable conduct but sweep in speech that the legislature adjudges harmful only because of its content.” Fallon, *supra* note 64, at 15-16; Post, *supra* note 154, at 1258; Volokh, *Speech as Conduct, supra*, at 1302-1303; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA. REV. 1791, 1830-31(1992) [hereinafter Volokh, Comment] (citing *United States v. O’Brien*, 391 U.S. 367 (1968)). In such cases, even a generally applicable law might inflict an “impermissibly severe” burden on expression. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 242 (1998). Other scholars, however, suggest that a search for illegitimate legislative purpose is sufficient to invalidate such laws, and that *O’Brien*, the principal case cited in support of applying heightened scrutiny to general laws, contains “demonstrably flawed” analysis. E.g., Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 770-78 (2001). Rubenfeld persuasively argues that *O’Brien*, if taken at face value, would permit many people who break the law to claim that they were engaging in expressive conduct and thus subject any generally applicable law to First Amendment scrutiny. He illustrates this problem with a scenario involving a speeding driver who claims that he is engaging in performance art. See *id.* By dramatically enlarging the category of laws that raise speech concerns and must pass intermediate scrutiny, *O’Brien* could become another *Lochner*. See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating labor law based on expansive, and now discredited, conception of substantive due process)

224. *Pittsburgh Press*, 413 U.S. at 383.

225. See *id.* at 384-85 (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

226. *Id.* at 385; see *Ragin v. New York Times*, 923 F.2d 996, 1002-03 (2d Cir. 1991) (relying on *Pittsburgh Press* to reject First Amendment defense to Fair Housing Act claim).

activity.”<sup>227</sup> And *Pittsburgh Press* deemed “[d]iscrimination in employment” to be “illegal commercial activity.”<sup>228</sup> Discriminatory breakdowns, which are basically “help wanted” advertisements for actors, violate Title VII’s ban on race-specific employment advertisements and presumptively violate its ban on sex-specific advertisements, which is subject to the “extremely narrow” BFOQ defense for sex.<sup>229</sup> *Pittsburgh Press* affirms that such bans are constitutionally permissible, even insofar as they impinge on a newspaper’s “editorial judgment.”<sup>230</sup> Just last Term, the Supreme Court, in rejecting a First Amendment claim, reaffirmed the logic of *Pittsburgh Press*, stating: “Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”<sup>231</sup> Lower courts, employing similar reasoning, have rejected First Amendment challenges to the Fair Housing Act’s ban on housing advertisements communicating racial preferences, including a claim based on the use of mostly white models in ads.<sup>232</sup>

Despite this precedent, defendants would likely argue that Title VII, as applied to casting, is content-based regulation and, as such, is presumptively unconstitutional.<sup>233</sup> The Court has stated that the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>234</sup> There is a considerable argument that Title VII, at least as it pertains to speech that constitutes harassment, is content based because it prohibits speech only if it discriminates based on race, sex or another protected trait. In this way, Title VII seems to make the content of the

227. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980) (emphasis added).

228. *Pittsburgh Press*, 413 U.S. at 388.

229. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

230. *Pittsburgh Press*, 413 U.S. at 386.

231. *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1308 (2006).

232. *See, e.g., Ragin v. New York Times*, 923 F.2d 996, 998, 1002-03 (2d Cir. 1991) (rejecting First Amendment defense to lawsuit against the New York Times for running real estate ads in which owners and renters were depicted with white models and black models were used to represent doormen and custodians); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) (permitting regulation of advertisement for apartment for rent in a “white home”).

233. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414-15 (1989).

234. *Hill v. Colorado*, 530 U.S. 703, 719 (2000); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1201 (1996) (“Content-based regulations aim at the communicative impact of communicative activity, whereas content-neutral regulations merely have an adverse effect.”); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 35 (2001) (“[C]ontent-neutral restrictions do not raise the same suspicion of improper government purpose or motive that underlies First Amendment treatment of content-based regulations.”); *see generally* Rubinfeld, *supra* note 223 (arguing that legislative purpose is central in First Amendment doctrine).

speech matter. Indeed, the Supreme Court made a similar argument in *R.A.V. v. City of St. Paul* in striking down a hate speech ordinance as a content-based restriction on speech.<sup>235</sup> But *R.A.V.* also specifically validated Title VII and concluded that even its ban on sexual harassment is not content based.<sup>236</sup> The *R.A.V.* Court explained that Title VII is “directed not against speech but against conduct.”<sup>237</sup> Title VII does not single out expressive industries; it regulates employment decisions by virtually all employers, including studios, and applies regardless of a film’s content.<sup>238</sup> Given the internal tension in *R.A.V.*, it is possible that the Court would disavow the dicta regarding Title VII. A recent case, *Rumsfeld v. FAIR*, however, reaffirmed that Title VII does not create a First Amendment problem because it aims at discriminatory conduct and its impact on speech is incidental.<sup>239</sup> Another method by which defendants may demonstrate content-based discrimination, also suggested by *R.A.V.*, is the government’s justification for the law.<sup>240</sup> Consequently, a plaintiff bringing a Title VII casting lawsuit should focus on the denial of an employment opportunity—the regulation of conduct—rather than any desire to diversify the filmmaker’s message.<sup>241</sup> The plaintiff’s goal would be to convince the

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235. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (“[T]he ordinance applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’ Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.”).

236. See *id.* at 389; see also *id.* at 390 (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”). Sexual harassment regulations and case law have raised serious questions about the extent to which Title VII suppresses protected speech in the workplace insofar as the speech contributes to a hostile working environment. Although *R.A.V.* indicated that Title VII harassment law permissibly regulates unprotected “fighting words” as well as some speech that would be protected if it were uttered outside the workplace, *id.* at 389 (noting that Title VII bans “sexually derogatory ‘fighting words,’ among other words”) (emphasis added), the Court has not fully explained the extent to which Title VII suppresses racist and sexist speech. Nor has it fleshed out a theoretical justification for Title VII’s restrictions on expression. These important and hotly contested questions are beyond the scope of this Article. For a primer on the debate regarding whether harassment law is consistent with the First Amendment, see Volokh, Comment, *supra* note 223, and Fallon, *supra* note 64. On the scope of harassment law, see Deborah Epstein, *Can A “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 *Geo. L.J.* 399 (1996); Eugene Volokh, *What Speech Does “Hostile Environment” Harassment Law Restrict?*, 85 *Geo. L.J.* 627 (1997).

237. *R.A.V.*, 505 U.S. at 389.

238. The statute contains an exception for very small companies, but this exception is not grounded on content. See 42 U.S.C. § 2000e(b).

239. 126 S. Ct. 1297, 1308 (2006) (quoting *R.A.V.*, 505 U.S. at 389).

240. In *R.A.V.*, the Court found that the government’s arguments smacked of viewpoint-based discrimination and this perceived bias aggravated the ordinance’s content-based distinction. See *R.A.V.*, 505 U.S. at 392 (quoting Brief for Respondent at 25).

241. As appealing as the desire to foster more complex, realistic and fair images of outgroup members is, the Court would likely view this interest as viewpoint-based. As a scholar, I disagree that there is something perverse from a First Amendment perspective in wanting to create more diverse representations, but as an advocate, I would not invoke diversity because of *R.A.V.*

court that the case should be understood principally as a dispute concerning employment discrimination rather than an attempt to change the content of a film.

Although the weight of the legal authority suggests that Title VII is not content based, that finding would not resolve the First Amendment defense to the Title VII suit. The court would likely still conclude that incidental burdens (i.e., those created by a content-neutral law) may trigger close scrutiny if the burden is “substantial.”<sup>242</sup> As noted above, *Pittsburgh Press* upheld a ban similar to Title VII’s ban on race and sex-specific employment ads. The defendants in a Title VII suit may stress, however, that the *Pittsburgh Press* Court determined that the ban would not significantly harm the newspaper’s functions or financial health.<sup>243</sup> The Court thus left room to find that even generally applicable laws may create burdens that are significant enough to violate the First Amendment. More recent Supreme Court cases have followed this implication in holding that specific applications of antidiscrimination laws violated the First Amendment.

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>244</sup> concerned a First Amendment claim raised by a veterans’ council that organized an annual St. Patrick’s Day parade. Pursuant to a state antidiscrimination law regulating places of public accommodation, state courts mandated that the council admit a group of LGBT descendants of Irish immigrants called “GLIB.”<sup>245</sup> Writing for a unanimous Court, Justice Souter resolved that parades are protected speech.<sup>246</sup> The Court found GLIB’s effort to access the parade “equally expressive,”<sup>247</sup> noting that GLIB “was formed for the very purpose of marching in [the parade] . . . in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.”<sup>248</sup> In other words, the members

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242. See, e.g., *Dorf*, *supra* note 234, at 1180 (“Although not entirely self-consciously, the Court has closely scrutinized incidental burdens that it deems substantial.”); see also *id.* at 1182 (“The substantiality threshold is only implicit in the law and is not uniformly followed.”). Although the Court would require a “substantial” burden, the Court has varied in how stringently it has interpreted that term, as it has in applying intermediate scrutiny in general. See Netanel, *supra* note 234, at 36 (“[A] variety of tests, including some explicitly denominated as intermediate scrutiny and some not, have been applied to content-neutral regulation. Those tests fall on a spectrum, ranging from highly exacting to what some commentators view as exceedingly deferential to speech-burdening regulations.”).

243. See *Pittsburgh Press*, 413 U.S. at 380 (“Nor does *Pittsburgh Press* argue that the Ordinance threatens its financial viability or impairs in any significant way its ability to publish and distribute its newspaper. In any event, such a contention would not be supported by the record.”).

244. 515 U.S. 557 (1995).

245. See *id.* at 562-64.

246. *Id.* at 569.

247. *Id.* at 570.

248. *Id.*

of GLIB wanted to march to make their own political point. And they intended to do so in a vivid fashion, with a “shamrock-strewn banner with the simple inscription ‘Irish-American Gay, Lesbian and Bisexual Group of Boston.’”<sup>249</sup> The Court understood the state’s generally applicable antidiscrimination laws in this instance as *not* banning the exclusion of individuals based on their sexual orientation, but permitting outsiders to propagate their own message, thereby distorting the council’s intended message.<sup>250</sup> The Court held that this “peculiar” application of the antidiscrimination law violated the First Amendment.<sup>251</sup>

The Court expanded *Hurley* in *Boy Scouts of America v. Dale*,<sup>252</sup> a controversial and vague precedent.<sup>253</sup> A five-Justice majority drew on *Hurley* to hold that the forced inclusion of Dale, a gay Scout leader, in the Scouts “would significantly burden the organization’s right to oppose or disfavor homosexual conduct.”<sup>254</sup>

Although *Hurley* and *Dale* indicate that certain applications of antidiscrimination laws can violate the First Amendment, these are factually distinguishable from our proposed Title VII dispute. *Hurley* and *Dale* suggest that an actor does not have a right to use a studio’s film to convey her own message, such as wearing a political symbol to express opposition to the war against Iraq or making a statement about gay identity. They do not indicate that granting access to an outsider who does not communicate a contradictory or competing message (in terms of altering the narrative or creating aesthetic dissonance) creates a cognizable First Amendment burden. Moreover, *Dale*’s analysis contains several ambiguities that render it unlikely to apply to the Title VII dispute. First, *Dale* avoided exploring the extent to which equality might justify a First Amendment burden, a question raised by the earlier *Roberts v. U.S. Jaycees* decision.<sup>255</sup> The *Roberts* Court expressly held that the “compelling

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249. *Id.*

250. See *Hurley*, 515 U.S. at 573-74 (“[O]nce the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the [council’s] speech itself to be the public accommodation,” which “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”); see also *id.* at 580-81.

251. *Id.* at 572.

252. 530 U.S. 640 (2000).

253. See, e.g., Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002) (characterizing Dale as a “disastrous opinion”); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 WM. & MARY BILL RTS. 595 (2001) (arguing that Dale’s extreme deference is out of step with mainline First Amendment doctrine in that it involved a generally applicable law); Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81 (2001) (attacking Dale for insensitivity to LGBT community).

254. *Dale*, 530 U.S. at 659.

255. See 468 U.S. 609 (1984); see also *Dale*, 530 U.S. at 659 (concluding, without further explanation, that “[t]he state interests embodied in New Jersey’s public accommodations law do not



interest” in eradicating sex discrimination trumped any impingement on the First Amendment right of association.<sup>256</sup> Second, the Court did not determine whether its analysis has any applicability to commercial entities<sup>257</sup>—such as studios. It seems unlikely that the Court would extend *Dale*’s analysis to commercial entities because such a rule would broadly arm businesses with a First Amendment right to discriminate and severely impair Title VII.<sup>258</sup> Third, the Court’s First Amendment analysis might very well differ if it were analyzing a statute banning race and sex discrimination, such as Title VII, rather than sexual orientation discrimination. The Court generally treats race and sex discrimination more seriously than sexual orientation discrimination.<sup>259</sup> Fourth, the Court has not been clear about its methodology for ascertaining an impermissible burden. Specifically, *Dale* deferred somewhat to the Boy Scouts’ assertion of a First Amendment burden.<sup>260</sup> A post-*Dale* case, *Rumsfeld v. FAIR*,<sup>261</sup> as well as pre-*Dale* precedent such as *Pittsburgh Press*, confirm that a mere assertion of a First Amendment burden will not suffice to show a constitutional violation and that the deference applied in *Dale* has limits. In these other cases, the Court independently determined whether there was a speech burden.<sup>262</sup> My proposal for a First Amendment rule in the casting

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justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association”); *Hurley*, 515 U.S. at 580 (distinguishing *Roberts* in passing).

256. See *Roberts*, 468 U.S. at 610 (majority opinion) (“We are persuaded that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”). *Dale* recognized that courts must balance speech against equality, setting “the associational interest in freedom of expression . . . on one side of the scale, and the State’s interest on the other,” yet it failed sufficiently to justify its finding that speech trumped equality. *Dale*, 530 U.S. at 658-59.

257. See BERNSTEIN, *supra* note 64, at 104.

258. In *Roberts*, Justice O’Connor refused to interpret the First Amendment in this manner. “The Constitution does not guarantee the right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.” 468 U.S. at 634 (O’Connor, J., concurring in part and concurring in the judgment).

259. Cf. *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 723 (2003) (distinguishing age and disability classifications from sex discrimination, as only sex “triggers a heightened level of scrutiny”).

260. The Court stated: “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression,” but it also noted “[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” *Dale*, 530 U.S. at 653.

261. 126 S. Ct. 1297 (U.S. 2006). The *FAIR* Court flatly rejected the organization’s claim that the Solomon Amendment burdened its freedom of expressive association and omitted *Dale*’s statement requiring deference to the organization’s assertion of a burden. See *id.* at 1312.

262. See, e.g., *Pittsburgh Press*, 413 U.S. at 388 (finding no record evidence that an antidiscrimination ordinance created an unconstitutional burden); *Meese v. Keene*, 481 U.S. 465, 483-84 (1987) (finding insufficient evidence that the government’s “political propaganda” designation had “interfered with the exhibition of a number of foreign-made films”). *Keene* is particularly relevant because it involved an asserted burden on films. A state senator who wanted to show three Canadian films argued that the federal government’s requirement that films affiliated with a foreign government

context would likewise require courts to determine whether denying a studio the use of a discriminatory breakdown would impose an actual and substantial burden. As I explain further below, I conclude that in many casting instances it would not.

In sum, these cases show that the First Amendment defense would ultimately boil down to the question of whether banning the race and/or sex classifications in breakdowns would substantially harm the defendants. Defendants could assert two types of First Amendment burdens, economic and artistic. The next Section concerns the economic defense, and the following one explicates artistic concerns. The economic concerns are two-fold. First, the defendants may argue that applying Title VII to prevent them from using discriminatory breakdowns will unduly burden the casting process. Resolving this argument requires a careful look at the mechanics of the casting process in order to determine whether there would be an actual and substantial burden. Second, the defendants may argue that banning discriminatory breakdowns will require them to cast actors who will harm the profitability of their films. Finally, the defendants may assert that nondiscriminatory casting creates a burden on their artistic expression if it requires changing the narrative.

### 1. *Procedural Burden Defense*

Defendants could argue that applying Title VII to casting will extend and frustrate their normal casting process, making it more difficult for studios to cast the actors they wish to hire and increasing the costs of the casting process. However, practical limitations restrict the law's ability to regulate, and thus burden, the casting process, which helps to mitigate the First Amendment concerns. First, many roles are cast without using auditions, casting calls or breakdowns since studios often cast established actors based on reputation alone. Although a discriminatory breakdown could function as a "smoking gun," where such breakdowns are not used, an actor would have extreme difficulty prevailing because of the discretion, opaqueness and subjective nature of the casting process.<sup>263</sup>

Second, prohibiting breakdowns would not preclude studios from taking race and sex into account. It is important to recognize the distinction between banning a discriminatory breakdown and dictating that the studio cast a person of color or woman in a role intended for a white or male

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be distributed with a statement labeling the films political propaganda violated the First Amendment. *See Keene*, 481 U.S. at 471. The senator supported his argument that the "propaganda" designation would stigmatize the films with evidence from an opinion poll and affidavits submitted by a Yale psychology professor and a political strategist, which persuaded the district court. *See id.* at 468-69. But a divided Supreme Court brushed aside the lower court's evidence and independently determined that the asserted harm was illusory. *See id.* at 480-81.

263. *See generally* Part I.

actor.<sup>264</sup> My proposal would require the former, in at least some cases, without going so far as to compel the latter. Even though the studio at the outset could not screen candidates by expressly stating a preferred race and/or sex, the result would not be “color blind casting” because those traits would usually be apparent once the actor showed up for the audition.<sup>265</sup> At that point, the studio could carefully examine the extent to which the actor’s race and/or sex would concretely interfere with the production’s artistic goals.

This sort of rule effectuates similar goals as waiting periods and informational requirements that attach to certain protected but also regulated constitutional rights, such as the right to abortion. Although in a general sense women maintain the ultimate right to decide whether to terminate a pregnancy, the Supreme Court has allowed states to regulate the process leading up to an abortion, so long as its regulation does not create an “undue burden.”<sup>266</sup> The undue burden standard is an attempt to accommodate both the state’s weighty interest in fetal life and the woman’s constitutional right to terminate a pregnancy. It expressly permits procedural regulations that stop short of substantially burdening the right.<sup>267</sup> Courts can similarly accommodate both speech and equality in the casting context by creating minor procedural hurdles that create space for decision makers to consider the race and/or sex designation carefully and reflect on alternative casting options prior to making their ultimate decision. Ian Ayres and Jennifer Gerarda Brown have proposed a similar intervention in response to the *Dale* case. They suggest that organizations who wish to discriminate based on sexual orientation, such as the Boy Scouts, should have to disclose and obtain consent from potential members in order to claim constitutional protection.<sup>268</sup> The goal of both proposals is

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264. Enforcing Title VII in the casting process would only require the consideration of actors of color and women; it would not impose quotas or require that they be cast in non-stereotypical roles. Some may fear nonetheless that applying Title VII would coerce studios into using quotas to ward off discrimination claims. At the same time, others might argue that merely requiring the consideration of actors of color is inadequate because it does not guarantee the studios will actually hire them. How studios would react to Title VII regulation is ultimately an empirical question not easily resolved. However, there seems to be no basis for assuming that studios would be more likely to resort to quotas than any other business constrained by Title VII. Further, because the law would be just one pressure on studios, and would have to compete with market and creative interests, it seems unlikely that studios will systematically override directors’ choices and insist on casting a woman/person of color.

265. This reality would prevent extending to film casting a policy pursuant to which orchestras asked musicians to audition behind a screen in order to deter gender discrimination.

266. *Planned Parenthood v. Casey*, 505 U.S. 833, 876-77 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

267. *See id.* at 877.

268. This proposal is designed to inform all applicants, especially those who would be uncomfortable associating with an organization that discriminates. *See* Ian Ayres & Jennifer Gerarda Brown, *Warning: We Discriminate*, ALTERNET, May 17, 2005, <http://www.alternct.org/module/printversion/22030> (last visited July 7, 2005); Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations through an Informed Association Statute*, 87 MINN. L. REV. 481 (2002).

to prevent reflexive discrimination, that is, discrimination not preceded by a period of critical reflection.

A ban on discriminatory casting breakdowns would nonetheless render it more difficult and costly for casting directors to discriminate, which in disrupting established exclusionary practices might create a potential First Amendment burden. The costs would differ depending on the breadth of the ban. In this Section, I consider two alternatives and their attendant costs and benefits. A flat ban on race- and sex-based breakdowns would have the virtue of clarity and simplicity: breakdowns could never express race and sex preferences. The ban would require casting directors to consider actors who did not fit their preconceived notions about characters, identity, and audience perceptions and thus erode reflexive discrimination. In general, it seems likely that opening casting calls to previously excluded actors will result in meaningful access for some outsiders and cause decision makers to rethink their assumptions in a subset of cases. An actor's impressive performance might prompt the director to reconsider and pursue casting the applicant, which could include rewriting the role, if necessary, to accommodate the applicant's race and/or sex.<sup>269</sup> By bringing to the attention of the decision makers talented and potentially suitable actors who would have been arbitrarily excluded, Title VII would confer a benefit on studios that to some extent would offset its costs. To the extent that audiences are receptive to more diverse casting, but the studio's narrow assumptions would otherwise preclude it, the studio would benefit in the end. Of course it is difficult to predict how the costs and benefits will net out in the aggregate or with respect to any particular film.

Despite the ban on discriminatory breakdowns, the final casting decision would continue to be largely insulated from legal scrutiny. Studios with legitimate reasons for taking race and/or sex into account thus could hold fast to their preferences in making the final casting decisions, but they would first have to wade through a number of actors who do not fit their preference. This burden likely would not be significant when the studio wants to cast a white actor. Because the majority of working actors in Hollywood are white,<sup>270</sup> the cost would entail considering a small percentage of actors of color alongside the larger share of white actors.

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269. See HETTIE LYNNE HURTES, *THE BACK STAGE GUIDE TO CASTING DIRECTORS* 96 (2d ed. 1998) (recounting how a casting director ultimately cast Julia Roberts as a Portuguese waitress in *Mystic Pizza*—even though Roberts did not “look the part at all”—because of an impressive audition); see also Georgakas & Rabalais, *supra* note 11, at 29 (describing how casting director persuaded studio to cast a “wonderful actress” opposite Robert Redford in *The Sting* even though she was not “drop-dead gorgeous” as the studio envisioned the character). Even when such accommodation does not occur, the casting director might decide to cast the applicant in another role that would accommodate the candidate's race or gender.

270. See *supra* note 83.

With respect to roles intended for an actor of color, the burden would be greater. Without the use of a breakdown to narrow the pool of actors, the studio would have to consider a large number of white actors in order to gain access to the few actors of color perceived to be suitable for the role. Similarly, a flat ban on sex-based breakdowns would impose considerable costs in that, even where a role was legitimately designated as male, the studio would presumably have to consider about fifty females for every fifty male actors. Thus, casting decision makers might feel that, at least in certain contexts, a flat ban would require them to waste time and money considering actors who will never be cast. These defendants would have the strongest burden defense if Title VII were applied without reference to storyline and related First Amendment concerns.

An alternative proposal seeks to fold the First Amendment concerns into the Title VII analysis by effectively creating a First Amendment-based BFOQ for casting only when race or sex is integral to the narrative. This proposal would ease the burden on the studios that have legitimate reasons for casting a person of color or an actor of a specific sex. Recognizing the strength of the First Amendment defense when race and/or sex are integral to the narrative, this proposed rule would permit the use of a discriminatory breakdown only when casting an actor of a non-preferred race and/or sex would create a substantial burden on the narrative. This proposal would require studios in the first instance, and ultimately judges in the subset of cases that end up in court, to decide whether there would be a substantial burden. Critics might challenge the ability of judges to analyze a film narrative and determine the artistic impact of race and sex. They might argue that inserting judges into the casting process would create a First Amendment burden.<sup>271</sup> However, federal judges are already required to make artistic judgments on a regular basis, primarily in cases involving federal intellectual property rights.<sup>272</sup> In addition, they sometimes make such artistic determinations in right of publicity cases,<sup>273</sup> contract disputes<sup>274</sup> and even criminal cases.<sup>275</sup> In numerous copyright decisions,

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271. Defendants might try to extend the Supreme Court's concern about judges parsing religious doctrine to the casting context. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987). However, judicial scrutiny of religious doctrine implicates weighty concerns about government entanglement with religion that do not apply to judicial analysis of art.

272. Although I draw on copyright as an analogy, copyright law differs from Title VII for First Amendment purposes in that it "directly and systematically restricts the sorts of expressive activity protected by the First Amendment." Netanel, *supra* note 234, at 54. Because Title VII is less likely to interfere with protected speech, I argue that it should be analyzed as a law of general applicability, which might pose a First Amendment problem only when it imposes a "substantial" burden on speech.

273. *See, e.g.*, *ETW Corp v. Jireh Publishing, Inc*, 332 F.3d 915 (6th Cir. 2003) (finding that painting of Tiger Woods was sufficiently creative to trump Woods' right of publicity claim).

274. *See, e.g.*, *Shirley MacLaine Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 182 (1970) (finding that actor did not have to mitigate her damages by accepting role in film that court deemed "different or inferior" to contracted-for role).

courts have compared two musical or visual artistic works in order to determine whether they are substantially similar.<sup>276</sup> In a leading intellectual property case, the Supreme Court passed artistic judgment in determining whether rap group 2 Live Crew's sexually explicit revision of the Roy Orbison song "Oh Pretty Woman" was a parody or a satire for the purposes of a fair use analysis.<sup>277</sup> The courts regularly engage in qualitative judgments about art, which diminishes the critique that the type of inquiry casting discrimination lawsuits would require falls outside the realm of judicial competence or appropriate functioning.<sup>278</sup>

Some commentators have criticized flawed judicial assessments of art in particular cases.<sup>279</sup> Such artistic judgments however, need not—and should not—rest solely on the judge's individual perceptions.<sup>280</sup> In numerous opinions, judges have relied heavily on art, film or music experts, including noted professors and critics. For instance, in *MGM v. American Honda Motor Co.*, the court drew on expert opinions from a University of Southern California School of Cinema-Television professor who had taught a course on James Bond films, and a film critic who had written articles about and reviews of Bond films in order to determine that a commercial infringed MGM's copyrights in various James Bond films.<sup>281</sup> Although judges regularly make qualitative judgments without the aid of

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275. See, e.g., *In re George T.*, 33 Cal. 4th 620 (2004) (holding that a violent poem disseminated by a juvenile was not a threat); *In re Ryan D.*, 100 Cal. App. 4th 854 (2002) (same as to violent painting).

276. See, e.g., *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002) (comparing allegedly infringing TV program *City of Angels* to similar screenplay); *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (finding that a Honda commercial infringed MGM's copyrights in James Bond films).

277. *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994).

278. The publication *Entertainment Law Reporter* catalogues such decisions, reported and unreported. For examples of cases in which courts compared or assessed artistic works, see *Recent Cases*, ENT. L. REP. (Sw. U. Sch. L., Los Angeles, CA), Apr. 2006 (listing cases involving judicial assessment of TV show *Friends*, novel *The Da Vinci Code*, movies *Billy Elliot*, *White Chicks* and *Bowling for Columbine* and various video games); *International Developments*, ENT. L. REP. (Sw. U. Sch. L., Los Angeles, CA), Feb. 2006 (listing cases involving photos of Anastasia Myskina in GQ magazine, rap song by Ludacris, movie *The Perfect Storm* and various musical recordings released by Capitol Records).

279. See, e.g., Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1 (2001); Eugene Volokh, *Freedom of Speech and Intellectual Property*, 40 HOUS. L. REV. 697 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

280. See Gorman, *supra* note 279, at 19 ("[C]ourts should rely not on their own aesthetic intuition and preferences but rather on the opinions of art professionals; even if those cannot always agree, the court's judgment will be better informed and focused.").

281. See *American Honda*, 900 F. Supp. at 1294; see also *United States v. Ten Erotic Paintings*, 311 F. Supp. 884, 889 (D.C. Md. 1970) (looking to affidavits from professors at the Maryland Institute of Art and director of Baltimore Museum of Art, among others).

experts, the expert-driven analysis that I propose would be preferable in that it would produce more stable and informed outcomes.<sup>282</sup>

Although the limits of my proposal—(1) it would permit breakdowns where race and/or sex is integral to the storyline; (2) it would not ban all consideration of race and sex; (3) it would not regulate where casting decision makers do not use breakdowns—render it likely to withstand First Amendment scrutiny, some critics may complain that it accomplishes too little. This pragmatic standard would, however, confer important legal and practical benefits. From a legal perspective, it would express the community's judgment that discriminatory casting is generally immoral and illegal. A judicial holding prohibiting unjustifiably discriminatory breakdowns would create a new awareness of Hollywood's heavy reliance on race and sex to position individuals in its caste system. Even if every incident of discrimination could not be proven and remedied in court from a practical perspective, decision makers would know that they risked Title VII liability by impermissibly considering race or sex in casting. Presumably, this legal risk and the moral condemnation accompanying it would spur at least some studios to question or alter their practices, and hopefully the industry would begin to adopt proactive measures to increase diversity in entertainment.<sup>283</sup> "Laws will never deter violations altogether, but they will deter 'whoever is deterrable.'"<sup>284</sup>

My proposal is not intended to be a panacea for the multiple entrenched forms of discrimination that beset the entertainment industry. Rather, it provides a starting point for challenging Hollywood's discriminatory practices and pragmatically begins with the most overt and legally vulnerable practice—the use of discriminatory breakdowns. It would erode the common assumptions that a white male must be in the center of the frame and women and people of color must be assigned to marginal, stereotypical roles. Instead of waiting to be cast in the rare (and likely stereotypical) "Asian film," such as *Memoirs of a Geisha*, Asian women would be able to compete with all of the other female actors for roles in racially integrated films and compete for some "male" roles. Enforcing Title VII in this way would begin to bring the film world more into line with the rest of American employers.

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282. To the extent that one questions judicial ability to assess artistic content, even with the aid of experts, one might favor the flat ban on discriminatory breakdowns and tolerate imposing a workload burden on a subset of producers in order to avoid extending the practice of judges making artistic assessments.

283. Cf. Case, *supra* note 57, at 82, 86-94 (discussing how voluntary action prompted by public events, including the Los Angeles riots and the Clarence Thomas-Anita Hill hearings, helped instill certain antidiscrimination norms more effectively than did litigation).

284. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C.L. L. REV. 133, 149 (1982) (quoting Gordon Allport, *The Nature of Prejudice* 77-78 (1954)).

## 2. Market-Based Defense

Although my proposal would not compel the casting of a woman or person of color in any particular role, it would create greater employment opportunity and increase diversity in casting, particularly in lead roles. Aside from the procedural burden argument, a First Amendment question remains as to whether more diverse casting practices will harm the profitability of films. Studios typically engage in discriminatory casting not out of animus but out of a genuine belief that such casting maximizes box office potential—especially overseas where macho action films excel and character-based movies featuring women and people of color are said to falter.<sup>285</sup> The extent to which studios have empirical support for this assertion is unclear, as they do not make such evidence publicly available. Some communications and marketing scholars have looked at the impact of race and gender of actors in advertising, but the available evidence is limited, quite mixed in terms of outcome and of questionable applicability to the film context.<sup>286</sup> Given the prevalence of racial and gender

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285. See, e.g., Patrick Goldstein, *Ice Cube Crosses over to Warm and Fuzzy Side*, L.A. TIMES, Jan. 25, 2005, at E1 (“When studios do international box office for African-American films, they write in a zero unless the film is an action movie.”); Denise D. Bielby & William T. Bielby, *Hollywood Dreams, Harsh Realities: Writing for Film and Television*, CONTEXTS, Fall/Winter 2002, at 25 (“Increasingly, Hollywood films are financed by foreign investors, who believe that scripts with strong minority themes (or even films featuring persons of color in lead roles) have limited appeal in overseas markets.”); Lorenza Munoz, *Diversity in Oscars Still Elusive*, L.A. TIMES, Mar. 24, 2001, at A1 (statement of former president of marketing for Polygram Films) (“[N]o one recently has tried hard to market African-American story lines or actors to the international marketplace” because of perceived past failures.).

286. See Osei Appiah, *Black and White Viewers’ Perception and Recall of Occupational Characters on Television*, 52 J. COMM. 776, 777 (2002) [hereinafter Appiah, *Perception and Recall*] (“Research examining the effects of a model’s race on White audiences’ responses to media has not provided definitive conclusions. Although much of the research suggests race of the model makes no difference for white viewers, a body of research indicates that White respondents evaluate media with White models more favorably than they do with Black models.”) (citations omitted); William J. Qualls & David J. Moore, *Stereotyping Effects on Consumers’ Evaluation of Advertising: Impact of Racial Differences Between Actors and Viewers*, 7 PSYCHOL. & MARKETING 135, 137 (1990) (“First, it was found that white respondents evaluate ads with white models more favorably than they do ads with black models . . . Conversely, several studies have found no difference in consumer ad evaluations when either black models or white models were used. In general, these research results do not lead to a definitive conclusion regarding the effect of race on consumer product evaluations.”).

Some scholars posit that viewers are more likely to react favorably to ads featuring characters with whom they identify. But there appear to be differences between black and white viewers as to how they process race and the extent to which it plays a role in the identification process. Studies have found that racial symmetry between viewer and actor is more important to black viewers than white viewers. See, e.g., Osei Appiah, *Ethnic Identification on Adolescents’ Evaluations of Advertisements*, 41 J. ADVERTISING RES. 7, 9 (2001) [hereinafter Appiah, *Ethnic Identification*] (“Black viewers have better recall of Black occupational characters than they do White occupational characters on television.”); Qualls & Moore, *supra*, at 138; see also Osei Appiah, *Black, White, Hispanic, and Asian American Adolescents’ Responses to Culturally Embedded Ads*, 12 HOW. J. COMM. 29, 31 (2001) [hereinafter Appiah, *Culturally Embedded Ads*] (discussing studies finding that Hispanic viewers prefer to see ads with Hispanic models). In part because they see few positive examples of people of color in the media, viewers of color may see race as more significant and react more favorably to a representation of a



stereotyping in society, there may be some factual basis for the intuition that there is resistance, at least under certain circumstances, among some white filmgoers to seeing a film focusing exclusively on the lives of people of color. The same may be true among male viewers, who may be unwilling to see women in lead action roles or softer female portrayals in films they might deem “chick films.”

In spite of common stereotypes, empirical evidence may not be able to tie the economic success or failure of a film to casting based on race or sex because movies are some of the most complicated and uncertain cultural products. It is difficult to compare audience reactions to Denzel

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person of their own race than a comparable white viewer would react to a white character. Because race is less salient in the lives of white people, at least at a conscious level, white viewers may be more concerned with shared traits such as social class and profession than race. *See, e.g.,* Appiah, *Ethnic Identification, supra*, at 12 (“Many researchers . . . argue that characteristics such as personal appearance, dialect style, and socioeconomic status have a greater impact on whites’ evaluations of a source than does the race of a source.”). The immense crossover popularity of TV’s *The Cosby Show* demonstrates that under the right circumstances white viewers are open to embracing black characters, even an all-black cast. *Cf.* Appiah, *Perception and Recall, supra*, at 788 (finding that white viewers reacted more favorably to a black doctor than to a white doctor). White *Cosby* fans may have identified more with the show’s upper-middle-class milieu and values than its racial character. Some studies have even found that white viewers are more strongly attracted to ads featuring black characters and/or black culture over culturally white ads. *See id.* (finding that white viewers recalled black characters as easily as white characters and viewed black characters more favorably than white characters); Appiah, *Culturally Embedded Ads, supra*, at 43 (“White adolescents identified more strongly with Black characters in ads than with White characters in ads. . . .”); Appiah, *Ethnic Identification, supra*, at 17 (“[W]hite adolescents felt more targeted by black culturally embedded advertisements than they did white culturally embedded advertisements.”); *see also* Appiah, *Culturally Embedded Ads*, at 43 (finding that Hispanic and Asian adolescents preferred ads with black models over those with white models). *But see* Qualls & Moore, *supra*, at 144-46 (finding that whites preferred white models and blacks preferred black models).

It is hard to reach firm general conclusions based on these studies because viewer response to any racial and/or gender representation would seem to be heavily dependent on the particulars of the depiction. *Cf.* Kate Pierce, *What if the Energizer Bunny Were Female? Importance of Gender in Perceptions of Advertising Spokes-Character Effectiveness*, 45 *SEX ROLES* 845, 855-56 (2002) (finding that the gender of a spokes-character may impact viewer perceptions, but it depends on the nature of product); Jon B. Freiden, *Advertising Spokesperson Effects: An Examination of Endorser Type and Gender on Two Audiences*, 24 *J. ADVERTISING RES.* 33, 40 (1984) (noting the difficulty of predicting when gender will have an impact). The question is not “Do white viewers enjoy seeing black characters?” but rather “In what contexts and in what types of roles and movies do white viewers react favorably or negatively to black characters?” Some white viewers might react very differently to a stereotypical black character than to a Bill Cosby-type character. In addition, one cannot simply discuss the reactions of the “white viewer” or “male viewer” without acknowledging differences such as age, geography, social class, attitudes regarding race and gender, etc. For example, a hip-hop oriented black male character might simultaneously turn off older white viewers while turning on younger whites. *See* Appiah, *Culturally Embedded Ads, supra*, at 32-33, 45 (suggesting that stereotypes of blacks as “cool, hip, athletic, musical and fashionable” make them appealing to young white viewers). Thus, in order for analysis of viewer reactions to be meaningful it will have to focus on the particulars of the actors and characters involved and their relation to the storyline and remainder of the cast, as well as the specific identities of the white and/or male viewers in the study. Yet few of the existing studies provide such context-specific information about the ads or viewers studied. *Cf.* Appiah, *Ethnic Identification, supra*, at 9 (noting that most prior studies used ads featuring blacks devoid of any black cultural context but failed to recognize the potential significance of this type of representation).

Washington, an African American, with reactions to a white counterpart because each actor is distinct, with a distinct film history and relationship with an audience. Further, a film's success or failure also turns on factors such as the quality of work done by the many individual participants (e.g., actors, directors, producers, screenwriters, cinematographers); the success of the collaboration of these many individual participants, creative people with different and often conflicting agendas; the creativity and persuasiveness of the storyline; the effectiveness of the studio's marketing efforts; the competition at the box office; congruence with national trends; and vacillating popularity of the film's stars.<sup>287</sup> Because these variables are resistant to objective measurement or prediction, economists have concluded that "no one knows anything" when it comes to predicting the success of a movie.<sup>288</sup> "The business of Hollywood, driven as much by relationships and celebrity as it is by economic rationality, doesn't necessarily behave logically."<sup>289</sup> As economist Richard Caves explained:

There are no formulas for success in Hollywood . . . . [C]onventional Hollywood wisdom is not valid. [Studio predictions] lack a foundation in theory and evidence . . . . Movies are complex products and the cascade of information among film-goers during the course of a film's theatrical exhibition can evolve among so many paths that it is impossible to attribute the success of a movie to individual causal factors.<sup>290</sup>

Despite its best efforts, Hollywood regularly produces "ten-ton turkeys"—movies studios invest in heavily and hype breathlessly, yet that plummet upon release.<sup>291</sup> When a film is in development, rarely is there agreement on which property will be a hit. "[E]very major film-maker" at the time declined to direct the supposedly unworkable, but now legendary, *The Godfather*.<sup>292</sup> Although *Titanic*'s troubled production invited the media and industry insiders to predict a tragic end, it ended up reaping multiple Oscars and a record box office take.<sup>293</sup> And it is safe to say that no one in Hollywood predicted that *My Big Fat Greek Wedding*, a slender movie starring an ethnic, unknown, unglamorous and—by Hollywood's

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287. See, e.g., Arthur De Vany & W. David Walls, *Uncertainty in the Movie Industry: Does Star Power Reduce Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 288 (1999).

288. See *id.* at 285; see also RICHARD CAVES, *CREATIVE INDUSTRIES* 3 (2000) (stating that industry "[r]esearch and pretesting are largely ineffective . . . because a creative product's success can seldom be explained even ex post").

289. Jon Gertner, *Box Office in a Box*, N.Y. TIMES MAG., Nov. 14, 2004, at 105-06.

290. De Vany & Walls, *supra* note 287, at 286.

291. CAVES, *supra* note 288, at 136.

292. BART & GUBER, *supra* note 17, at 58.

293. See IMDB, Business Data for *Titanic*, <http://www.imdb.com/title/tt0120338/business> (last visited Dec. 30, 2003).

standards—overweight woman, would trump every Julia Roberts and Meg Ryan movie to become the highest-grossing romantic comedy ever.<sup>294</sup>

These types of surprises are almost routine. In 2004, the blockbuster success of Mel Gibson's *The Passion of the Christ*, which grossed over \$600 million worldwide,<sup>295</sup> confounded industry predictions of the limited appeal of a religious, foreign-language film. Although many have attributed the success of this film and 2004's other surprise success, *Fahrenheit 9-11*, to their ability to stir controversy, both also tapped genuinely underserved markets for religious films and documentaries.<sup>296</sup> Major studios passed on both films despite the track records of Mel Gibson and Michael Moore. Tim Gray, the executive editor of *Variety* magazine, described 2004 as the year the industry learned that "everything you know is wrong."<sup>297</sup> The year 2005 delivered another unforeseen breakthrough as *Brokeback Mountain*, a movie widely derided before its release as a niche "gay cowboy" flick, drew audiences across the country, became the Oscar front-runner and grossed \$175 million worldwide.<sup>298</sup> These examples suggest that conventional studio wisdom often fails to predict audience reactions. Given the pervasive uncertainty in the industry, which cannot fully be explained or contained by conventional Hollywood wisdom, evidence claiming to show that casting a woman or person of color by itself would cause a drop in box office gross is likely to lack sound empirical grounding.<sup>299</sup>

294. See Todd McCarthy, *Critically Speaking: Film*, VARIETY, Jan. 20, 2003, at A15.

295. See IMDB-Pro, Business Data for *The Passion of the Christ*, <http://pro.imdb.com/title/tt0335345/boxoffice> (last visited June 30, 2004).

296. See, e.g., Elaine Dutka, *DVDs' Faith-based Bonanza*, L.A. TIMES, Mar. 15, 2005, at E1; Sharon Waxman, *Nonfiction Films Turn a Corner: 'Fahrenheit' Shows Approval of Audiences and of Distributors*, N.Y. TIMES, July 5, 2004, at E1.

297. See KCRW, *Hollywood, the Year that Was*, at [http://www.kcrw.com/cgi-bin/db/kcrw.pl?show\\_code=tb&tmplt\\_type=program](http://www.kcrw.com/cgi-bin/db/kcrw.pl?show_code=tb&tmplt_type=program) (last visited Dec. 20, 2004).

298. See, e.g., John Lippman, *Mining Brokeback Mountain*, WALL ST. J., Jan. 27, 2006 at W6; IMDB-Pro, <http://pro.imdb.com/title/tt0388795/> (last visited Aug. 30, 2006).

299. Even so, many industry decision makers will likely cling to such "wisdom," which reflects a form of institutional isomorphism, or cultural homogenization. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149 (1983). "[I]ndividual efforts to deal rationally with uncertainty and constraint often lead, in the aggregate, to homogeneity in structure, culture, and output," which of course stifles diversity. See *id.* at 147; Bielby & Bielby, *supra* note 285, at 21 (arguing that "distinctive features of work in Hollywood build stereotyping and an especially insidious form of discrimination into everyday business: a high level of risk and uncertainty, an emphasis on reputation, demographically-based marketing and a product that embodies cultural idioms about age, gender and race"). Even if following these rules fails to produce success, industry decision makers can at least preserve their reputations by showing that they adhered to industry norms. See DiMaggio & Powell, *supra*, at 156 ("[I]n fields characterized by a high degree of uncertainty, new entrants, which could serve as sources of innovation and variation, will seek to overcome the liability of newness by imitating established practices within the field."). Conformity is especially important in an environment in which studios are mere subsidiaries of corporate conglomerates and studio chiefs are closely monitored by corporate bosses. See, e.g., Sharon Waxman, *Universal Cancels Film with Oscar Stars*, N.Y. TIMES, Oct. 9, 2004, at B7; Bielby & Bielby, *supra* note 285, at 21.

Further, as I explain below, industry analysts, in trying to derive rules from the chaos of moviemaking, may be drawn to race and gender as oversimplified explanations for unconventional movies that failed. Innovative legal scholars have applied insights from cognitive psychology to better understand how discrimination shapes people's assumptions and mental processes.<sup>300</sup> Professor Linda Krieger has written about biases in causal attribution:

[B]iases in the attribution of causation frequently result in discrimination against members of stereotyped groups. Assume for example that two individuals, one a member of a stereotyped outgroup and the other a member of a dominant ingroup, experience the same negative outcome. If a member of the outgroup experiences the negative outcome, and if it is consistent with a stereotype associated with that group, ingroup members will tend to attribute the bad outcome to stereotype-consistent traits, such as lack of ability. If on the other hand, a member of a preferred ingroup experiences the negative outcome, it will more likely be attributed to transient external factors, such as bad luck or task difficulty.<sup>301</sup>

A few examples of how the industry reacted to the failures of recent films help flesh out how this “fundamental attribution error”<sup>302</sup> appears to apply to the entertainment industry. In the last few years, the industry has launched a number of successful action films based on comic book characters, including the popular and financially successful *Spiderman* and *X-Men* franchises.<sup>303</sup> Two high-profile comics-based films featured female leads, Halle Berry's *Catwoman* and Jennifer Garner's *Elektra*. Both were box-office disappointments.<sup>304</sup> Although some, including an executive at Twentieth Century Fox, blamed these failures on an ostensible male aversion to action films that star women,<sup>305</sup> they may have overlooked

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300. See, e.g., Gary Blasi, *Advocacy Against the Stereotype*, 49 UCLA L. REV. 1241, 1248-49 (2002); Kang, *supra* note 63; Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 88 CALIF. L. REV. 1251, 1265 (1998) [hereinafter Krieger, *Perestroika*]; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) [hereinafter Krieger, *Categories*]; see also Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (drawing on a different body of psychological scholarship).

301. Krieger, *Perestroika*, *supra* note 300, at 1267.

302. *Id.* at 1330.

303. See A.O. Scott, *Heroes v. Stars: Revenge of the Nerds*, N.Y. TIMES, May 8, 2005, at 2A-1.

304. *Catwoman* cost \$85 million and grossed \$40 million. See IMDB-Pro, <http://pro.imdb.com/title/tt0327554/> (last visited May 10, 2005). *Elektra* cost \$43 million and grossed \$25 million. See IMDB-Pro, <http://pro.imdb.com/title/tt0357277/> (last visited May 10, 2005).

305. Bruce Snyder, Fox's domestic distribution executive, “speculated that superwomen just don't seem to draw as well as supermen.” Bridget Bayne, “Coach Carter” *Dunks Box Office*, E ONLINE, <http://www.eonline.com/News/Items/0,1,15719,00.html> (last visited Jan. 18, 2005).

more salient reasons for these failures.<sup>306</sup> First and foremost is that both films were critically reviled.<sup>307</sup> Did *Catwoman* fail because audiences rejected Halle Berry (who was also a lead in the successful *X-Men* films) or because of the many other things that apparently went wrong with the production? The concern is that industry decision makers may unwittingly discount other causal factors as well as similar unsuccessful films starring men (such as *The Hulk* and *The Punisher*).<sup>308</sup>

Studio decision makers have incentives to place the blame for audience reactions on gender rather than on their own decisions in developing, distributing and marketing the film.<sup>309</sup> Fox may have made choices in developing *Elektra* that minimized the studio's risk, but also reduced the film's potential for success. The film was an offshoot of *Daredevil*, which starred Ben Affleck and co-starred Garner as a secondary character, Elektra. Although Affleck played the lead in *Daredevil*, "Garner's Elektra, in some viewers' opinion, outshone" him.<sup>310</sup> The *New York Times* called Garner the movie's "saving grace. The actress stole every one of her scenes . . ." <sup>311</sup> As a result, Fox built a sequel around Garner, not Affleck. Significantly, it also slashed the budget nearly in half,<sup>312</sup> which required drastically reducing the special effects shots. The *Times* described the resulting effects as "tacky and very unpersuasive."<sup>313</sup> These decisions, and the choice to downplay action scenes in favor of character development intended to draw female viewers, may have made the film's failure a byproduct of the studio's lowered and gendered

306. Cf. LARSON, *supra* note 2, § 43.03, at 43-51 (noting "evidentiary problem" of vague assertions of customer preference).

307. Metacritic.com, which compiles movie reviews, says critics gave *Catwoman* twenty-seven out of 100 possible points and *Elektra* thirty-four. See Metacritic.com, *Catwoman*, <http://www.metacritic.com/film/titles/catwoman> (last visited May 9, 2005); Metacritic.com, *Elektra*, <http://www.metacritic.com/film/titles/elektra> (last visited May 9, 2005).

308. See Krieger, *Perestroika*, *supra* note 300, at 1268-69 (discussing "selective memory" mechanism whereby stereotype-consistent information is easily recalled but stereotype-disconfirming information is more difficult to retrieve); *id.* at 1288 ("It is well-established that people pay particularly close attention to distinctive stimulus objects, such as a 'token' woman or minority group member. . . . Accordingly, the poor performance of a distinctive minority student is more likely to be remembered, and will tend to be charged with a more powerful negative valence, than the poor performance of a majority white student."). *The Punisher* grossed \$34 million and cost \$33 million; *The Hulk* grossed roughly \$132 million, less than its \$137 budget. See <http://pro.imdb.com/title/tt0330793/> (last visited Oct. 5, 2006); <http://pro.imdb.com/title/tt0286716/boxoffice> (last visited Oct. 5, 2006).

309. See Blasi, *supra* note 295, at 1251-52. Cf. Krieger, *Perestroika*, *supra* note 300, at 1275 ("[A]n episode of personal failure, experienced under conditions in which group membership has been made salient, exacerbates negative reactions to members of the contextually relevant outgroup.").

310. John Lippman, *The Superhero Glass Ceiling*, WALL ST. J., Jan. 7, 2005, at W6.

311. Manohla Dargis, *Moral Conflict Plus a Hot Bod: What More Does a Girl Need?*, N.Y. TIMES, Jan. 14, 2005, at E6.

312. See Lippman, *supra* note 310, at W6 (reporting that *Elektra*'s budget was \$43 million, while *Daredevil*'s was \$78 million).

313. See Dargis, *supra* note 311, at E6.

expectations. A conclusion that audiences reject women as action stars thus may be too facile. Indeed, a study of star power by two economists found that “the real surprise” was the underrated “power of female stars,” who were some of the most consistent box-office performers.<sup>314</sup>

The flip side of the mistaken attributions accorded to unsuccessful films is the readiness to dismiss successful films featuring nontraditional actors as flukes.<sup>315</sup> Instead of reconsidering the assumption that films starring African Americans will inevitably suffer in foreign markets, which would seem to be the rational response to recent international blockbusters like Will Smith’s *I, Robot* and *Hitch* and Vin Diesel’s *The Pacifier*, industry decision makers may resist questioning their cognitive framework.<sup>316</sup> “One or two successes can be explained away as a result of the unique ‘crossover’ appeal of a star like Will Smith, while the overall pattern reinforces the stereotype that only white characters and stories have audience appeal abroad.”<sup>317</sup> Decision makers thus segregate actors like Smith and Diesel in a separate category, a “subtype,” which prevents their success from problematizing the stereotypes that confine the rest of the group.<sup>318</sup>

Even if customer preferences for white male leads were empirically verifiable, that would not give defendants a defense due to concerns about profitability. To the extent such preferences exist, they reflect the negative images that Hollywood and the broader society have systematically instilled in audiences. The Ninth Circuit made a similar point when

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314. See De Vany & Walls, *supra* note 287, at 309 (citing Jodie Foster, Sandra Bullock and Michelle Pfeiffer).

315. See, e.g., Krieger, *Perestroika*, *supra* note 300, at 1267.

316. See *id.* at 1268 (discussing “body of research [that] convincingly demonstrated that stereotypes and other forms of initial expectancies are highly resistant to subsequent expectancy-inconsistent information”); Blasi, *supra* note 300, at 1253 (“One of the reasons stereotypes persist is that they are easy to maintain; overcoming them requires significant effort.”). Will Smith decided to concentrate on cultivating a foreign audience for his films, despite suggestions by white producers that the returns would be minimal. See Laura M. Holson, *The Fresh Princes of Mumbai*, N. Y. TIMES, Aug. 21, 2006, at C1 (stating that the “turning point in Mr. Smith’s foreign appeal” was his aggressive overseas promotion of 1995’s *Bad Boys*, which went on to gross “15 times as much at the international box office as was predicted”).

317. Bielby & Bielby, *supra* note 285, at 25. Thus, the unprecedented success of *Crouching Tiger, Hidden Dragon*, a foreign language film cast with Chinese actors, which grossed over \$85 million and won four Academy Awards, did not lead to the expected glut of Chinese martial arts films. Cf. Craig S. Smith, *Hero Soars, and its Director Thanks Crouching Tiger*, N.Y. TIMES, Sep. 2, 2004, at E4 (noting long delay between *Crouching Tiger* and subsequent hit *Hero*).

318. See Krieger, *Perestroika*, *supra* note 300, at 1269. An experienced creative executive at a major studio, who spoke off the record, explained that small character-based films that explore cultural themes specific to America do not translate overseas as well as action extravaganzas in which culture and language are almost superfluous. The problem with many of the unsuccessful films starring African Americans is not the actor’s race *per se*, but that the actors were othered. The films framed the actors as black people living urban experiences specific to America. The recent films that succeeded overseas did not frame their leads as black, but as people that happened to be black, and the storylines had little if anything to do with race or “urban” culture.

Continental Airlines attempted to justify its requirement that female flight attendants be thin and attractive, while failing to impose similar requirements on their male counterparts.<sup>319</sup> The court did not deny that customers might prefer thin, pretty women and care less about the appearance of male employees. Yet the Ninth Circuit replied that “it was, to a large extent, these very prejudices the [Civil Rights] Act was meant to overcome.”<sup>320</sup> Like Continental Airlines, commentators sometimes refer to “preferences” not just as individual behavioral choices, but as normative truths deserving of legal respect. Under this view, one might argue that the law should not force non-discriminatory casting on the industry if the public, i.e., the market, “prefers” white male protagonists.<sup>321</sup> Cass Sunstein argues that a deeper understanding of “preference” requires unpacking what lies behind that presumptive choice: the “internal mental states” that can be “extraordinarily complex.”<sup>322</sup> Pervasive but largely unconscious norms about race and gender—which bear the taint of our racist and patriarchal history—infuse many expressions of “preference.”<sup>323</sup> Moreover, “[c]hoices depend on norms that people may not endorse on reflection.”<sup>324</sup> The preferences may be so deeply embedded that the possessor is not aware of them.<sup>325</sup> Yet if individuals became cognizant of these biased preferences, they might very well make different choices. Preferences are socially contingent and cannot be easily disaggregated from a system that has historically set up white men as protagonists and others as peripheral.<sup>326</sup>

Surveying the history of cross-racial and cross-gender casting illustrates how such preferences shift over time alongside changing industry practices. During the Shakespearean era, male actors routinely played female characters to great acclaim, and white actors filled the parts of black characters, like Othello.<sup>327</sup> Early films also regularly cast white actors as people of color. “Yul Brynner appeared as the King of Siam,

319. *Gedrom v. Cont'l Airlines*, 692 F.2d 602, 609 (9th Cir. 1982).

320. *Id.*

321. *Cf. Zacharek*, *supra* note 90.

322. Cass R. Sunstein, *Social Norms and Social Roles*, in *CHICAGO LECTURES IN LAW AND ECONOMICS* 135, 156-57 (Eric Posner, ed., 2000).

323. As Jerry Kang has written, “even when we have explicitly decided in favor of racial equality, something implicit within us does not follow. It is as if the racial meanings ubiquitous in our culture, embedded in our histories, exert a deterministic drag that prevents us from fully adopting self-defining choices about fairness and human decency.” Kang, *supra* note 63, at 1587; *see also* Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2420 (1994).

324. Sunstein, *supra* note 322, at 156-57.

325. *See* Russell K. Robinson, *Uncovering Covering*, 101 *NW. U. L. REV.* (forthcoming Summer 2007).

326. A filmgoer might be disturbed to learn that nine of the ten movies she “chose” to see in a given year starred white male protagonists. The import of this choice would change if the studios released only twenty movies in that year and sixteen of them starred white men.

327. *See, e.g.*, Lisa Jardine, *Boy Actors, Female Roles, and Elizabethan Eroticism*, in *STAGING THE RENAISSANCE: REINTERPRETATIONS OF ELIZABETHAN AND JACOBEAN DRAMA* 57-67 (P. Stallybrass and D. Scott Kastan, eds., 1991).

Elizabeth Taylor as the Nubian Queen Cleopatra, Peter Sellers as Fu Manchu, Laurence Olivier as Othello, and the blue-eyed Chuck Connors as Geronimo.”<sup>328</sup> Some of the most respected and successful white actors engaged in the mainstream practice of cross-racial performance, and it was widely embraced by white audiences.<sup>329</sup> Today, putting a white actor in blackface on film would be unthinkable to many casting directors, as would casting men as female characters.<sup>330</sup> Audiences would likely reject this once commonplace casting practice because of the evolution of social norms and audience preferences.<sup>331</sup> Hence, courts should not adopt a legal rule that uncritically legitimates “preferences” at this fixed point in time, especially since such preferences are largely byproducts of the representation norms of a caste-like society. This discussion has shown a lack of trustworthy proof that greater diversity in casting would cause economic harm. Claims of harm, like many other aspects of conventional Hollywood wisdom, tend to be based on hunches and stereotypes, which often turn out to be wrong. To the extent that there is some empirically verifiable harm, courts should resist legitimating the preferences underlying such economic effects. A special customer preference defense to Title VII suits for the entertainment industry would be “totally anomalous.”<sup>332</sup>

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328. Krieger, *supra* note 10, at 846.

329. Other actors who played characters of a race other than their own included Marlon Brando, Charlton Heston, Fred Astaire, Judy Garland, Rudolph Valentino, Mickey Rooney, Bing Crosby, Laurel and Hardy, Shirley Temple, Jerry Lewis and Danny Thomas. See GUBAR, *supra* note 96, at 86-91; see also Jesse Katz, *The Curse of Zapata*, LOS ANGELES MAGAZINE, Dec. 2002 (discussing how in order to play a Mexican in *Viva Zapata!* Brando “hired his own makeup man, undergoing contortions that now seem laughable. He flared his nostrils with plastic tubing. He slanted his eyes with latex glue. He painted his face brown.”).

330. In making this statement, I assume the films do not include a thematic element of passing or drag, such as *White Chicks* or *The Crying Game*. High-profile examples of audience backlash to cross-racial casting include the brouhaha surrounding the casting of a white actor as an Asian character in *Miss Saigon*. See generally Krieger, *supra* note 10; see also Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1098* (Hyung Chan Kim ed., 1982); Richard Hornby, *Interracial Casting*, 42 *THE HUDSON REVIEW* 459 (1989).

331. Interestingly, norms have not changed as much with respect to non-black people of color, especially Latinos. For instance, studio decision makers saw no problem in casting the leads of the Cuban crime saga *Scarface* with white actors. Director Gregory Nava has consistently faced pressure from studios to cast white actors like Brooke Shields and Marisa Tomei as Latinas. See Katz, *supra* note 329; Navarro, *supra* note 104, at E1; see also A. O. Scott, *A Love That’s Forever, If Only for a Day*, N.Y. TIMES, February 13, 2004, at E1 (noting that in the comedy *50 First Dates*, Rob Schneider, wearing brown makeup and a wig, played Adam Sandler’s buffoonish best friend, “a goofy Hawaiian stoner.”). At the same time, some lighter-skinned Latinos, from Martin Sheen to Jennifer Lopez, enjoy the opportunity to play white characters.

332. *Gerdom v. Continental Airlines*, 692 F.2d 602, 609 (9th Cir. 1982).



### 3. *The Artistic Defense*

Although general expectations of economic harm are not persuasive, artistic concerns could give rise to serious First Amendment concerns in some cases. In order to assess the First Amendment burden in a Title VII casting suit, the court would have to consider the context and narrative of the film, the roles that race and gender play in the storyline, and the function of the breakdown in the casting process. An anticaste perspective—in contrast to a colorblindness rationale—acknowledges that most people are not blind to race and sex. This acknowledgement means an actor's identity is likely to be noticed by viewers,<sup>333</sup> but often the effect of the actor's identity would be incidental. As explained above, under First Amendment precedent, the burden must be substantial to warrant First Amendment intervention.<sup>334</sup> Thus a court probably would not—and should not—permit the use of a discriminatory breakdown merely on the grounds of slight changes to the story. In some cases, however, casting an actor of a non-preferred race and/or sex might create a cognizable artistic burden where it would add an unintended racial or gender element to the storyline or require filmmakers to alter the narrative in order to avoid unwanted racial or gender implications.<sup>335</sup> The ultimate legal question would be whether such a change amounts to a substantial burden on the narrative.

The EEOC's framing of the BFOQ issue presumes the central question is whether a female actor can play a male character or "pass" as a man. This approach is unlikely to break down the gender-based caste system since it is unrealistic for most actors; only truly exceptional actors would be able to play characters of another sex convincingly. Further, letting a few women play men would not erode the norm of male centrality or eliminate its negative employment effects. In addition, the EEOC

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333. See, e.g., Krieger, *Perestroika*, *supra* note 300, at 1283 ("Whether we like it or not, it is highly implausible to assume that an American of one race encountering an American of another race would not notice racial attributes or use those attributes in initially categorizing the person perceived. It is one thing to maintain as a normative matter that people should not categorize by race. But it is counterfactual to maintain that they will not do so."); Yuracko, *supra* note 2, at 196 ("In a sexist society, nothing done by men and women has precisely the same meaning. Traits are not understood or viewed as isolated technical attributes. They are necessarily viewed in relation to all of the other traits an individual possesses and through a systematically gendered lens.").

334. See *supra* note 242.

335. The *Hurley* Court asserted that speakers generally have the autonomy to decide not merely what to say but also what *not* to say. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995) (emphasis added).

As an example of an arguable "compelled speech" burden, consider critic Janet Maslin, who opined that the casting of Whoopi Goldberg in *Sister Act*, in a role intended for Bette Midler, created uncomfortable racial undercurrents. See BOGLE, *supra* note 101, at 333-34. In Maslin's view, "[scenes between Goldberg and her boss Maggie Smith] that might have played as mere snobbery with Ms. Midler now have a hint of racism." *Id.* at 333 (internal quotation marks omitted); see also Hornby, *supra* note 330, at 461 (approving of the casting of African Americans in certain roles in Shakespeare's *As You Like It*, but suggesting that the director should have omitted a line in which Oliver describes Celia as "brownier than her brother" as "the line is minor enough to be cut.").

interpretation of the problem is out of touch with the realities of the industry. Requiring actors to conceal their sex would frustrate the studio's efforts to publicize and promote the film and actors' interests in building a reputation.

The more relevant inquiry concerns whether the studio could change the requested sex or race of a character to hire in a nondiscriminatory manner without substantially altering the narrative. In antidiscrimination parlance, a court might frame the question as a "reasonable accommodation" requirement.<sup>336</sup> Would the script alterations necessary for a woman or person of color to play the part originally scripted for a male or white actor impose a substantial burden on the narrative? For instance, if Will Smith were cast in a role as a character with a white brother, it may not be necessary to the story to explain the racial disparity, as in the film *Sideways*,<sup>337</sup> or the film might explain briefly that Smith was adopted by a white family. Depending on the narrative, this sort of alteration may not impose a substantial burden and it could open up a significant number of roles to otherwise excluded actors. Some viewers might experience some initial difficulty upon seeing siblings of different races, but they might very well overcome it quickly, as did customers greeted by male flight attendants, instead of previously preferred females in the flight attendant BFOQ cases.<sup>338</sup> The importance of artistic freedom, however, should prevent courts from requiring substantial alterations or redefining the message of a film when a studio asserts a First Amendment defense in the way that BFOQ courts have redefined the "essences" of ordinary businesses contrary to employers' conceptions in order to promote gender equality. Drastically revising the storylines of films would impose a substantial burden in violation of the First Amendment. My proposal, however, would ban discriminatory breakdowns to the extent that the race and sex of particular roles are not integral to the narrative.

We can identify certain categories of films that might impose greater or lesser artistic burdens on studios to begin an outline for a judicial test in casting discrimination suits. Where race or gender plays an integral role in the storyline, the studio maintains a stronger argument that the actors need

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336. Cf. 42 U.S.C. § 12112 (2006). Although scholars sometimes assume that the antidiscrimination rules of Title VII and accommodation mandates are fundamentally different, Christine Jolls has shown that the two overlap in important respects and that certain aspects of Title VII, including its disparate impact prong, sometimes require accommodation. See generally Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001). To be clear, my argument is not that Title VII technically contains a reasonable accommodation requirement for race and sex but that one could be fashioned in the casting context to account for First Amendment concerns. Jolls' work shows that this test would not be anomalous.

337. The director of *Sideways* chose not to explain why Sandra Oh, who is Asian American, had a black child and white mother.

338. See, e.g., *Wilson*, 517 F. Supp. at 299; *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971)

to possess certain traits to present the narrative accurately and clearly. Similarly, films set in a particular historical and social context deserve some leeway to convey an accurate image of that period.

However, most films do not possess these special themes and needs, so studios should not be allowed to rely on an artistic defense unless they demonstrate some other legitimate justification for using discriminatory breakdowns. In the next Part, I suggest several categories of films with strong First Amendment claims: stories with racial themes, stories with gender themes, stories with historical accuracy concerns and a limited set of stories involving romantic relationships. I then examine some films in which the lead role might have been cast with an actor of a different race or sex without substantially altering the narrative.

*a. Stories with Racial Themes*

*(1) Stories about Race Relations*

Considering the different race- and gender-based roles in film helps sketch out how studios might comply with Title VII, in relation to the strength of the First Amendment defense.<sup>339</sup> The strongest claim to take race into account in casting decisions would be stories about race relations.<sup>340</sup> Race-blind casting could make movies such as Spike Lee's *Do The Right Thing* and more recently *Crash* and *Guess Who* downright inscrutable. Viewers need to be able to identify the distinct racial identities of the various African-American, Italian-American, Asian-American, and Latino characters in order to follow Lee's story of a racial meltdown on the hottest day of the summer. Despite the absence of a statutory BFOQ exception for race, defendants like these filmmakers would have a strong First Amendment defense to a Title VII suit. The race relations justification could rarely be invoked as few films grapple with race explicitly—only 5% of the 2004, and 6% of the 2005, films either had racial themes or the casting of the leads otherwise clearly implicated race.<sup>341</sup>

*(2) Historical Accuracy*

There are two obvious categories in which historical accuracy concerns would frequently arise. First, biographical stories of famous people, from *Kinsey* to *Selena* to *Ray*, should enjoy a strong First Amendment claim to use a discriminatory breakdown. Because the

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339. I provide the following analysis simply as a rough sketch of how a court, guided by the testimony of artistic experts, might resolve such issues. Although my analysis is based on reading several critical reviews of each film, I am not a film expert.

340. See Hornby, *supra* note 330, at 461 (“[I]f race is at issue in the play, then it should not be ignored.”).

341. As explained more fully in the methodology section, these numbers are based on viewing trailers, and in some cases entire films, for the 2004 and 2005 films, conducted with my research assistants. See *supra* text accompanying notes 42-48.

audience is familiar with these figures and their racial identities, filmmakers should have the right (but not the obligation) to cast an actor to play Malcolm X or George Washington who conforms to the audience's expectations of accuracy. Second, even where the film depicts characters that are not well known, filmmakers creating period pieces should not have to cast actors whose racial identity might be unrealistic given the historical setting.<sup>342</sup> The filmmaker's interest in creating a historically accurate piece is reasonable and legitimate. Twelve percent of the 2004 films clearly implicated historical accuracy concerns regarding race, and 9% did so regarding sex. For both 2004 and 2005, thirteen percent of the films implicated historical accuracy concerns.

The artistic concern with presenting an accurate reflection of social reality might also apply to films set in the present, but this is a weaker argument and less frequent scenario. Unlike past eras of rigid racial and gender segregation, today there are few positions that have never been occupied by a person of color or a woman other than a President or Vice President of the United States.<sup>343</sup> Thus, even though Latinos are underrepresented in the legal profession, casting a Latino as an attorney would not be jarring to a viewer because Latino lawyers do in fact exist. An alternative rule under which only majority members of a group can be cast would itself undermine the interest in accuracy by suggesting that all lawyers are white.<sup>344</sup>

### (3) *Interracial Romance*

A common justification for discriminatory casting is the desire to avoid depicting an interracial romance.<sup>345</sup> If an actor of color were cast in a role designated as white, defendants might argue, the casting would unduly insert an interracial romance into the narrative, whether the script acknowledged the issue or not. Defendant studios might justify their

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342. Cf. Wertheimer, *supra* note 147, at 101 ("Some reaction tendencies may be deeply rooted in general developmental patterns or changeable only at great social or individual costs.").

343. Even here, it might be a mistake to assume that audiences would reject anyone other than a white male as President. The TV shows *24*, *Commander in Chief* and *The West Wing* successfully cast a black man, a woman and a Latino, respectively, as the President.

344. Moreover, we should keep in mind that audience members are unlikely to make the sort of cross-film comparisons that might undermine verisimilitude. Each film is presented as a separate entity with little connection to others, and films are produced by many different filmmakers and studios. Most viewers also see only a subset of films released each year. Under these circumstances, it would be difficult to conclude that the average audience member would reasonably determine that Latino lawyers are overrepresented in films in general or in the films released by a particular studio.

345. See, e.g., Carson, *supra* note 91, at 119 (describing depictions of interracial sexuality as "Hollywood's last taboo."). Director Jonathan Kaplan (*The Accused*, *Love Field*) explains: "Movies are too expensive now. Nobody wants to take a chance on anything the least bit controversial. It's not the public, which is very savvy in this area; it's the Hollywood establishment. They're overly sensitive toward anything to do with interracial romance." Glenn Lovell, *The Color of Love: Interracial Romance Still Makes Hollywood a Little Nervous*, CHI. TRIB., Sept. 18, 1994, at C34.

refusal to cast actors of different races in a romantic storyline based on the perceived racial prejudice of the audience or the insertion of an unwanted racial dynamic.

An actor plaintiff might make the following responses. First, from a consequential perspective,<sup>346</sup> a blanket rule permitting discriminatory casting whenever the character has a love interest would largely validate the status quo and prevent the realization of balanced equality and speech concerns.<sup>347</sup> This is so because most lead roles involve a romantic attraction of some sort, so a general exception for interracial romance would legitimate a vast amount of discrimination. Second, the plaintiff might amplify Title VII's clear and consistent opposition to customer preferences by drawing on precedent specifically refusing to respect prejudices against interracial romance, such as *Loving v. Virginia*<sup>348</sup> and *Palmore v. Sidoti*.<sup>349</sup> Under a synergistic conception of equality, these equal protection cases are instructive for their refusal to accommodate and legitimate private discrimination. Third, these cases have in part facilitated and somewhat normalized interracial relationships, thus the grounds for expecting this kind of audience prejudice are eroding. Studio fears regarding interracial romance may be overblown and largely attributable to risk averseness or internal studio biases, as suggested by mainstream hit movies with interracial couplings like *The Bodyguard* and *Save the Last Dance*.<sup>350</sup>

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346. See Wertheimer, *supra* note 147, at 110 ("If counting reaction qualifications seriously compromises one's range of employment opportunities, it seems at least somewhat unjust to count them.").

347. The impact of catering to audience preferences for monoracial relationships would fall heavily on a discrete group of employees, actors of color. *Cf. id.* at 109 (warning against honoring preferences that would "work a serious hardship on a class of job seekers").

348. 388 U.S. 1 (1967) (holding that a Virginia statute barring interracial marriage violated equal protection).

349. 466 U.S. 429 (1984) (holding that a judge determining custody could not consider racial prejudice that child might suffer as a result of mother's interracial relationship).

350. *The Bodyguard* grossed \$410 million worldwide. See IMDB-Pro, <http://pro.imdb.com/title/tt0103855/> (last visited Nov. 10, 2004). Despite that success, "the pairing of white male superstars with black love interests is extremely rare." Lovell, *supra* note 345, at C34; see also *id.* (*Corrina, Corrina* director Jessie Nelson recounting demands to "cut out the relationship between Whoopi [Goldberg] and Ray [Liotta] completely"). More recently, the hip-hop interracial romance *Save the Last Dance* (budgeted at \$13 million) came out of nowhere to gross \$91 million domestically. See IMDB-Pro, <http://pro.imdb.com/title/tt0206275/> (last visited Nov. 10, 2004). It appears that younger audiences are relatively unfazed by depictions of interracial romance. *Cf.* Appiah, *Culturally Embedded Ads*, *supra* note 286, at 43 ("White adolescents identified more strongly with Black characters in ads than with White characters in ads . . ."); Appiah, *Ethnic Identification*, *supra* note 286, at 17; Zina Magubane, *Black Skins, Black Masks or 'The Return of the White Negro,' MEN AND MASCULINITIES*, Jan. 2002, at 240 (discussing Cornel West's argument regarding the "Afro-Americanization of white youth"). Some of the opposition to interracial romance can come from audiences of color who do not want to see "their" stars paired with a white person. Denzel Washington has reportedly shied away from depicting interracial romances after receiving flack from some of his black female fans. See Lovell, *supra* note 345, at C34. The Oscar-winning film *Monsters Ball*, which improbably paired Halle Berry with Billy Bob Thornton, is singularly loathed by many within the black community in part because of its explicit interracial sexuality.

Fourth, studios have tools to mute the impact of race, such as common marketing and promotional techniques.<sup>351</sup> Race is not wholly fixed, but performative.<sup>352</sup> Actors of color can construct or de-construct their racial identities to suit the role they are performing,<sup>353</sup> although the capacity for assimilation varies based on phenotypic constraints. Just as filmmakers often use techniques to underscore the racial identities of actors,<sup>354</sup> they may use similar tools to mitigate perceptions of racial difference, which might have the effect of eroding the exoticization of interracial relationships.<sup>355</sup>

These arguments may not necessitate a categorical rule against considering adverse reactions to interracial romance when casting. Stories that focus heavily on the romantic relationship or include significant racial themes might be more profoundly altered by the casting of an interracial pair. Race-blind casting could lead to unintended racial implications, as would have happened in *Sleeping with the Enemy*, which starred Julia Roberts as a woman fleeing from her abusive husband. Casting Denzel Washington as the “abusive and brutally obsessed husband” who will “stop at nothing to find and kill”<sup>356</sup> Roberts would have clearly added an unintended and troubling racial dimension. Because the entire storyline revolves around this abusive relationship, it is doubtful that a filmmaker could have easily mitigated the racial implications. Under these circumstances, defendants might have a strong defense for considering race in casting this role.<sup>357</sup>

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351. Studios have employed various techniques to mute the racial or interracial dimensions of films, including tinting the colors of posters to obscure racial identity and omitting black characters altogether. See, e.g., Goldstein, *supra* note 285, at E1 (“In his film [*Are We There Yet?*], [Ice] Cube is seen wearing a jumble of silver-chained jewelry. In the film’s poster, the chain’s have been airbrushed out. Moreover, Cube is pictured not just with the two African-American kids who serve as his comic foils in the film but a host of other kids, mostly white.”); Lovell, *supra* note 345, at C34 (describing “the monochromatic, ‘race-neutral’ posters and cassette sleeves for ‘The Bodyguard’” in which “neither star’s race is identifiable”); Goldstein, *supra* note 74, at 6-1 (noting that ads for *Lean on Me* and *The Color Purple* showed black characters in silhouette and *The Mighty Quinn* displayed no characters).

352. See Carbado & Gulati, *supra* note 67, at 1796.

353. Hence, some viewers may not have realized that Thandie Newton was African American when she starred opposite Tom Cruise in *Mission Impossible II* because the film did not present her as such. Conversely, some viewers likely mistakenly assumed that the raven-haired, olive-hued Catherine Zeta-Jones was a Latina when she debuted in the movie *Zorro* with Antonio Banderas.

354. See BERG, *supra* note 71, at 10.

355. Gender also is largely constructed. Despite our tendencies to see physical differences as important, “bodies end up meaning less in the fight for equality than the roles, myths, and stereotypes that transform a vagina into a she.” Franke, *supra* note 195, at 39-40.

356. See IMDB-Pro, <http://pro.imdb.com/title/tt0102945/storyline> (last visited Oct. 19, 2004).

357. However, as noted above, they may *not* have a strong basis for using a racially discriminatory breakdown. Since roughly 80% of Screen Actors Guild members are white, failing to specify “white” in the breakdown would simply require the consideration of a relatively small number of men of color. With respect to sex, however, the studio would have a strong claim for specifying male in the

By contrast, the Julia Roberts thriller *The Pelican Brief* did not revolve around a romantic relationship or contain domestic violence, and an interracial romance probably would not have changed the movie or its success much. In the novel by John Grisham, her character was a law student fleeing for her life after discovering a nefarious conspiracy. She also flirts with an investigative journalist, but they do not consummate the relationship until the end. The focus of the book and film is the chase, not the relationship between the two. Moreover, there is no element of interracial violence or other unusual racial dynamic. Yet in casting Denzel Washington, the studio unnecessarily neutered the romance and kept the relationship strictly platonic.<sup>358</sup> This instance also displays how studios can—and already do in rare cases—downplay unintended racial implications of a storyline (whether actually necessary or not, in the case of *The Pelican Brief*) in order to accommodate casting highly bankable actors of color in roles originally characterized for white actors. As a general rule, casting decision makers should consider the impact of race on a case-by-case basis, but with a strong presumption against restricting the race of actors portraying romantic relationships.

*b. Stories with Gendered Themes*

A prime example of a film with a substantially gendered theme is the Brad Pitt-Edward Norton film *Fight Club*. Critics have described it as a “film about men who like to fight.”<sup>359</sup> Pitt plays Tyler Durden, a hypermasculine, reckless nihilist who derides Norton’s everyman character as a “bourgeois wimp” and “Ikea Boy.”<sup>360</sup> Railing against the commercialization and feminization of males that has produced middle-class men more likely to run from a humiliating encounter than engage in a physical fight, Durden offers deliverance through brutal underground male-only brawls.<sup>361</sup> Roger Ebert described the film as “macho porn,” suggesting that “men may get off on the testosterone rush” of “brutal, unremitting, nonstop violence.”<sup>362</sup> There is indeed a homoerotic edge to the comradery between the swaggering, musclebound Pitt and the meek Norton character

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breakdowns because considering an equal number of female candidates would be considerably more burdensome.

358. Washington has starred in a number of films in which race was not a significant story element, and in some cases he was cast despite an initial contrary racial designation (*e.g.*, *Out of Time*, *Manchurian Candidate*). I have not been able to determine the percentage of 2004 and 2005 films that involved an interracial romance because such romances may not be disclosed in trailers and advertisements.

359. Kenneth Turan, *The Roundhouse Miss: Fight Club*, L.A. TIMES, Oct. 15, 1999, at F1.

360. Stephen Hunter, *'Fight Club': No Holds Barred*, WASH. POST, Oct. 15, 1999, at C1.

361. See Roger Ebert, *"Fight" Stresses Frightful Ideas*, CHI. SUN-TIMES, Oct. 15, 1999, at 31.

362. *Id.*

who falls helplessly under Pitt's spell.<sup>363</sup> Although critics differed vehemently over the ultimate meaning of the film, virtually all agreed that it centers on the male psyche.<sup>364</sup> Changing one of the central characters to a woman would drastically revise the filmmaker's message. The primary function of the only female character of note, played by Helena Bonham Carter, is to provide a sexual outlet for the men and assure the audience that the relationship between Pitt and Norton is not literally sexual.

Similarly, female-centric films like *Bridget Jones' Diary* may also be entitled to creative defense protection, even if the gender commentary is slightly less direct than the *Fight Club* variety. The story is essentially a comic "fairy-tale romance"<sup>365</sup> that arguably "suggest[s] that a woman's value is entirely wrapped up in the man she persuades to marry her."<sup>366</sup> A film about an aging man fearful of failing to find a partner could be compelling, but given the disparate gender expectations regarding dating and marriage—a thirty-two-year-old resolutely single man who likes to drink and smoke is perceived as sowing his wild oats (or perhaps gay),<sup>367</sup> while a single woman of the same age is thought to be on the verge of spinsterhood—it would unquestionably be a substantially different story.

By contrast, the psychological thriller *The Sixth Sense*, which starred Bruce Willis, could have been refashioned with a female lead without losing substantial narrative integrity. Willis played a child psychiatrist "with a soft demeanor and a body swaddled in shapeless, dowdy Ivy League clothes."<sup>368</sup> "His eyes [bled] compassion for a young boy haunted by visions of dead people . . . His voice [was] a mutter hidden inside a whisper."<sup>369</sup> One could imagine Julianne Moore, a fine actor who often plays depressed female characters, performing this role.<sup>370</sup>

This Part has applied the legal standard that I propose in order to provide a sense of the exceptions and some counterexamples of films that could have been refashioned to accommodate an actor of a different race and/or sex. The overarching question, whether concerning historical accuracy or a race or gender-based theme, is whether casting an actor of a race or sex other than that preferred by the studio would create a substantial burden on the film's narrative. Under such circumstances, my

363. See Maslin, *supra* note 360, at E14 ("This is a classic pattern . . . where the flashy boy liberates the dull boy. It's been done a thousand times in a variety of genres, but here it's almost mythic-pure.").

364. See, e.g., *id.* (describing the film as a "true-blue, angry-young man rant.").

365. Kenneth Turen, *Keeping Up With Ms. Jones*, L.A. TIMES, Apr. 13, 2001, at F1.

366. Desson Howe, *Bridget Is Almost V. Good*, WASH. POST, Apr. 13, 2001, at T34.

367. Indeed, this essentially describes the Hugh Grant character, a promiscuous cad who, because of his gender, is viewed as a "sex god."

368. Stephen Hunter, *'The Sixth Sense': Shocker Therapy*, WASH. POST, Aug. 6, 1999, at C1.

369. *Id.*

370. In 2004, Moore starred in *The Forgotten*, a psychological thriller about a lost boy that aspired to follow in the footsteps of *The Sixth Sense*.



proposal would recognize a First Amendment-based exception to Title VII. The goal has simply been to provide a rough sketch of the types of exceptions likely to emerge. I acknowledge that this judicial exercise might involve some difficult line drawing, especially with respect to sex, but, as explained above, judges already regularly engage in such artistic analysis and line drawing in intellectual property cases.

#### CONCLUSION

I have attempted to show that Title VII and the First Amendment may reasonably ban race- or sex-specific breakdowns in many cases. As a predictive matter, the specter of judges dictating casting decisions (even if guided by artistic experts) might deter a court from applying Title VII to the casting process. But there is ample, if not wholly uncontradicted, case law that would support a decision to apply Title VII to the use of breakdowns in casting.

Although much of this project has been positive, I also conclude normatively that the critical thinking fostered by a judicial holding in favor of an actor would represent a marked advance over the status quo in which everyday decisions hinge on race and sex, yet few see this practice as illegal or even problematic. Such a holding would force predominantly well-meaning industry decision makers to confront and either justify or overcome their assumptions, making manifest and to some extent eroding the rigid industry caste structure. If the law were enforced in this manner, the impact could be as pervasive and profound as the influence of Hollywood itself.

