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And the Oscar Goes to; Well, It Can't Be You, Can It: A Look at Race-Based Casting and How It Legalizes Racism, Despite Title VII Laws

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AND THE OSCAR GOES TO . . . WELL, IT CAN'T BE YOU, CAN IT?: A LOOK AT RACE-BASED CASTING AND HOW IT LEGALIZES RACISM, DESPITE TITLE VII LAWS

LATONJA SINCKLER*

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I. INTRODUCTION

During an *Inside the Actors Studio* feature, Salma Hayek¹ recalled an influential conversation she once had.

Interviewer: I don't understand what you're doing here, are you working?

Salma Hayek: Not really, I did an extra here, I did this little part here, and this little part there.

Interviewer: It doesn't make sense I mean why are you not in Mexico, why are you not working there?

Salma Hayek: Because I want to do movies.

Interviewer: But there are no parts for Latino girls in movies here right?

Salma Hayek: Right.

Interviewer: So I don't understand, how you're going to do it.

Salma Hayek: Well I'm going to change that.²

In the *Inside the Actor's Studio* feature, Hayek credits her career's start with this one small interview.³ The film director of *Desperado* saw the interview and decided that Hayek fit the role of Carolina.⁴ A casting director assigns roles to a person based on a set list of qualities assigned to a particular character. These qualifications are typically compiled in what is known as a "breakdown."⁵ Breakdowns usually only feature the major characters to be cast for a specific film. They identify the character's name, followed by his or her gender, age, and race; it also includes a small description of the character's personality, background, or appearance. Breakdowns are created by the producer, checked by the production company, and disseminated to various casting directors who then release them to agents. Professor Russell K. Robinson explained that there is a hierarchy in the casting process, where studio executives are at the top, followed by producers, the director, and lastly the casting director.⁶

Even though race is rarely pivotal to the character herself, race is often used as a qualifying characteristic in a breakdown.⁷ When authors write books or screenplays, they tend to construct their characters in a certain

1. *Salma Hayek*, IMDB, http://www.imdb.com/name/nm0000161/?ref_=nv_sr_ (last visited Feb. 5, 2014). Salma Hayek is a Mexican actress who was able to break into the US film industry.

2. *Inside the Actor's Studio: Salma Hayek* (Bravo television broadcast Dec. 5, 2004).

3. *Id.*

4. *Id.*

5. See Appendix page I for an example of a breakdown.

6. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 6 (2007).

7. *Id.* at 11-12.

way. These authors have a creative and First Amendment right to write their characters how they see fit and it would be difficult to challenge an author's creative process and logic. However, acting is an occupation through which many people hope to earn a living. Concerns about the First Amendment right to free speech should not be used to allow discriminatory employment practices. However, specifying the character's race in a breakdown generally governs the type of people able to audition for those roles and consequently the people who will ultimately receive them.⁸

Professor Robinson performed a three-month study of breakdowns posted on the Internet Movie Database (IMDb) between June 1 and August 31, 2006, and found that 22.5% of the breakdowns identified a character as white; 8.1% as black; 5.2% as Latino; 4.3% as Asian; and 0.5% as Native American. Only 8.5% of the breakdowns were listed as open to all ethnicities, and 50.9% did not list the character's race.⁹ While it may seem optimistic that a little more than 50% of the roles did not have racial characteristics attached to them, the industry consensus is that white is implied when a race is omitted.¹⁰ Applying this logic, approximately 73.4% of all roles are intended for Caucasians, though this rises to almost 82% if one includes "any ethnicity" roles in the calculation. As such, it has become exceptionally difficult for individuals of other races to find acting roles.

Essentially, some individuals have had their ability to practice their craft curbed, because of their skin color—not their abilities.¹¹ Actress Kimberly

8. See Robinson, *supra* note 6, at 18, 32 (interviewing casting directors Erin Hill and Jane Jenkins, both admitting that casting directors usually adhere to the race agreed on by writers and studio executives but that they will occasionally submit someone of a different race who they feel would also be good for the part. These attempts are usually unsuccessful and when the race of a character is changed, it is usually an inconsequential role).

9. *Id.* at 10-11.

10. *Id.* at 11 (stating that white is often considered the default race unless another race is specifically stated); see also Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertaining Programming*, 45 ARIZ. L. REV. 293, 311 (2003) [hereinafter Baynes I] (quoting Rene Balcer, the executive producer of *Law & Order* as stating "there is a phenomenon that if you don't specify race in a script, nine times out of ten a white person will be cast - that if you want a person of color you write it down and if you want a white person you don't write it").

11. Robin Givens, *Why Are Black Actresses Having Such a Hard Time in Hollywood? Racism and the Film Industry's Limited Vision Contribute to the Scarcity of Roles for Black Women*, EBONY, June 1991, at 36, 40, available at <http://books.google.com/books?id=QdQDAAAAMBAJ&lpg=PA3&pg=PA36#v=onepage&q&f=true>; see also Robinson, *supra* note 6, at 11 (quoting former producer and casting director Reuben Cannon "The problem is not lack of roles, it's lack of

Russell¹² reflected on this practice by stating, “the feeling is greater than frustration. It’s an injustice. It’s almost as if we are being raped or robbed of our craft because we are so limited in our opportunities. Meryl Streep¹³ can do the classics and she can do She-Devil . . .” but women of color must choose between playing a hooker and not working.¹⁴ Korean actress Sandra Oh expressed that her agents have a hard time getting her auditions because of her race.¹⁵ After reading the script for the lead role in the film, *Things We Lost in the Fire*, Actress Halle Berry¹⁶ urged her agent to get her an audition, but she was repeatedly denied the ability to try out for the part because the casting called for a white woman.¹⁷ When a Danish director was hired to do the film, Berry set up a meeting with her and asked her, “Do you care about the color of my skin; do you care that this wasn’t written for a black woman?”¹⁸ After meeting with the director, Berry obtained the role.

Unfortunately, most individuals do not have the opportunity to meet with a director in order to gain the chance to audition for a role. For many, the journey begins and ends with the casting directors, who do not have the same ability to change the predetermined breakdowns as those higher up in the hierarchy. Due to the format of breakdowns, the current system is

imagination, lack of courage”); Baynes I, *supra* note 10, at 311 (stating that decisions are not made regarding who is most qualified or who is a better actor but instead on who fits the criteria the director and writers are looking for).

12. Kimberly Russell, IMDB, http://www.imdb.com/name/nm0751274/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Kimberly Russell is an African American actress who has played minor and supporting roles in a variety of films.

13. Meryl Streep, IMDB, http://www.imdb.com/name/nm0000658/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Meryl Streep is a Caucasian actress.

14. Givens, *supra* note 11, at 40.

15. Hilary De Vries, *All that Korean Rage, Unbottled*, N.Y. TIMES (Oct. 17, 2004), http://www.nytimes.com/2004/10/17/movies/17devr.html?_r=1 (quoting the actress as commenting that her agents tell her they “‘have a hard time getting [her] in’ and all [she] wants is a shot”).

16. Halle Berry, IMDB, http://www.imdb.com/name/nm0000932/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Halle Berry is a prominent multiracial actress. She is half African American and half White.

17. *Fighting to Hold On: Halle’s ‘Things We Lost In the Fire’*, HOLLYWOOD (2007), <http://www.hollywood.com/static/halles-berry-things-we-lost-in-the-fire-race>. *Inside the Actor’s Studio: Halle Berry* (Bravo television broadcast Oct. 29, 2007) (recounting the story of how she came upon this role on Inside the Actors Studio, summarizing her efforts in the sentence, “All I wanted was an opportunity to be seen for the role”).

18. *Id.* The director replied that skin color was not a concern and how Berry saw and interpreted the role was what was of the highest importance.

unable to provide fair opportunities for all. The casting system has allowed whites, perhaps even less qualified whites, to obtain employment over similarly or more qualified minority candidates solely because of race.¹⁹

In 1964, Congress enacted Title VII of the Civil Rights Act.²⁰ This legislation was passed in the wake of the Civil Rights Movement, when minorities were often precluded from gaining lawful employment because of the color of their skin. After the Civil Rights Act was passed in the House and Senate, employers and industries were legally barred from disqualifying a qualified person from employment because of their race, color, religion, gender, or national origin.²¹ This law allows for the employment of minorities in fields that they were previously and routinely turned away from. This law made it so minorities could gain employment in any position as long as they met the requirements necessary for the job. The acting industry, however, has failed to adequately comply with Title VII of the Civil Rights Act. This paper will elaborate on the casting practices within the film industry and will argue that in allowing the film industry and Hollywood to disregard Title VII, society has allowed these industries to perpetuate a system that favors one race over others.

19. As is pointed out in later sections of this paper, if it is true that casting looks to authenticity as one of its main criteria for who does and does not get a role, then it would make sense to find an Asian actor to play a character who is based on a real Asian man. Unfortunately, a white person, whether famous or relatively unknown, is often given the role instead; See Robinson, *supra* note 6, at 27 (interviewing the casting director and producer Rueben Cannon where Mr. Cannon stated that studios “‘will take a bet on an unknown white actor in a lead’ but not an actor of color”).

20. The Civil Rights Act of 1964, 42 U.S.C. § 2000c-2(a)-(b) (2006) states:

(a) Employer practices:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way, which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

21. *Id.*

II. BACKGROUND

A. Justifications for Race-Based Casting

1. Authenticity

Maintaining a film's authenticity is often used as a means to defend race-based casting. Under this justification, a film's cast can be comprised predominately or entirely of Asians for a film set in China. The production company could assert that the casting choice maintains the authenticity of the film and its environment. Admittedly, a film set in China with an entirely Hispanic cast would seem odd to viewers. However, this is an extreme example. While the authenticity argument legitimately supports this hypothetical, the same argument has not always been used with such clearly demonstrative facts.

Films frequently vacillate between having actors in roles that support the film's "authenticity" and actors that run counter to the film's "authenticity." To determine whether a show was cast based on the story's "authenticity," one can compare the story the film was based on with the cast's composition, or examine the composition of the cast with regard to the movie's setting. For example, casting Idris Elba²² in the role of the Norse God Hemidall in the film *Thor* triggered a maelstrom of controversy. According to casting critics, because Hemidall is the "whitest of the gods," casting a black actor to play the role of Hemidall was disharmonious with the film, the comic book series, and Norse mythology.²³ Despite the casting backlash, Elba acknowledged the casting as a positive sign of changing times.²⁴

The virulent reaction to Elba's casting seems odd, considering minorities

22. *Idris Elba*, IMDB, http://www.imdb.com/name/nm0252961/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Idris Elba is a black British actor who has worked in film, television, and theatre in both the United Kingdom and the United States.

23. Sam Jones, *Idris Elba Defends Thor Film Role*, THE GUARDIAN (Apr. 27, 2010, 12:36 PM), <http://www.theguardian.com/culture/2010/apr/27/idris-elba-thor-race-debate> (noting that one film critic of the film posted that adhering to political correctness has gone too far and their anger with the casting was of a matter of principle. "Norse deities are not of an African ethnicity! . . . It's the principle of the matter. It's about respecting the integrity of the source material, both comics and Norse mythologies." Elba reportedly responded to the critics with a statement that reflected an interesting juxtaposition of one's ability to dispel reality in a fantastical world. "Thor's mythical, right? Thor has a hammer that flies to him when he clicks his fingers. That's OK, but the colour of my skin is wrong?").

24. *Id.* (stating that even though he does not share physical characteristics with the Norse people, Elba believes "it's a sign of the times for the future. [He] thinks we will see multi-level casting . . . and . . . that's good.").

are rarely cast in roles that would typically go to Caucasian actors. More often than not, the opposite occurs, where a Caucasian is cast in a role that should go to a minority under the “authenticity” argument. For example, *Avatar: The Last Airbender* received considerable controversy for casting white actors in its lead roles.²⁵ *Avatar: The Last Airbender* is a film adapted from a popular cartoon. The cartoon has heavy Asian and Inuit influences: it takes place in an Asian-influenced world, where the characters eat with chopsticks, use kung-fu, wear kimonos, and view traditional Chinese paintings and writings.²⁶ Despite the obvious Asian influence, when the official breakdown for the film was released, it called for “Caucasians or any other ethnicity.”²⁷ This particular wording quickly angered the public, as the breakdown deviated significantly from the standard practice of calling for “all ethnicities.”²⁸ Paramount Pictures producer Frank Marshall stated that the wording of the casting was “poor and offensive,” but it was done by a third-party casting agency and not by Paramount pictures.²⁹ According to the producer, the official casting call

25. Roger Ebert, *Extraordinary Measures* (Jan. 20, 2010), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20100120/REVIEWS/100129996> (stating *Extraordinary Measures* is a movie where real life Asian American scientist Dr. Yuan-Tsong Chen, the man who discovered the cure for the Pompe disease, was replaced with Dr. Robert Stonehill and played by Caucasian actor Harrison Ford).

26. Margret Cho, *The Last Airbender is the Last Straw*, (Apr. 14, 2009, 11:51 AM), <http://www.margaretocho.com/content/tag/race/>.

27. Interview with Russell K. Robinson, UCLA Law Professor (Oct. 9, 2009), available at <http://www.racebending.com/v4/interviews/interview-with-professor-robinson/> (stating that this was the casting agencies’ way of ensuring whites also tried out for these parts given the Pan-Asian influences of the cartoon. He goes on to say that it is interesting that they lead with Caucasians instead of stating it was open to all ethnicities and not just Asians. “It’s a very blatant reminder, and it’s hard to see—in any other context in this day in age—[a job listing] saying ‘whites preferred. I think most of us believe that we are beyond that. It is striking to see it on the page. They softened it by saying ‘and others,’ but by leading with Caucasian they are indicating a preference. We prefer whites but we’ll take others as well, we’re [specifically] mentioning whites, only”).

28. Jordan Hoffman, *Interview with the Racebender*, UGO (Apr. 1, 2010), <http://www.ugo.com/movies/interview-with-the-racebender?cmpid=sm>.

29. Jordan Hoffman, *Frank Marshall Clarifies Key Issue in Racebending Controversy*, UGO, (Apr. 8, 2010) <http://www.ugo.com/movies/frank-marshall-clarifies-key-issue-in-racebending-controversy> (quoting producer Frank Marshall as saying, “[I] agree that this casting notice was poorly worded and offensive. However, it was not written nor distributed by the production, or the studio, but by a local extra casting entity that did not consult with either. Ultimately, we all take responsibility for not doing a more thorough job monitoring these frequently used third-party agents and Paramount has since been in regular dialogue with Asian American advocacy groups

did not state possible ethnicities for any of the characters.³⁰ However, according to the website Racebending.com, the original casting call distributed on the official website for *The Last Airbender*, was the “poorly worded” version.³¹ In sharp contrast to the main character casting, when casting background or non-essential actors for the movie, commonly known as extras, the casting called for individuals of ethnicities other than Caucasian.³² These individuals were asked to come dressed in traditional cultural ethnic attire.³³

Despite Paramount Pictures’ statement that the breakdowns handed out in relation to this movie were the actions of an unrelated third party and not supported by the company, all of the lead roles for this movie were initially filled by Caucasian actors.³⁴ The casting decisions drew a firestorm of controversy, which resulted in replacing one of the lead characters with Indian actor Dev Patel. The result was three white leads as the heroes of the story, leading the three world tribes against one tribe of villains, led by the only minority lead actor.³⁵

The Hunger Games, a film that has gained Hollywood notoriety along

including the Japanese American Citizens League and the Media Action Network for Asian Americans to ensure that such a mistake does not happen in the future.”).

30. See *id.*; see also Appendix page II-III.

31. See Lorraine Sammy, *Caucasian or Any Other Ethnicity*, RACEBENDING (Oct. 20, 2009) <http://www.racebending.com/v4/campaigns/airbender/caucasian-or-any-other-ethnicity/> (claiming that Gail Levin was originally Paramount’s casting chief, which conflicts with Frank Marshall’s declaration that the breakdown was not affiliated with Paramount Pictures); see also Appendix page IV for an advertisement regarding the casting.

32. *Id.* (stating that one casting agency in Philadelphia called for people who were near Eastern, Middle Eastern, Asian, Mediterranean or of a Latino ethnic group).

33. *Id.* When a black woman asked if she was at a disadvantage because she was not wearing traditional attire the casting director replied, “It doesn’t mean you’re at a disadvantage if you didn’t come in a big African thing. But guys, even if you came with a scarf today, put it over your head so you’ll look like a Ukrainian villager or whatever.”

34. Marissa Lee, *The Last Airbender—A Timeline of the Protest*, RACEBENDING, (Feb. 18, 2011), <http://www.racebending.com/v3/press/the-last-airbender-timeline/>. The four leads were initially filled by Noah Ringer, Jesse McCartney, Nicola Peltz and Jackson Rathbone. Noah Ringer, young and inexperienced Caucasian actor, was cast to play the role of the main character Aang. Meanwhile, another inexperienced Korean American actor of approximately the same age was also cast in the movie to play a minor role only known as “Earthbender boy.”

35. Casey Tran, *Is “The Last Airbender” Just Another Racebender?*, HARDBOILED (Mar. 2010), available at <http://hardboiled.berkeley.edu/archived-issues/issue-13-3/is-the-last-airbender-just-another-racebender/>; see also Appendix page VI for a comparison of the cartoon characters and the actors cast in the film.

the same lines as the *Harry Potter* and *Twilight* franchises, is based on Suzanne Collins' best-selling trilogy about a dystopian world where children from different districts are thrown in an arena and forced to kill each other. The lead character, Katniss, is described in the book as a girl with olive-skin, gray-eyes, and straight dark-hair.³⁶ Many believe that Katniss's description was left intentionally vague so the reader could relate to the character.³⁷ However, when the casting agency was left with the job of finding an actress to play the role, it released a breakdown that stated "she should be Caucasian, between ages [fifteen] and [twenty], who could portray someone 'underfed but strong,' and 'naturally pretty underneath her tomboyishness.'"³⁸ Moviefone phrased the issue perfectly: "the question isn't, 'Is Katniss white?' but 'Could Katniss possibly be anything other than white?'"³⁹ Actress Jennifer Lawrence,⁴⁰ who is not gray-eyed, olive-skinned, or dark-haired, was cast for the lead role. From the start, the casting agency excluded girls of ethnicities other than white, without giving them the chance to audition. While the general public may have anticipated that the lead role would go to a white person, a number of outlets seemed ready for Hollywood to change its casting practices.⁴¹

36. Katey Rich, *Jennifer Lawrence May Be up for Hunger Games Lead, but There's Controversy Too* (Mar. 2, 2011, 9:10 AM), <http://www.cinemablend.com/new/Jennifer-Lawrence-May-Be-Up-For-Hunger-Games-Lead-But-There-s-Controversy-Too-23439.html>.

37. *Id.*

38. Ted Casablanca & Taryn Ryder, *The Hunger Games Casting Controversy! Looking for White "Underfed" Girls* (Mar. 2, 2011, 3:04 PM), <http://www.eonline.com/news/228932/the-hunger-games-casting-controversy-looking-for-white-underfed-girls>.

39. *Id.*

40. *Jennifer Lawrence*, IMDB, http://www.imdb.com/name/nm2225369/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Jennifer Lawrence is a white American Actress who works primarily in films.

41. Casablanca & Ryder, *supra* note 38 (stating "true, when we read it we imagined the character to probably be Caucasian, but don't you think some of it was purposefully left open to interpretation? . . . We say let's look outside of the Hollywood cookie cutter box!"); see also Ted Casablanca & Taryn Ryder, *Let's Cast The Hunger Games! Who Should Play Katniss Everdeen?* (Mar. 3, 2011, 6:40 AM), <http://www.eonline.com/news/229014/let-s-cast-the-hunger-games-who-should-play-katniss-everdeen> (stating "we simply suggested that maybe the casting for Katniss Everdeen, the arrow-packin' teen female lead, shouldn't just be between somebody white or . . . white"); Jen Yamato, *Oh No They Didn't: The Hunger Games Casting for 'Underfed' White Teenage Girls*, (Mar. 01, 2011, 7:40 PM), <http://www.movieline.com/2011/03/oh-no-they-didnt-the-hunger-games-casting-for-underfed-white-teenage-girls.php> (stating "[t]here aren't many good reasons for excluding non-white performers from consideration based on Collins' books and characters, aside from the desire to appeal to the dominant paradigm in the film's

Even if one disregards a film's breakdown, the trend of favoring white actors is easy to spot by examining the films themselves and the stories on which they were based. The movie *21* is another film that faced a backlash due to questionable casting. The movie is based on the best-selling book *Bringing Down the House*, which reiterates the true story of a team of primarily Asian-American MIT students who were coached by an Asian-American professor on how to use their math skills to gain an edge in blackjack at casinos.⁴² However, when the film was cast, all of the lead roles were given to white actors, and minority actors were relegated to minor and supporting roles.⁴³ Despite the true story behind the movie, the producer decided against casting Asians in the main roles. The producer, Dana Brunetti, wrote that he "would have LOVED to cast Asians in the lead roles, but the truth is, we didn't have access to any bankable Asian-American actors that we wanted . . ."⁴⁴ This similar sentiment was

marketing materials"); Scott Ross, "*Hunger Games*" Looking at Lawrence, Steinfeld or Breslin, NBC CHICAGO (May 30, 2012, 1:41 PM), <http://www.nbcchicago.com/blogs/popcornbiz/The-Hunger-Games-Eyes-Lawrence-Steinfeld-and-Breslin-for-Lead-117316703.html> (stating "[l]ook, Lawrence, Steinfeld and Breslin [actresses who were in the running for playing the lead] are all fine actresses, each with an Oscar nomination on her resume, but isn't it about time Hollywood stops whitening everything? Haven't we learned anything from *The Last Airbender*?"); Darren Franich, '*Hunger Games*': Is Rue Black? And Should Race Matter When You're Casting the Movie, ENTERTAINMENT WEEKLY (Oct. 14, 2010, 4:12 PM), <http://shelf-life.ew.com/2010/10/14/hunger-games-is-rue-black-and-should-race-matter-when-youre-casting-the-movie/> (stating "[h]ow important is it that Rue [a supporting character in the books described as having satiny brown skin] be played by an African American actress? . . . it feels like there should be some color in this movie, if only to avoid something like the color-bleached *Last Airbender* or the caucasified *Earthsea* . . . Would you be offended if they didn't cast a black actress for Rue? Doesn't big screen sci-fi/fantasy just need more non-white actors on principle?").

42. Ed Moy, *Does Hollywood 'White-Wash' the Casting of Asian Characters in Movies?*, EXAMINER.COM (July 29, 2009), <http://www.examiner.com/asian-american-movie-in-los-angeles/does-hollywood-white-wash-the-casting-of-asian-characters-movies>; see also BEN MEZRICH, *BRINGING DOWN THE HOUSE: THE INSIDE STORY OF SIX MIT STUDENTS WHO TOOK VEGAS FOR MILLIONS* 252-53 (2002).

43. *MANAA's Response to Letter from Paramount on The Last Airbender*, MANAA (Apr. 9, 2009), <http://www.manaa.org/labmanaaresponse.html> [hereinafter *MANAA's Response Letter*]. In a letter to Paramount Pictures, Media Action Network for Asian Americans (MANAA) stated that in dealing with Hollywood over the past seventeen years it has become familiar with the way Hollywood justifies its casting of white actors over actors of color and calling it diversity. One such way is by casting individuals of color in supporting roles but maintaining a level of discrimination by casting whites for lead roles.

44. *Controversy Still Surrounds DVD Release of Movie "21"*, MANAA (last visited Nov. 22, 2011), <http://www.manaa.org/twentyonedvd.html> [hereinafter *DVD Release of Movie "21"*] (quoting Dana Brunetti to say that if he knew how upset the

reiterated to Professor Robinson when his 2006 paper received media attention. According to a casting director he spoke with, Hollywood is looking for more diversity, but as “Asian-American culture does not support acting,” there are not any “qualified” actors from which to choose.⁴⁵

Likewise, it appears that there are not any “qualified” Middle Eastern actors to choose from, as Jake Gyllenhaal⁴⁶ was chosen to play the lead role of Dastan in the film *Prince of Persia*.⁴⁷ The video game on which the movie is based takes place in ancient Iran and features a heroic Middle Eastern, Muslim character that is caught between the forces of good and evil.⁴⁸ Unfortunately, despite the origins and history of the story, none of the principle actors cast were of Iranian, Middle Eastern, or of Muslim decent.⁴⁹ Independent filmmaker Jehanzeb Dar commented on the film’s casting stating, “[the part of Dastan] really needed to go to someone who’s Persian. It’s not only insulting to Persians, but it’s also insulting to white people. It’s saying white people can’t enjoy movies unless the protagonist is white.”⁵⁰

As disturbing as it may be, perhaps this sentiment is true. Hollywood persists to favor casting Caucasians, even in instances where those of another racial category are better suited to take a particular role. In 2011, Warner Bros began deliberations to take *Akira*, an old and popular

Asian American community would have been about his casting choices he would have just chosen to make a different film); *see also* Moy, *supra* note 42. Jim Sturgess was cast as the lead in this movie, but was relatively unknown at the time.

45. Interview with Russell K. Robinson, UCLA Law Professor (Oct. 9, 2009), available at <http://www.racebending.com/v4/interviews/interview-with-professor-robinson/045>; *see also* Roger Ebert, *What Color Were Zuzu’s Petals in “It’s a Wonderful Life”?* *Easy!*, ROGEREBERT.COM (Dec. 23, 2009), <http://www.rogerebert.com/answer-man/what-color-were-zuzus-petals-in-its-a-wonderful-life-easy> (protesting that it was illogical for Paramount and director M. Night Shyamalan go out of their way to offend fans when there are many Asian actors capable of playing these roles).

46. *Jake Gyllenhaal*, IMDB, http://www.imdb.com/name/nm0350453/?ref_=nv_sr_1 (last visited Feb. 5, 2014). Jake Gyllenhaal is a white American actor who works primarily in films.

47. *Prince of Persia: The Sands of Time*, IMDB, <http://www.imdb.com/title/tt0473075/> (last visited Jan. 22, 2014).

48. Chris Lee, *A Whitewash for ‘Prince of Persia Sand of Time’ and ‘The Last Airbender’*, L.A. TIMES (May 23, 2010), <http://articles.latimes.com/2010/may/23/entertainment/la-ca-racebender-20100523>.

49. *Id.*

50. Katherine Thomson, *‘Prince of Persia’ & ‘Airbender’ Attacked For Perceived Whitewashing*, HUFFINGTON POST (Apr. 25, 2010), http://www.huffingtonpost.com/2010/05/25/prince-of-persia-airbende_n_589116.html.

Japanese anime and manga, and turn it into a live action movie.⁵¹ Despite Akira's origins, Warner Bros decided to keep the original names of the story's characters, but looked to Caucasian actors and actresses for the lead roles.⁵² In 2011, the lead roles of Ky Reed, Lady Miyako, and Kaneda were reportedly assigned to Caucasian actors Kristen Stewart, Helena Bonham Carter, and Garrett Hedlund, respectively.⁵³

Last, the oddity of casting compositions is apparent within television shows that portray the day-to-day lives of characters in urban areas and states with typically high minority populations. HBO's series *Girls* was originally promoted as a modern show for this generation's twenty-something women.⁵⁴ However, despite being a show for young women of the modern age and taking place in New York City, it suffers from a complete lack of diversity.⁵⁵ In fact, while the story line was created to appeal to modern thinking, the show's casting has followed in the antiquated footsteps of other programs set in New York City, such as *How I Met Your Mother*, *Sex in the City*, *Friends*, and *Gossip Girl*.⁵⁶ Somehow, in one of the most diverse cities in the country, the perception persists that the characters in these shows all continually live without having any close friends who are also people of color.⁵⁷ Similarly, AMC's television series

51. Mike Bracken, *Fans Already Protesting the White-washing of 'Akira' Cast* (Mar. 23 2011, 5:00 PM), <http://blog.moviefone.com/2011/03/23/akira-movie-protests/>. The project was stalled in 2012, but may be starting up again; see Justin Kroll, *Jaume Collet-Serra Returns to Direct 'Akira' (Exclusive)*, VARIETY (Aug. 1, 2013, 5:10 PM), <http://variety.com/2013/film/news/akira-jaume-collet-serra-1200571854/>.

52. Marissa Lee, "Akira" Adaptation Courts White Actors (Mar. 22, 2011), RACEBENDING, <http://www.racebending.com/v4/featured/akira-adaptation-courts-white-actors/> (stating that Warner Brothers is in the works to create a live-action adaption of the Japanese Anime and Manga Akira). Forerunners for the lead roles of Tetsuo and Kaneda are white male actors: Garrett Hedlund, Michael Fassbender, Chris Pine, Justin Timberlake and Joaquin Phoenix, Robert Pattinson, Andrew Garfield and James McAvoy.

53. *Akira*, IMDB, <http://www.imdb.com/title/tt1134795/> (last visited Jan. 22 2013).

54. Dodai Stewart, *Why We Need to Keep Talking About the White Girls on Girls*, JEZEBEL (Apr. 19, 2012), <http://jezebel.com/5903382/why-we-need-to-keep-talking-about-the-white-girls-on-girls>.

55. Jon Caramanica, *Broadcasting a World of Whiteness*, N.Y. TIMES (Apr. 25, 2012), http://www.nytimes.com/2012/04/29/arts/television/hbos-girls-is-hardly-the-only-example-of-monochromatic-tv.html?_r=0.

56. See Stewart, *supra* note 54.

57. Alex Moaba, *Lena Dunham, 'Girl' Creator, Addresses Race Criticisms on 'Fresh Air'*, HUFFINGTON POST (Apr. 7, 2012), http://www.huffingtonpost.com/2012/05/07/lena-dunham-fresh-airgirls_n_1496780.html.

The Walking Dead, which takes place near Atlanta, has continually held surprisingly few minorities in the roles of either primary characters or zombies.⁵⁸ This casting choice is both surprising and inconsistent with Atlanta's demographics, which has a minority population of approximately 57%.⁵⁹ Perhaps more startling is that until its fourth season, the show continually killed off its previous black male character once a new one arrived.⁶⁰

2. Marketability

Television and movies are multi-billion dollar industries.⁶¹ One feature film's production may generally cost upwards of \$78 million to make.⁶² Production companies take large risks through high costs for every movie they make with the hope of reaping substantial profits. As such, production companies often consider their bottom line when it comes to casting. They primarily focus on how accessible a program will be to whites, since they comprise the majority of America's population.⁶³ This logic fails to take into account the fact that African Americans and Latinos are twice as likely to go to the movies as whites.⁶⁴ Film companies are apprehensive about

58. Chris Kirk, *The Walking Dead, Season 3 The Walking Dead Has Risen from the Dead*, SLATE (Dec 3, 2012, 12:30 PM), http://www.slate.com/articles/arts/tv_club/features/2012/the_walking_dead_season_3_recaps/week_8/the_walking_dead_review_season_3_episode_8_made_to_suffer_recap.html.

59. *State & County QuickFacts: Atlanta (city), Georgia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/13/1304000.html> (last visited Jan. 22, 2014).

60. Kirk, *supra* note 58.

61. *All Time Box Office*, BOX OFFICE MOJO, <http://boxofficemojo.com/alltime/> (last visited Jan. 22, 2014).

62. Ryan Nakashima, *Hollywood and Big Budget Movies: Is the Love Affair Over?*, HUFFINGTON POST (Sept. 9, 2011, 7:42 PM), http://www.huffingtonpost.com/2011/09/17/hollywood-big-budget-movies_n_967559.html. The top grossing movie of all time for both domestic and international revenue is *Avatar*, which had an approximate budget of \$500 million. The highest grossing movie for opening weekend both domestically and worldwide is *Harry Potter and the Deathly Hallows*, which had a production budget of approximately \$125 million. The top-grossing movie that spent multiple consecutive weekends at number one was *Titanic* which had a production budget of \$200 million. See Rebecca Keegan, *How Much Did Avatar Really Cost?*, VANITY FAIR (Dec. 22, 2009, 11:48 AM), <http://www.vanityfair.com/online/oscars/2009/12/how-much-did-avatar-really-cost>.

63. Jesse Algeron Rhines, *BLACK FILM/WHITE MONEY* (1996).

64. Karen Grigsby Bates, *Minorities at the Movies Fill Seats, But Not Screens*, NPR (June 23, 2011, 3:06 PM), <http://www.npr.org/2011/06/24/137374242/minorities->

having a minority lead actor as opposed to a white lead actor when they take their movies overseas, which suggests that a white actor is more centrally acceptable across an international platform than an actor of any other race.⁶⁵ According to production companies, it is more financially responsible to hire white actors over actors of other races.

When deciding the makeup of a cast, generally speaking, the more important the role, the more likely the casting decision will be micromanaged by a higher-ranking executive.⁶⁶ Studio executives will sometimes instruct those lower on the casting ladder to choose actors who will have the greatest level of marketability for lead and significant supporting roles. Even when it is not explicitly stated, these actors are often Caucasian because production companies believe that Caucasians will ensure that their works are applicable to a wider audience.

This trend applies not only to the casting of the lead characters, but also to the casting of romantic couples. Production companies have been wary of hiring minority leads for romantic relationships as well as creating interracial relationships. The companies fear that many white Americans would be less likely to support a film with interracial romantic leads. Production companies are especially afraid of hiring two minority leads for these roles because they fear that the film will lose its central appeal to all audiences.⁶⁷ In effect, it is believed that if a film has two African American leads, then the film will be seen as a “black” film and not a film for the masses.⁶⁸ On the other hand, if the film features two white leads, then the film could be seen as being universally acceptable to all. This became especially evident with the casting of the female lead in the 2005 film *Hitch*. African-American Actor, Will Smith, was cast as the lead male; however, the production company took aims to ensure that the lead female

at-the-movies-fill-seats-but-not-screens.

65. Robinson, *supra* note 6, at 8-9.

66. *Id.* at 6.

67. Patrick Goldstein, *Marketing the Color Black: Strategies for ‘Crossover’ Films Fail to Stifle Charges of Racism*, L.A. TIMES (Apr. 18, 1989), http://articles.latimes.com/1989-04-18/entertainment/ca-1965_1_crossover-films-fail-studio-market.

68. Allison Samuels, *Why Can’t a Black Actress Play the Girlfriend?* NEWSWEEK (Mar. 13, 2005, 7:00 PM), <http://www.newsweek.com/why-cant-black-actress-play-girlfriend-115041> (quoting Nia Long as saying “two black characters equals a black film and not just a movie about two people”); *see also* Goldstein, *supra* note 66 (quoting Keenen Ivory Wayans as stating that MGM/UA sold their film “I’m Gonna Get You Sucka” as a black film instead of just as a comedy. Producer Dale Pollock also states “[i]t’s unfortunate that just because you have prominent black actors in a film that it automatically gets classified as a black film.”).

role was not given to an African-American female.⁶⁹ Instead, the role was cast to Eva Mendez, who was seen as a more favorable alternative between hiring a black or white actress.⁷⁰ Nonetheless, even Eva Mendes has commented about the fact that she is readily cast as the love interest for African-Americans but not white males; she attributes this to the perceived apprehension regarding interracial pairings.⁷¹

The 1993 film *Pelican Brief* is another example of corporate apprehension concerning interracial couples on film.⁷² In the John Grisham novel on which the film was based, a law student runs for her life after discovering evidence of a conspiracy, but then meets a journalist who helps her. While the book focuses on uncovering the validity of the conspiracy and not the relationship between the main characters, the two protagonists begin to create a more romantic relationship. In the film-adapted version, the lead roles were played by African-American Actor Denzel Washington and Caucasian Actress Julia Roberts.⁷³ Unlike their literary counterparts, the two main characters in the film seemed to keep their relationship strictly platonic. However, the apparent aversion the American public is perceived to have against interracial couples is not as prevalent as the industry would have one believe. In one interview, Julia Roberts

69. Angela Onwuachi-Willig, *There's Just One Hitch, Will Smith: Examining Title VII, Race, and Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia*, WIS. L. REV. 319, 320 (2007). (recording Smith himself commenting on the filmmakers' casting decisions, noting how they avoided casting a black woman as the movie's female lead because they feared the film would be labeled a "black movie," which could make it less profitable, and avoided casting a white woman as the movie's female lead because they feared that such a coupling would offend audiences in the United States. Smith proclaimed that "[t]here's sort of an accepted myth that if you have two black actors, a male and a female, in the lead of a romantic comedy, that people around the world don't want to see it . . .").

70. *Id.* at 320 (providing that "these days African American leading men tend to be cast opposite Latinas instead of black actresses" in a way that "is meant to reflect-perhaps even flatter- a society that increasingly sees itself as multicultural"); see also Omayra Zaragoza Cruz, *Easy Lover: Calculating the Upside of Eva Mendez*, POPMATTERS (Apr. 5, 2005), <http://www.popmatters.com/column/cruz050406/>; accord Greg Morago, *Still Taboo? The Racial Divide in Film and TV Has Yet to Close*, HARTFORD COURANT (Mar. 25, 2005), http://articles.courant.com/2005-03-25/features/0503250772_1_black-men-white-women-white-woman.

71. Onwuachi-Willig, *supra* note 69, at 331; see also Cruz, *supra* note 70.

72. Robinson, *supra* note 6, at 70-71; see also Onwuachi-Willig, *supra* note 69, at 329. *Contra Inside the Actor's Studio: Julia Roberts* (Bravo television broadcast July 27, 1997) (showing Julia Roberts as she commented that while she advocated some kind of romance between the two lead characters, Denzel Washington opposed it because he felt it would be too soon for his character to go after her since Robert's character lost her dad less than a month before their meeting).

73. *THE PELICAN BRIEF* (Warner Bros. 1993).

comments that random people would regularly ask her why she did not kiss Denzel's character in the film.⁷⁴ She goes on to state that she really wanted to kiss him and that based on the location of the last scene, the two characters became lovers.⁷⁵

In spite of production companies' views on how to ensure a successful film, it is actually very hard to predict what will make a movie a hit. Robinson argues that, "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."⁷⁶ Factors such as the current economic climate, the manner in which the film is advertised, the film's release date, and the film's genre all go beyond cast determinations and are indicators of how a film fares at the box office. Indeed, at one time, many filmmakers did not want to touch films that we now know as blockbusters, including *The Godfather*,⁷⁷ *Dances with Wolves*,⁷⁸ and *Silence of the Lambs*.⁷⁹ Film critics initially predicted that *Titanic*, *My Big Fat Greek Wedding*, and *Brokeback Mountain* would fail at the box office.⁸⁰ Yet despite initial apprehension and grim projections, each of these films went on to win at least one Academy Award, with the exception of *My Big Fat Greek Wedding*, though it was nominated.⁸¹ Given Hollywood's shaky record of accomplishment for pinning down the recipe for instant movie success, it seems equally unsound to believe that casting a minority as a lead would, by itself, doom a picture to failure.

While the United States was built on an apartheid system, we currently hold ourselves out to be a land of equality for all. A recent New York Times article reports that in the 2010 census, approximately 3% of the U.S. population considers themselves multiracial.⁸² Furthermore, interracial

74. *Inside the Actor's Studio: Julia Roberts*, *supra* note 71.

75. *Id.*

76. Robinson, *supra* note 6, at 57.

77. *See id.* at 58.

78. *See Inside Story: Dances With Wolves* (Biography television broadcast Aug. 16, 2011).

79. *See Inside Story: The Silence of the Lambs* (Biography television broadcast Sept. 8, 2010).

80. Robinson, *supra* note 6, at 58-59.

81. *Nominees & Winners for the 75th Academy Awards*, THE OSCARS, <http://www.oscars.org/awards/academyawards/oscarlegacy/2000-present/75nominees.html> (last visited Jan. 19, 2014).

82. Susan Saulny, *Census Data Represents Rise in Multicultural Population of Youths*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/2011/03/25/us/25race.html?ref=susansaulny>.

marriages increased to 9% in 2009.⁸³ Both of these trends are purported to be on the rise.⁸⁴ According to the 2012 census, 33.3% of the United States population is comprised of minorities.⁸⁵ Latinos or Hispanics of any race are currently the largest minority group, making up 16.9% of the population.⁸⁶ Despite these numbers, it is unclear why production companies favor obvious prejudice in one of the most popular mediums of entertainment in the world.⁸⁷ Many individuals have favorably remarked that our society is constantly inundated with other races and cultures all the time.⁸⁸ In America, it would take less than a day to listen to hip-hop on the radio; take a martial arts class where you call your teacher sensei; eat lunch at an authentic Mexican restaurant; and buy a small totem pole or dream catcher air freshener to hang in your car. Because the U.S. is experiencing a growing minority population, an increase in its multicultural population, and a rise in multiracial households, it seems incontestable that Hollywood would want to capitalize on these changes and produce films that appeal to diverse audiences. Spanish-language network channels like Univision and Telemundo, for example, are continuously met with high ratings among the Latino population,⁸⁹ and their shows contain elements that could make films more appealing for Latinos. From an economic standpoint, it may be argued that it would behoove Hollywood to diversify, but the status quo remains firmly intact.

Unfortunately, as a result of the capitalistic business approach to films, many of the roles available are reserved for white actors under the belief that audiences prefer them.⁹⁰ The 2011 Academy Awards reflect this

83. Haeyoun Park, *Who is Marrying Whom*, N.Y. TIMES (Jan. 29, 2011), <http://www.nytimes.com/interactive/2011/01/29/us/20110130mixedrace.html>.

84. See Susan S. Lang, *Interracial Relationships Are on the Increase in U.S., But Decline with Ages, Cornell Study Finds*, CORNELL CHRONICLE (Nov. 2, 2005), <http://www.news.cornell.edu/stories/Nov05/interracial.couples.ssl.html>; see also Saulny, *supra* note 81.

85. State & County QuickFacts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html>.

86. *Id.*

87. See Morago, *supra* note 69.

88. Goldstein, *supra* note 68 (quoting Jeff Dowd, a veteran Hollywood marketing strategist as saying “what studio executives don’t seem to understand is that the biggest segment of their audience—the youth crowd—is the most open of all to black subject matter. White kids in urban areas have no problem with black topics. They’re surrounded by black culture, whether it’s rap music, street fashions or basketball”).

89. Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 866 (2003) [hereinafter Baynes II].

90. Manohla Dargis & A.O. Scott, *Hollywood’s Whiteout*, N.Y. TIMES (Feb. 11,

preference for white actors in roles that could be easily played by minority actors. Some of the films nominated for awards focused on the recent financial crisis. These films contained themes of the mass unemployment and foreclosures faced by middle and lower class Americans.⁹¹ While the correlation between race and socioeconomic status has been well documented and demonstrates that minorities make up most of the lower socioeconomic population in this country, this was not reflected in any of these films.⁹² Instead, the films nominated for Best Picture for the 2011 Academy Awards were “more racially homogenous—more white—than the [ten] films that were up for best picture in 1940.”⁹³ In perpetuating a system that precludes individuals based on race alone, this is neither a surprising nor an uncommon fact. Furthermore, these actions do not only affect adults in their pursuit of their craft but child actors as well. In the 2011 People’s choice list of the “Top 25 Actors Under 25,”⁹⁴ only three of those listed were minorities.⁹⁵ Two of the three⁹⁶ are African American while the third⁹⁷ is multiracial.

Each year the Academy of Motion Picture Arts and Sciences gives out

2011), <http://www.nytimes.com/2011/02/13/movies/awardsseason/13movies.html>.

91. Emily Colette Wilkinson, *On Race, Class and the Hollywood ‘Whiteout’*, THE MILLIONS (Feb. 16, 2011, 6:00 AM), <http://www.themillions.com/2011/02/on-race-class-and-the-hollywood-whiteout.html>.

92. See John Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U.L. REV. 785, 797 (2009); c.f. Lia Epperson, *African Americans: The Rehnquist Court, the Resurrection of Plessy, and the Ever-Expanding Definition of ‘Societal Discrimination,’* in AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE 44 (Denise C. Morgan et al. eds., 2005) (stating that whites are more likely to attend rich sub-urban schools while African Americans are more likely to attend poor urban schools).

93. Dargis & Scott, *supra* note 90.

94. This is a list of the top twenty-five highest grossing actors and actresses under the age of twenty-five.

95. *People’s Choice Awards 25 Under 25: Hollywood’s Hottest Young Stars*, MOVIEFONE (Oct. 18, 2011), <http://blog.moviefone.com/2011/10/18/peoples-choice-awards-25-under-25-voting> (listing the 2011 25 under 25 list: Willow Smith, Jaden Smith, Elle Fanning, Chole Morte, Abigail Breslin, Joel Courtney, Saoirse Ronan, Taylor Lautner, Josh Hutcherson, Shailene Woodley, Emma Roberts, Jennifer Lawrence, Emma Watson, Kristen Stewart, Liam Hemsworth, Mia Wasikowska, Daniel Radcliffe, Lily Collins, Elizabeth Olsen, Vanessa Hudgens, Emma Stone, Rupert Grint, Julianne Hough, Zac Efron, Tom Felton).

96. Jaden Smith and Willow Smith are the children of prominent African American actors Will Smith and Jada-Pinkett Smith.

97. *Vanessa Hudgens*, IMDB, <http://www.imdb.com/name/nm1227814/bio> (last visited Nov. 25, 2011). (expressing the belief that Vanessa Hudgens is half Filipino and half Irish).

four “Oscars” for excellence in acting: Best Actor in a Leading Role, Best Actor in a Supporting Role, Best Actress in a Leading Role, and Best Actresses in a Supporting Role.⁹⁸ The 2002 Academy Awards were lauded as the turning point for the industry as Halle Berry and Denzel Washington each won an Oscar, Will Smith was nominated for an Oscar, and Sidney Poitier was bestowed with an honorary Lifetime Achievement Award. At the time, Tom Ortenberg, the president of Lionsgate, stated “I do think this will help end the pigeonholing that goes on for black actors, and other people of color and just help open people’s eyes in the corridors of power that old stereotypes don’t apply anymore.”⁹⁹ March 2, 2014 marked the year of the 86th annual presentation of the Oscars. In those eighty-six years, roughly 344 awards based on acting were handed out. Of those 344 awards, eight have gone to black actors;¹⁰⁰ seven to black actresses;¹⁰¹ three to Asian actors;¹⁰² one to an Asian actress;¹⁰³ three to Hispanic/actors;¹⁰⁴ and two to Hispanic/actresses.¹⁰⁵ In total, twenty-four out of 344 awards have gone to minority actors, or roughly 7%. Unfortunately, despite the high expectations that the country had for the 2002 Oscars, not much changed when it came to the industry as a whole. Many of the female minority artists who have won Oscars are still more limited than their white counterparts because of the dearth of racially defined roles. The African

98. *Nominees*, THE OSCARS, <http://oscar.go.com/nominations> (last visited Nov. 15, 2011).

99. Rick Lyman, *Hollywood Questions the Meaning of Its Historic Oscar Night*, N.Y. TIMES (Mar. 26, 2002), <http://www.nytimes.com/2002/03/26/us/hollywood-questions-the-meaning-of-its-historic-oscar-night.html>.

100. *List of Black Academy Award Winners and Nominees*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_black_Academy_Award_winners_and_nominees (last visited Jan. 4, 2014).

101. *Id.*

102. *List of Asian Academy Award Winners and Nominees*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Asian_Academy_Award_winners_and_nominees (last visited Jan. 4, 2014).

103. *Id.*

104. *See List of Latin American Academy Award Winners and Nominees*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Latin_American_Academy_Award_winners_and_nominees (last visited Jan. 4, 2014); *see also List of Hispanic-American (U.S.) Academy Award Winners and Nominees*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Hispanic-American_%28U.S.%29_Academy_Award_winners_and_nominees (last visited Jan. 4, 2014).

105. *See List of Latin American Academy Award Winners and Nominees*, *supra* note 103; *List of Hispanic-American (U.S.) Academy Award Winners and Nominees*, *supra* note 103.

American women who have won or were nominated for awards have often done so while embodying the stereotypical Hattie McDaniel framework as opposed to Halle Berry, thus blocking them from the more lucrative roles as the romantic leads.

However, Hollywood possibly knows its audience and understands just how much or little diversity it can throw into the system. When *The Hunger Games* casted three African Americans as peripheral characters in the film, it sparked a number of racist twitter comments. Two of the characters portrayed by black actors, Rue and Thresh, are described within the books as having dark brown skin. Yet, when fans saw the casting choices they tweeted¹⁰⁶ comments such as “why does Rue have to be black not gonna lie kinda ruined the movie” and “awkward moment when Rue is some black girl and not the little blonde innocent girl you picture.”¹⁰⁷ Since the casting of people of color for supporting roles inspired racist comments among American youth, the demographic targeted by this film, perhaps Debra Zane and the production company purposefully knew to limit the casting of the main characters to Caucasians in order to avoid a greater protest of the film.

B. Stereotyping and Supporting Roles for Minorities

While minority actors do not always head the list for lead roles, diversity works at its best when it comes to less profitable acting roles. Many minorities are often given roles in film and television that are either

106. These tweets are quoted as they were written, grammatical and spelling mistakes included. Those listed in the body of this paper were some of the least offensive statements; others, although not the worst, were of the ilk of “I just pictured darker skin, didn’t really take it all the way to black”; “How in the world are they going to make rue a freakin black bitch in the movie?!?!?!?! Lolol not to be racist buuuuut . . . I’m angry now ;o”; “some ugly little girl with nappy add hair. Pissed me off. She was supposed to be cute and at least remind her of Prim.”; “KK call me racist but when I found out rue was black her death wasn’t as sad.” See Dodai Stewart, *Racist ‘Hunger Games’ Fans Are Very Disappointed*, JEZEBEL (Mar. 26, 2012, 12:00 PM), <http://jezebel.com/5896408/racist-hunger-games-fans-dont-care-how-much-money-the-movie-made>; *Speak the Truth, Even if Your Shakes: Spoiler Warning: Sorry, I Couldn’t Avoid It*, ATRAPFORFOOLS, TUMBLR (Mar. 28, 2012), <http://atrapforfools.tumblr.com/post/20052467238/spoiler-warning-sorry-i-couldnt-avoid-it-this>.

107. See Stephanie Marcus, *‘The Hunger Games’ Actress, Amandla Stenberg, Responds to Racist Tweets About Rue*, HUFFINGTON POST (Mar. 28, 2012), http://www.huffingtonpost.com/2012/03/28/the-hunger-games-amandla-stenberg-respons-racists-tweets-rue_n_1386027.html; see also Stephanie Goldberg, *‘Hunger Games’ and Hollywood’s Racial Casting Issue*, CNN (Mar. 28, 2012), <http://www.cnn.com/2012/03/28/showbiz/movies/hunger-games-black-actors/index.html>.

stereotypical,¹⁰⁸ or for a supporting or recurring character.¹⁰⁹ Generally, Arabs or Muslims are often portrayed as terrorists, African Americans as criminals such as drug dealers, Latinos as criminals such as gang members, and Whites as victims or heroes.¹¹⁰ Hiring according to stereotypes leads to typecasting based on those stereotypes. While playing these types of roles can initially help an actor get her foot into the door, constantly being associated with these types of roles can consequently limit her career opportunities.¹¹¹ Many casting directors agree that once you become typecast, it is exceedingly difficult to break out from that mold, as the casting director would not think to offer you a role that deviates from that norm.¹¹²

Sadly, the decisions regarding whom to hire and for what roles are often predicated on society's perception of race, in contrast to the role the individual is to portray. It is partially because of society's acceptance of stereotypes that roles are casted based on them.¹¹³ In other words, Hollywood produces villains and victims that audiences will accept, and, in

108. See Diane J. Klein, *Latino Masculinities Under the Microscope: Stereotyping and Counterstereotyping on Five Seasons of CSI: Miami*, 3 FLA. INT'L U. L. REV. 395, 400 (2008) (showing that John Thompson developed what he called a stereotype commutation test. Charles Berg states that you apply this test by substituting another ethnicity for the role and if the role and all its nuances can still be portrayed accurately and with ease then the role may not be a stereotype but rather a dramatic or comic type. If another ethnicity cannot play the part and keep the same nuances of the character then it would appear that the role is relying on preconceived notions attached to that ethnic group to bring across the intended effect).

109. See Suzanne C. Ryan, *In Living Color, Most Stars Are White/Blacks, Asians, Latinos Still Playing Limited Roles on TV*, S.F. GATE (Nov. 29, 2002), http://articles.sfgate.com/2002-11-29/entertainment/17570618_1_asian-american-actors-american-television-actors-in-guest-roles; see also Ken Choy, *Diversity States for 2011-2012 TV Season*, WIDE LANTERN (June 20, 2011), <http://widelantern.com/2011/06/diversity-stats-for-2011-2012-tv-season/>.

110. See Tung Yin, *Through a Screen Darkly: Hollywood as a Measure of Discriminating Against Arabs and Muslims*, 2 DUKE F. L. & SOC. CHANGE 103, 105-07 (2010) (detailing how Muslims are often depicted as two dimensional, Koran quoting terrorists and that Whites are often shown to be the victims); Ediberto Roman, *Who Exactly Is Living La Vida Loca? The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 42-45 (2000) (discussing how Latinos and Latinas are often depicted as associated with gangs and violence); see also Baynes II, *supra* note 90, at 820-21 (stating that African Americans are often viewed negatively by television viewers).

111. Ezra W. Zuckerman et al., *Robust Identities or Nonentities? Typecasting in the Feature-Film Labor Market*, 108 AM. J. SOC. 1018, 1039 (2003).

112. *Id.* at 1019.

113. *Id.* at 1040.

doing so, they perpetuate social biases more than break them.¹¹⁴ However, in terms of the business aspect of producing films, these shows are simply making a profit by selling something that people will pay for; stereotyping brings an accepted level of reality to the picture.

So, if Idris Elba can play a Norse God, then why is it a problem when white actors play the parts of minorities? The answer is simple: very few roles are created for minority actors. The vast majority of roles are defined as for, and cast with, Caucasians. As opportunities for minorities are exceedingly rare, it is a significant problem when it appears that a minority actor should have the advantage for a role and yet a white person is cast. In essence, what has persisted is an industry where one has a greater chance to practice and make a living off of acting if that person is white. Hollywood continues to use a facially discriminatory employment practice to pigeon-hole some actors and exclude others. This fact is evident in the make-up of Hollywood today.

III. ANALYSIS

A. Title VII and the BFOQ Exception

The Civil Rights movement of the 1960s brought to light the level of inequalities that minorities faced because of their race. In response to the fact that many Americans were still being denied the opportunity to exercise certain fundamental rights, Congress passed the Civil Rights Act of 1964. The purpose of this Act was to remedy racial discrimination that still plagued the nation, and move towards eliminating prejudice.¹¹⁵ Title VII of this Act was created to respond to rampant levels of employment discrimination.¹¹⁶ Title VII made it unlawful to deprive a person of employment or employment opportunities based on race, color, religion, sex, or national origin. However, the purpose of Title VII was not to guarantee the employment of minorities.¹¹⁷ Title VII also was not created to allow a less qualified candidate to be chosen over candidates who are more qualified.¹¹⁸ The objective of Title VII was to create equal employment opportunities for all persons by removing barriers that discriminated based on race or other impermissible classifications.¹¹⁹ Through this Act, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to

114. See Yin, *supra* note 110, at 112.

115. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 433 (1966).

116. *Id.* at 431-33.

117. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

118. *Id.* at 436.

119. *Id.* at 431.

'freeze' the status quo of prior discriminatory employment practices."¹²⁰

Congress realized that there might be certain occupations where it is necessary to hire individuals based on certain facially discriminatory classifications. Often referred to as the bona fide occupational qualifications (BFOQ) exception, Title VII states that it is not unlawful to hire an employee based on their religion, sex, or national origin if it is a bona fide occupational qualification.¹²¹ "Occupational" is defined as meaning related to the job.¹²² Therefore, it must be "reasonably necessary to the normal operation of that particular business or enterprise" to justify a hiring technique that uses religion, sex, or national origin as a means to determine employment.¹²³ Congress was careful to narrow the permissible exception to those qualifications, which it thought would affect an employee's ability to do a job.¹²⁴ While employers may use this exception to justify their hiring practices, the courts stated that this defense is to be read and applied narrowly.¹²⁵

A discriminatory requirement implemented by an employer is considered job-related because the employer chose to make the requirement a condition of the employment.¹²⁶ Only through the use of a BFOQ exception may an employer justify the use of facially discriminatory employment practices. However, to qualify as a BFOQ exception, the facially discriminatory requirement must relate to the "central mission of the employer's business."¹²⁷ When an employer wants to invoke a BFOQ exception, it must show that the facially discriminatory practice relates to the job, the employee's ability to perform the duties of the job, and the essence of the business.¹²⁸ In the acting industry, for every instance where race is used as a means to determine employment, the person's race is considered to be a job-related condition for the employment.

B. Customer Preference

From a business perspective, it would appear that one of the biggest forces of maintaining the current casting system is customer preference. People have certain expectations, and it is the adherence to those

120. *Id.* at 430.

121. 42 U.S.C. § 2000e-2(e)(1) (2006).

122. *See Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

123. § 2000 e-2(e)(1).

124. *See Int'l Union*, 499 U.S. at 201.

125. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).

126. *See Int'l Union*, 499 U.S. at 201.

127. *See W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985).

128. *Id.*

expectations that drives sales. However, the courts have already established that customer preference is not an acceptable BFOQ exception. In *Diaz v. Pan American World Airways, Inc.*, Pan American World Airways (Pan Am.) refused to hire male stewards because its predominately male clientele preferred female attendants.¹²⁹ Pan Am. also believed that females were better suited for the non-mechanical functions of the job, such as reassuring passengers and making flights more pleasurable,¹³⁰ and that hiring males would decrease its level of performance.¹³¹ The court stated that the applicable test is “a business necessity test, not a business convenience test.”¹³² The court found that a BFOQ exception is not based on the preferences of clients, customers, co-workers, or the employer, but rather on the abilities that are necessary to perform the main functions or service of the industry.¹³³

Similarly, the popular clothing brand *Abercrombie and Fitch* was accused of hiring workers in order to maintain a specific appearance and adhere to customer preference. It was alleged that when Abercrombie hired minorities it relegated them to positions that kept them out of sight.¹³⁴ It also apparently fired minorities at higher rates than their white counterparts.¹³⁵ The reason for the job termination was often that the workers did not conform to the “look” that corporate officials desired.¹³⁶ As a result of these allegations, a class action suit alleging racial discrimination was filed against Abercrombie under the claim that “Abercrombie hires a disproportionately white sales force, favors white employees for the best positions, and discourages minorities from even applying for jobs.”¹³⁷ Rather than allowing the case to go through full

129. See *Diaz*, 442 F.2d at 389.

130. *Id.* at 387.

131. *Id.*

132. *Id.* at 388.

133. *Id.* at 388-89.

134. See Consent Decree at 7, *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Case Nos. 03-2817 SI, 04-4730 and 04-4731 (N.D. Cal. 2005), available at http://www.afjustice.com/pdf/20050422_consent_decree.pdf; Rebecca Leung, *The Look of Abercrombie & Fitch*, CBS NEWS (Nov. 24, 2004), http://www.cbsnews.com/stories/2004/11/24/60minutes/main657604.shtml?source=search_story.

135. See Consent Decree at 6, *Gonzalez*, Case Nos. 03-2817 SI, 04-4730, and 04-4731.

136. See Leung, *supra* note 135 (quoting a former employee as stating “[a] corporate official had pointed to an Abercrombie poster and told our management at our store, ‘[y]ou need to have more staff that looks like this.’ And it was a white Caucasian male on that poster”).

137. See Consent Decree at 4, *Gonzalez*, Case Nos. 03-2817 SI, 04-4730, and 04-

litigation proceedings, Abercrombie settled. As part of the consent agreement, Abercrombie had to commit to reach certain benchmarks through active recruitment of minorities for their stores and use minorities to model and advertise their clothing.¹³⁸ Abercrombie also had to pay a monetary award of forty million dollars plus interest, to be divided among the plaintiffs.¹³⁹

As emphasized by *Diaz* and *Abercrombie*, neither efficiency¹⁴⁰ nor customer preference¹⁴¹ are adequate excuses to justify employment discrimination. This begs the question, what distinguishes Hollywood from every other industry in the United States? Why is Hollywood able to use customer preference as a means of regulating employment even in circumstances where race is not essential to the character? Using the concept of customer preference not only prevents a person from attaining a job in acting, but also prevents her from obtaining the opportunity to show an employer that she *could be* right for a particular role. The effect of this race-based casting is that “with the exception of a limited number of stars, minority actors and actresses of all races are virtually invisible on screen.”¹⁴² One manner of recourse that actors have to increase their opportunities and stop this form of discrimination would be to bring a Title VII lawsuit against the industry.

C. Changing the Industry: Analyzing the Success of a Title VII Claim

If someone were to bring a lawsuit against the film industry, she would first have to decide whom she would choose to file suit against. As there are many different individuals involved in the process of deciding who will be casted as a character, this can be difficult. Potential parties to the lawsuit might include the individual who wrote the project, the studio executives who oversaw the whole process, the producer, the director, or the casting director, all of whom had a part in determining which types of people they would consider. She could also sue the talent agent who initially submitted the actors.

4731; *see also* Leung, *supra* note 135.

138. Consent Decree at 29, Gonzalez, Case Nos. 03-2817 SI, 04-4730, and 04-4731.

139. Consent Decree at 47, Gonzalez, Case Nos. 03-2817 SI, 04-4730, and 04-4731.

140. *See* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993).

141. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 2011); Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982).

142. *See* Onwuachi-Willig, *supra* note 69, at 334-35.

1. Disparate Treatment Theory

Once the opposing party is identified, the claimant will have to use a disparate treatment theory of discrimination. A disparate treatment theory is used for employment practices that negatively affect one group of people to a higher degree than other groups, and that do not have a legitimate, non-discriminatory purpose.¹⁴³ The casting rubric, which dramatically benefits whites more than non-whites, is one such employment practice. Under this theory, the plaintiff must show that she was a member of a suspect class, applied for the job, was rejected, and that the job stayed open or was given to someone less qualified.¹⁴⁴ At this point, the burden would shift to the defendant to provide a legitimate, non-discriminatory reason for rejecting the plaintiff.¹⁴⁵ Once the defendant provides a substantial non-discriminatory reason for its actions, the burden shifts back to the plaintiff who must show that the explanation provided by the defendant is a pretext.¹⁴⁶ If the plaintiff is able to show pretext for the defendant's employment actions, then she may win the case.

One of the arguments that could be used in a case like the above hypothetical is that Title VII specifically states that it is unlawful to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,"¹⁴⁷ and using race as a means of determining employment has violated this Act. As stated above, for the industry to show that the use of race is a permissible practice, it must be able to state that the use of race falls within the confines of a BFOQ exception. Congress has mandated that sex, religion, and national origin are the only permissible discriminatory hiring practices that will qualify under the BFOQ exception.¹⁴⁸ The BFOQ exception does not include race as a permissible hiring technique that is necessary for the normal operation of a particular business or enterprise. Therefore, using race as a means to determine whether a person can satisfy the needs of an acting position is an impermissible means of determining employment.

2. Class Action

To date, only one racial discrimination lawsuit has been brought against the television industry. Nathaniel Claybrooks and Christopher Johnson,

143. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

144. *Id.*

145. *Id.*

146. *Id.* at 804.

147. 42 U.S.C. § 2000e-2(a)(2) (2006).

148. § 2000e-2(e)(1).

two football players, filed a class action suit against ABC's *The Bachelor*.¹⁴⁹ The plaintiffs claimed that they and others applied and were denied an equal opportunity to play the role of *The Bachelor* or *The Bachelorette* because of their race.¹⁵⁰ The plaintiffs announced that with more than a combined total of twenty-three seasons, neither show has ever had a bachelor or bachelorette of color.¹⁵¹ The plaintiffs also allege that producers have kept minorities out of leading roles in an attempt to maintain their majority-white viewership and the advertisers that target that demographic.¹⁵² Meanwhile, the executive producer of the show, Mike Fleiss, stated that the reason for the lack of people of color on the show is not because of any discriminatory practices but because of a lack of applicants of color.¹⁵³ The plaintiffs believed that if they won, then the suit would serve as an example to help create shows that "will be inclusive, will be diverse, and will better reflect this country."¹⁵⁴ Unfortunately, the case was dismissed on First Amendment grounds.¹⁵⁵ The judge held that network producers have the right to craft and control the messages of their programs at will and could take into consideration any factors of their choosing.¹⁵⁶ In 2013, the producers announced they would have their first non-white bachelor.¹⁵⁷

3. Civil Advocacy Groups

Another option that may be utilized to challenge the way casting is done, is through groups like the National Association for the Advancement of Colored People (NAACP), the National Latino Media Council (NLMC), and Media Action Network for Asian Americans (MANAA). In the fall of 1999, these types of organizations were able to use their power to change casting practices used by television networks. When the new television

149. See *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012).

150. See Complaint at ¶ 3, *Claybrooks v. Am. Broad. Cos., Inc.* 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (No. 12-00388), 2013 WL 1435050 at *2.

151. *Id.* at 1.

152. *Id.* at 8.

153. See Lanford Beard, *Men Suing 'The Bachelor' Discuss Their Case*, ENTMT WEEKLY (Apr. 18, 2012), <http://insidetv.ew.com/2012/04/18/bachelor-lawsuit-explained/>.

154. *Id.*

155. See *Claybrooks v. Am. Broad. Cos., Inc.* 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012).

156. *Id.*

157. See Michael Starr, *ABC's 'The Bachelor' Chooses First Minority Star*, N.Y. POST (Aug. 6, 2013), <http://nypost.com/2013/08/06/abcs-the-bachelor-chooses-first-minority-star/>.

line-up for the 1999 season was announced, despite the introduction of twenty-six new shows, none of them featured a minority in any of their leading or secondary roles.¹⁵⁸ The National Council of La Raza organized a protest and called for its members to avoid watching television for the week of September 12.¹⁵⁹ Additionally, the NAACP threatened to boycott the television networks and proposed to file a lawsuit against ABC, NBC, FOX, and CBS for their violation of the 1934 Federal Communications Act.¹⁶⁰ The NAACP proposed to file their lawsuit under the proposition that the television networks received their licenses to broadcast from the FCC and are therefore mandated to broadcast in the public interest.¹⁶¹ With such a significant lack of minority presence on television, these companies violated their obligation to serve the public interest and thus violated the Communications Act.¹⁶² As a result of the public backlash these networks received for their lack of diversity, they met with the NAACP and came to an agreement, which caused an increase in the presence of minorities in the 2000 fall line-up.¹⁶³ Consequently, the NAACP never levied their threats against the television networks. However, it is possible that such tactics would work again. If the various civil advocacy groups were to band together to take on the overly racialized aspect of casting in Hollywood, in a manner similar to the way the NAACP fought against network television companies in the 1990's, it is possible that this form of employment prejudice could be eradicated.

IV. POLICY RECOMMENDATIONS

A. Watch Dog Groups

In addition to having advocacy groups challenge industry practices, another possible solution would be to develop and form a watch dog group with the express purpose of ensuring that the industry is maintaining equal opportunity practices. This company could conduct and maintain studies to ensure that the industry does not perpetuate its trend of only committing to diversity with regard to background and supporting roles. The group would have the ability to give out awards or further promote organizations that take strides to form a more representative perspective of the American population. The organization would also be charged with levying Title VII

158. See Baynes II, *supra* note 89, at 850.

159. *Id.*

160. See Greg Braxton, *NAACP Will Fight Network TV Lineups*, L.A. TIMES (July 12, 1999), <http://articles.latimes.com/1999/jul/12/news/mn-55184>.

161. *Id.*; see also 47 U.S.C. §§ 151-615b (2012).

162. Baynes I, *supra* note 10, at 342.

163. Baynes II, *supra* note 89, at 850-53.

lawsuits against companies that fail to provide equal opportunities to minority groups.

B. Colorblind and Multiethnic Casting

A further way of changing the casting system would be to use an alternate form of casting. Colorblind and multiethnic casting are both non-traditional methods casting directors can use to cast for various productions. Colorblind casting essentially asks the decision-makers to ignore the factor of race throughout the casting process. This way a person is judged in accordance with their skills rather than how well their race fits the prescribed role. By its nature, colorblind casting will not compromise the integrity of a production because it is the “casting of ethnic and female artists in roles in which race, ethnicity, or gender is not germane to the character’s or play’s development.”¹⁶⁴ This manner of casting would open opportunities to a wider variety of actors since they would not be automatically precluded from a role based on a factor that essentially has no relevance to the character. The ABC network series, *Grey’s Anatomy*, illustrates how effective colorblind casting is in creating a cohesive and believable cast of characters.

The popular TV series features a cast of diverse actors who live and work together in a hospital in Seattle. When producer Shonda Rhimes wrote the pilot, she was sure to omit ethnicities and last names from the roles, allowing any actor, regardless of race, to personify any character for which she wished to audition.¹⁶⁵ Currently in its tenth season, the cast consists of African Americans, Latinos, Caucasians, and Asians. These individuals are interwoven within the storyline without focusing or acknowledging race or ethnicity.¹⁶⁶ Instead, the show concentrates on the struggles of daily life (troubles with your significant other, family problems, and bad days) and the chaos inherent in working in a hospital. The idea behind the casting was to show the diverse face of America and depict it in a show where “color is more description than definition.”¹⁶⁷ The only restraint on casting within this show is that “drug dealers and pimps cannot be black.”¹⁶⁸

164. See Bonnie Chen, *Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theatre*, 16 HOFSTRA LAB. & EMP. L.J. 515, 519 (1999) (citing Harry Newman, *Casting a Doubt: The Legal Issues of Nontraditional Casting*, 19 J. ARTS MGMT. & L. 55, 56 (1989)).

165. See Matthew Fogel, *Grey’s Anatomy Goes Colorblind*, N.Y. TIMES (May 8, 2005), <http://www.nytimes.com/2005/05/08/arts/television/08foge.html>.

166. *Id.*

167. *Id.*

168. *Id.* (quoting one of the show’s writers, Dr. Zoanne Clark).

Even with families, race-based casting is not necessary, as is shown with multiethnic casting. Multiethnic casting, like colorblind casting, encompasses the idea of ignoring race when it comes to a role. However, multiethnic casting takes this to another level by using colorblindness to cast within a familial unit. Normally, race is used to help create the nuclear family. With multiethnic casting, a family would consist of individuals from varying racial or ethnic backgrounds, thus suggesting an adopted family or causing the audience to dispel their belief of genetics.¹⁶⁹ This is especially pertinent since adopted or multicultural families are not uncommon occurrences within the United States.¹⁷⁰ Multiethnic casting was used in ABC's 1997 network production of *Cinderella*.¹⁷¹

Cinderella is a popular children's fairy tale about a daughter who lives with her stepmother and stepsisters after her father dies. Cinderella is treated like a servant by her step-family. Through serendipity, she meets the prince who falls in love with her and whisks her away to live with him in the palace. In 1997, Whitney Houston¹⁷² produced a version of this story where she used multiethnic casting for the roles.¹⁷³ In this version of the fairy tale, African Americans play Cinderella, the fairy godmother, the queen, and one stepsister; Caucasians play the king, the stepmother, and one stepsister; and the prince is Filipino.¹⁷⁴ The executive producer, Neil Meron, stated that in using this casting style he sought to make sure that everyone could identify with the story.¹⁷⁵

169. See Gregory J. Peterson, *The Rockettes: Out of Step With the Times? An Inquiry Into the Legality of Racial Discrimination in the Performing Arts*, 9 COLUM.-VLA J.L. & ARTS 351, 360 (1985) (stating that in a fantasy it is not necessary to cast a family according to race. However, this may be less useful and more of a distraction if used biographical production).

170. See Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need Race or Color BFOQ?* 35 U.S.F. L. REV. 473, 518 (2001) (stating "even though directors might desire racial consistency among family members, it is hard to say that such discrimination is 'required'").

171. See *Much Ado About Nothing*, IMDB, <http://www.imdb.com/title/tt0107616/> (last visited Jan. 21, 2014) (showing that multi-ethnic casting was also used in the 1993 version of *Much Ado About Nothing*. In that film, African American actor Denzel Washington and multiracial actor Keanu Reeves play the parts of the brothers Don Pedro and Don John respectively).

172. Whitney Houston is an African American singer and actress.

173. *Cinderella*, IMDB, <http://www.imdb.com/title/tt0128996/> (last visited Jan. 21, 2014).

174. See Rick Kushman, *The Cast May Be Multiracial But the Messages Are Still Mixed*, SACRAMENTO BEE TV CRITIC, <http://www.csus.edu/indiv/t/tanakar/eng20/kushman%20cinderella.pdf> (last visited Nov. 15, 2011).

175. *Id.*

While colorblind or multiethnic casting would ideally open acting opportunities so that they are more inclusive, it would be a mistake to forget that the film industry is highly esoteric. Individuals rarely know the reasons why they did not receive the role for which they auditioned. Even without blatantly using race as an excuse, casting directors and production companies could grant preference to one person over another based on race.¹⁷⁶ Removing the racially discriminatory portion of casting allows individuals to audition for roles that they may otherwise have been excluded from. In this way, they can increase their chance of being selected by impressing the decision-makers with the breadth of their talent. However, it is also possible that auditions would simply be used as a means of fulfilling an arbitrary quota.¹⁷⁷

C. Exceptions

When Title VII was before Congress, some representatives brought a motion to include race as a BFOQ exception, explicitly referencing the movie industry's need to use race as a discriminating factor.¹⁷⁸ Even when given the example of casting the part of Othello¹⁷⁹ in Shakespeare's famous play, Congress consciously decided not to include race as a BFOQ exception.¹⁸⁰ Congress thought that the crux of Title VII was to eliminate racially discriminatory hiring practices, thus, allowing even a small exception for the movie industry would create an unwanted loophole in the provision.¹⁸¹ Courts have since followed suit in stating that Title VII prohibits racial discrimination of any kind.¹⁸²

However, perhaps in specific situations a very narrow BFOQ exception should be allowed for casting based on race.¹⁸³ One such exception would

176. See Frank, *supra* note 170, at 506 (stating "it is uncontroverted that in casting actors for particular parts, directors sometimes intentionally discriminate based on race").

177. See Ryan, *supra* note 109 (quoting Todd Boyd a professor of critical studies at the University of Southern California as saying "what's important is that people of color are represented in prominent and meaningful roles and not just included so as to fill an arbitrary quota").

178. See 110 CONG. REC. 2550 (1964) (statements by Rep. Huddleston and Rep. Williams) (amendment by Rep. William).

179. In this play, Othello is usually portrayed as a Black male.

180. See 110 CONG. REC. 7217, 7220 (1964) (statement by Sen. Clark and Sen. Case).

181. See 110 CONG. REC. 2556 (1964) (statement by Rep. Celler).

182. See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982); *Swint v. Pullman-Standard*, 624 F.2d 525, 534-35 (5th Cir. 1980).

183. See Frank, *supra* note 170, at 498-99 (quoting K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47 (2000)).

include casting for a historically based production such as a documentary or biography. For example, it would be more logical to have an African American play the part of Dr. Martin Luther King¹⁸⁴ or an Asian play the role of Kim Jong II than to have Caucasians portray those figures.¹⁸⁵ Films based in a pre-colonization period could fall under another exception. For example, HBO's *Game of Thrones* series is a fictional story based in a setting similar to medieval Europe. As a result, the choice to have an all Caucasian¹⁸⁶ cast makes sense, because it would be unlikely for various minority groups to have been involved in the fight for kingdoms during this era and in this geographical area. ABC's series *Once Upon a Time* also features an all-Caucasian cast.¹⁸⁷ Like *Game of Thrones*, *Once Upon a Time* is a fictional story. Unlike *Game of Thrones*, it involves fairy tale characters set in modern day Maine.¹⁸⁸ Consequently, an entirely white cast is unnecessary since it does not seem altogether unlikely and would not have taken away from the authenticity of the show, if one of the lead fairy tale characters were of a minority status.¹⁸⁹ Another exception could include casting for a homogenous geographical region. For example, if a film were to take place in a country like China, where the population is more than ninety percent Asian, it would make sense if many of the background characters were Asian. Accordingly, race could be used to ensure that a level of authenticity is maintained in the film. Unless the casting needs fall within one of these three exceptions, colorblind or multiethnic casting should be used.

184. Dr. Martin Luther King was one of the major leaders of the Civil Rights Movement in the United States during the 1960's.

185. Kim Jong II was one of the previous dictators of North Korea. While most people would probably not have a problem with this proposition, just because you are of the same ethnic group as the person you are portraying does not necessarily mean you can or will portray them better than someone of another ethnic group. The thought is founded on the belief that casting by race in this situation would make the film seem more believable or authentic to the audience, despite the fact that the actor may not look anything like the person they are portraying, beyond their shared ethnicity. Being an actor is about being able to become someone very different from yourself, not someone that is a stereotype or offshoot of your perceived self.

186. See *Game of Thrones*, IMDB, <http://www.imdb.com/title/tt0944947/> (last visited Nov. 22, 2011).

187. See *Once Upon a Time*, IMDB, <http://www.imdb.com/title/tt1843230/> (last visited Nov. 22, 2011).

188. *Id.*

189. See Frank, *supra* note 170, at 518 (stating "many types of shows do not truly need actors of one race or another to convey the intended message, particularly because the show is already asking the audience to use its imagination to appreciate the show . . . in many fables, the race of the actors portraying fictional characters does not matter.").

V. CONCLUSION

Throughout American history, minorities have always been looked upon less favorably than their Caucasian counterparts. During the Jim Crow era, the opportunities open to a person depended on that person's race. Congress enacted Title VII of the Civil Rights Act of 1964 to end this form of segregation. With the exception of the BFOQ exception, Title VII aimed to open opportunities so that individuals could be judged on their qualifications and experience rather than on a factor that bore no relevance to their ability to fill a position. While it is illegal in every other business, the film industry still uses race as a means of determining a person's eligibility for employment. Unfortunately, because of the top-down capitalistic business approach to films, many of the available roles are reserved for white actors under the belief that audiences prefer them.¹⁹⁰

Race as a factor in casting decisions is not inherently invidious and therefore does not need to be completely eliminated.¹⁹¹ While Congress did not create a BFOQ exception to include race, despite the fact that the casting industry was deliberately brought up as an example where race may be a relevant characteristic, racial casting should be used only in very narrow circumstances. Race should be used in casting only when a production is trying to maintain authenticity in accordance with the true sense of the word. Namely, race should be used when casting for a biographical production; when the production is situated in an era that lacked diversity; or when the production is situated in an environment that lacks diversity. In situations that fall outside of these three exceptions, colorblind or multiethnic casting should be used where race is not germane to the role. Using colorblind or multiethnic casting will level the playing field by allowing minorities to try out for the same number of roles as whites, thus granting them more prospects for practicing their craft than they are being allotted by the current system. Eliminating race from the equation could also eliminate the double standard where it is common for whites to play roles delineated for minorities but rare to see the opposite.¹⁹² It would also help eliminate the perpetuation of casting based on stereotypes.¹⁹³

190. See Dargis & Scott, *supra* note 90.

191. See Robinson, *supra* note 6, at 15.

192. See Lisa Respers France, *White Actors Snagging Minority Roles Causes Furor*, CNN (June 18, 2010), http://articles.cnn.com/2010-06-18/entertainment/color.blind.casting_1_cleopatra-roles-actors?_s=PM:SHOWBIZ (quoting THR.com editor Wallenstein as saying that "there is an inherent double standard in that there is not much crossover in the opposite direction with actors of color snagging roles written for whites").

193. See Robinson, *supra* note 6, at 15.

Author Derek Kirk Kim exemplifies a sentiment many minorities contend with on a constant basis, due to the persistence of race based hiring techniques:

When my brother and I were in high school, our favorite class was Drama I don't think there was anything we liked more But we never even entertained the notion of actually pursuing it as a career. Not because we didn't want to, but because we had too much pride to spend our entire lives pretending to be Long Duk Dong, or a Chinese food delivery boy with one line, or a Kato to some Green Hornet. Or even worse, having our hearts broken over and over going after roles that specifically call for Asian Americans like "Avatar, The Last Airbender" only to see them go to white actors. Back in my Drama days in high school, I used to dream of being white so I could pursue acting.¹⁹⁴

This is the legacy we have inherited due to America's past and it is the legacy that we have allowed to persist by turning a blind eye to it. We continue to discredit what America stands for and belittle the American population by perpetuating the belief that a minority lead is less apt to carry a movie to the top of the box office charts. Moreover, while most of the film industry is concentrated in New York¹⁹⁵ and California,¹⁹⁶ both states with large minority populations, many films incorporate very few minorities as main characters in their productions. If this is the land of equality and we are all on the same footing when it comes to opportunities, why is society still giving the impression that the white doll is the "better" one?¹⁹⁷

If Title VII was enacted to ensure that everyone has equal employment opportunities as long as they are qualified, why are people still of the mindset that if they were white they could truly have a chance at being whatever it is they want to be? Moreover, why does the evidence seem to

194. See Derek Kirk Kim, *New Day in Politics, Same Old Racist World on the Silver Screen*, LOWBRIGHT.COM (Jan. 20, 2009), <http://derekkirrkim.blogspot.com/2009/01/new-day-in-politics-same-old-racist.html>.

195. See U.S. CENSUS BUREAU, 2010 CENSUS: NEW YORK PROFILE, http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_New_York.pdf. New York has a 34.3% minority population.

196. See U.S. CENSUS BUREAU, 2010 CENSUS: CALIFORNIA PROFILE, http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_California.pdf. California has a 42.4% minority population.

197. This is a reference to the case *Brown v. Board of Education*, 347 U.S. 483 (1954), where black and white children were told to choose between a black and white doll to show which was the "good" and "pretty" doll. This helped to prove that separate but equal was an unconstitutional policy that persisted in causing irreparable damage to the psyche of black children.

prove them right? It seems that a significant portion of America is ready to welcome films into our “post-racialized” society, but production companies are still stuck in an antiquated era and are in desperate need of a nudge forward. At the end of her episode of *Inside the Actor's Studio*, Salma Hayek declares:

How do you fight this level of ignorance?

You don't, you don't . . .

But if you're right, eventually you will override it.

And if I don't, the next generation will, but you can never fall into the trap of thinking like them . . . Ignore them, they don't know what they're talking about. They will be proved wrong, as soon as somebody takes the chance.¹⁹⁸

~Salma Hayek

198. See *Inside the Actor's Studio: Salma Hayek* (Bravo television broadcast Dec. 5, 2004).