

# Bias and the Business of Show Employment Discrimination in the “Entertainment” Industry

By KATHLEEN A. TARR\*

I can't mount a film of this budget . . . and say that my lead actor is  
Mohammad so-and-so from such-and-such. I'm just not going to get it  
financed. So the question [of casting non-White actors] doesn't even  
come up.

– Ridley Scott, Director<sup>1</sup>

YOU WOULD THINK ACTORS' EQUITY ASSOCIATION (“AEA”)—of all unions—would remember its Shakespeare: “A rose by any other name . . .” Yet, despite decades of casting notices that, in calling for Caucasians, implicitly excluded people of color, it wasn't until a production of *Hamilton* sought auditions from “non-White” talent that AEA took noticeable issue.<sup>2</sup> While AEA refuses to release its demographic data regarding employment under its contracts, statistics published by The Asian American Performers Action Coalition (“AAPAC”) show an overwhelming preference for White talent in stage productions,<sup>3</sup>

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1. Scott Foundas, ‘*Exodus: Gods and Kings*’ Director Ridley Scott on Creating His Vision of Moses, VARIETY, (Nov. 25, 2014), <http://variety.com/2014/film/news/ridley-scott-exodus-gods-and-kings-christian-bale-1201363668/> (after outcry from Scott's decision to cast White actors in most of the key roles in ‘*Exodus: Gods and Kings*’, Scott explained to Variety that otherwise he would not have been able to obtain financing for his film).

2. Isabella Ohlmeyer, ‘*Hamilton*’ casting call for nonwhite actors give diversity a shot, SAN FRANCISCO CHRONICLE (Apr. 6, 2016), <http://www.sfchronicle.com/opinion/openforum/article/Hamilton-casting-call-for-nonwhite-actors-7232978.php>.

3. See The Asian American Performers Action Coalition, *Ethnic Representation on New York City Stages 2014-2015*, ASIAN AM. PERFORMERS ACTION COALITION (Apr. 2016), [http://www.aapacnyc.org/uploads/1/1/9/4/11949532/aapac\\_2014-2015\\_report.pdf](http://www.aapacnyc.org/uploads/1/1/9/4/11949532/aapac_2014-2015_report.pdf) (explaining that 78% of all Broadway and non-profit theater roles in New York were filled by Caucasian

underscored by casting calls in which 69% of available on-camera roles are reserved for Whites.<sup>4</sup>

Michelle Rodriguez—of *Girlfight* and *The Fast and the Furious* fame—suggests that these numbers are the fault of those who are currently underrepresented; they “should stop being lazy.” Opposing racially diverse casting of fictional superheroes, Rodriguez asserts, “people should actually make an effort in Hollywood to develop their own [stories].”<sup>5</sup> This sentiment ignores the plethora of great scripts that star underrepresented characters and what happens to them when they are pitched. When Mario Van Peebles sought to bring his story of the Black Panthers to the screen, the studio he engaged “talked about having a white lead . . . a part for someone like Tom Cruise.”<sup>6</sup> When Danny Glover pitched a film about Toussaint L’Ouverture, leader of the Haitian independence movement during the French Revolution, Glover reported that producers said “It’s a nice project, a great project . . . where are the white heroes?” and denied Glover funding.<sup>7</sup> Michael Gene Sullivan, resident playwright of the San Francisco Mime Troupe, was told he must add a role for Scarlett Johansson to his biopic about Duke Ellington in order to get it produced.<sup>8</sup> Many have made efforts to develop their own stories starring underrepresented people. Most of those stories are indefinitely deferred.

Adding insult to injury, they are deferred because studios do not anticipate large enough profit margins. The entertainment industry’s preference for hiring talent is overwhelmingly justified by commerce, not creativity or the lack thereof.<sup>9</sup> It’s not that studios believe, for example, that

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actors from 2006-2015).

4. Russell Robinson, *Hollywood’s Race/Ethnicity and Gender-Based Casting: Prospects for a Title VII Lawsuit*, 14 *LATINO POLICY & ISSUES BRIEF*, UCLA CHICANO STUDIES RESEARCH CENTER (2006), available at [http://www.chicano.ucla.edu/files/LPIB\\_14December2006\\_001.pdf](http://www.chicano.ucla.edu/files/LPIB_14December2006_001.pdf).

5. Ben Beaumont-Thomas, *Michelle Rodriguez apologises for telling minorities to ‘stop stealing white superheroes’*, THE GUARDIAN (Mar. 2, 2015), <http://www.theguardian.com/film/2015/mar/02/michelle-rodriguez-apologises-white-superheroes>.

6. Nick Charles, *Clawing To Get ‘Panther’ to Screen Melvin And Mario Van Peebles Went Rough Route to Get Movie About Black Radicals Produced*, N.Y. DAILY NEWS (May 2, 1995), <http://www.nydailynews.com/archives/nydn-features/clawing-panther-screen-melvin-mario-van-peebles-rough-route-movie-black-radicals-produced-article-1.687046>.

7. *Danny Glover’s Haiti film lacked ‘white heroes’, producers said*, DOMINICAN TODAY (July 26, 2008), <http://www.dominicantoday.com/dr/people/2008/7/26/28807/Danny-Glovers-Haiti-film-lacked-white-heroes-producers-said>.

8. Michael Gene Sullivan, *Remarks at Getting Played: First Annual Symposium on Equity in the Entertainment Industry and Awards*, Stanford University (Feb. 21, 2015). The author was the moderator of this symposium (while a transcript is not available, the event’s website is <http://kantonia.wixsite.com/symposium2015>).

9. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 8 (2007) (“The primary concern in the casting

Tom Cruise tells a compelling (or even factual) story of the Black Panthers, it's that studios believe Cruise will guarantee profits. Subsequently, it is not simply in casting that players become 70% White;<sup>10</sup> it is in gatekeepers' funding and lack thereof, business practices that are unlikely to change from within.

There are, of course, industry practices that are simply bigoted. Screenwriter Larissa Fasthorse's script, that in part depicted life on a contemporary reservation, was rejected even though the producer "loved" the screenplay because, the producer remarked:

My son is five, and like me he loves everything about Native Americans. However, he still believes that your people live in teepees and ride horses. I could never be a part of a project that ruins that for him. If you write something like that, let me know.<sup>11</sup>

While industry leaders may be reluctant to admit this type of bigotry as motivating their production decisions, they are less diffident about acknowledging that without *White heroes* guaranteeing profits, they are not likely to greenlight even those scripts they enjoy. The long list of non-White, *real* people portrayed as White punctuate the issue including Chinese-American Jeff Ma played by Jim Sturgess in *21*<sup>12</sup> and Michael Jackson played by Joseph Fiennes in the "9/11 road trip comedy" *Elizabeth, Michael and Marlon*.<sup>13</sup> Similar whitewashing branches out to productions based upon non-fiction works that plant Whites in starring roles despite characters originally written as non-White. Notorious films include Rooney Mara as Tiger Lily, a Native American character in *Pan*,<sup>14</sup>

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process, which the studio often addresses before hiring a director or casting director, is guaranteeing an audience and financial returns.") (footnote omitted).

10. *Screen Actors Guild, 2007 & 2008 Casting Data Reports*, SCREEN ACTORS GUILD AND AM. FEDERATION OF TELEVISION AND RADIO ARTISTS [hereinafter SAGAFTRA], available at [http://www.sagaftra.org/files/sag/documents/2007-2008\\_CastingDataReports.pdf](http://www.sagaftra.org/files/sag/documents/2007-2008_CastingDataReports.pdf) ("Caucasians made up 72.5% of all roles in 2008, accounting for 74% of roles in feature films and 71.9% of roles in episodic television."); see also *2003 SAG Casting Data*, SAGAFTRA, available at <http://www.sagaftra.org/files/sag/documents/03castingdatarpt.pdf> (providing the statistic that White males are cast in about 47% of all roles, Caucasians over 73%, and males over 62% of all roles).

11. What The...Productions, *Getting Played: who's playing you?!*, YouTube (2010), <http://gettingplayed.homestead.com/>.

12. Justin Berton, *Hollywood deals Jeff Ma a good hand with '21': Jeff Ma's story of winning millions at blackjack makes it to big screen*, SFGATE (Mar. 27, 2008), <http://www.sfgate.com/entertainment/article/Hollywood-deals-Jeff-Ma-a-good-hand-with-21-3221945.php>.

13. Lisa Respers France, *Joseph Fiennes to play Michael Jackson in British TV show*, CNN (Jan. 27, 2016), <http://www.cnn.com/2016/01/27/entertainment/joseph-fiennes-michael-jackson-feat/>.

14. *Rooney Mara's Tiger Lily Could Not Be Less Native. That's a Problem*, INDIAN COUNTRY (Nov. 26, 2014), <http://indiancountrytodaymedianetwork.com/2014/11/26/rooney->

Emma Stone as Hapa Allison Ng in *Aloha*,<sup>15</sup> and Tilda Swinton as The Ancient One in *Doctor Strange*.<sup>16</sup> Writer C. Robert Cargill defended changing the character in the latter to Celtic by explaining that The Ancient One:

originates from Tibet, so if you acknowledge that Tibet is a place and that he's Tibetan, you risk alienating one billion people who think that that's bullsh\*t and risk the Chinese government going, 'Hey, you know one of the biggest film-watching countries in the world? We're not going to show your movie because you decided to get political . . .'.<sup>17</sup>

While all businesses concern themselves to some extent with financial gains, it seems only in the entertainment industry are profits allowed to take priority over discriminatory employment practices. Whether motivated by commerce or bigotry, greenlighting's entanglement with casting practices disparately impact all but White, male, able-bodied talent, and as such, these practices run counter to law.<sup>18</sup> Furthermore, the Bona Fide Occupational Qualification<sup>19</sup> ("BFOQ") specifies that workers are to be protected against employment discrimination with *no exception* carved out for race<sup>20</sup> and based upon sex only where *necessary*.<sup>21</sup> BFOQ does not

maras-tiger-lily-could-not-be-less-native-thats-problem-158028.

15. Brandon Griggs, 'Aloha' director apologizes for casting Emma Stone as Asian-American, CNN (June 4, 2015), <http://www.cnn.com/2015/06/03/entertainment/cameron-crowe-emma-stone-aloha-apology-feat/>.

16. Jess Denham, *Doctor Strange director 'listening and learning' after The Ancient One whitewashing backlash*, INDEPENDENT (May 5, 2016), <http://www.independent.co.uk/arts-entertainment/films/news/doctor-strange-director-scott-derrickson-listening-and-learning-after-the-ancient-one-whitewashing-a7014676.html>.

17. Adam Rosenberg, *Marvel defends 'Doctor Strange' casting with new character info*, MASHABLE (Apr. 26, 2016), <http://mashable.com/2016/04/26/doctor-strange-ancient-one-celtic/#Yu7J9rN63SqF>.

18. See Title VII of the Civil Rights Act 42 U.S.C. § 2000e-2(k) (1964) (defining burden of proof in disparate impact cases); see also Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287 (Feb. 2013) (an employment practice that has a disproportionately adverse impact on a protected class may amount to unintentional unlawful discrimination depending upon the employer's business rationale for implementing the policy and whether any alternative policies with less discriminatory impact were available).

19. See 29 C.F.R. § 1604.2(a)(2) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress" (Section 1604.2(a)(2) makes no such exception for race)).

20. Compare *Morton v. United Parcel Serv.*, 272 F.3d 1249, 1260 n.11 (9th Cir. 2001) ("Under Title VII, the [bona fide occupational qualification] defense is not available at all where discrimination is based on race or color."), with EEOC COMPLIANCE MANUAL 13 (2006) ("Title VII also does not permit racially motivated decisions driven by business concerns — for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII.").

21. See 29 C.F.R. § 1604.2(a) (1965); 42 U.S.C. § 2000e-2(e)(1) (1964) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national

exclude those workers who act for a living, a point emphasized by constitutional law scholar Erwin Chemerinsky who, when discussing the role of Snow White, asserted that racially restricting the player and even the character itself violates law.<sup>22</sup>

Contrary to some scholarly opinions,<sup>23</sup> factoring race into casting decisions is inherently invidious. Our obsession with race—giving it meaning where there is none—is exactly why BFOQ was adopted, and inflating the importance of race, gender, and many other demographics is symptomatic of the ailment. Conflating the demographics of *characters* with the *workers* who portray them further demonstrates just how ailing we are.

In 2014, The Alchemist Theatre in Milwaukee, Wisconsin licensed David Mamet's stage play *Oleanna*. The show was shut down after one performance when it came to the attention of Craig Pospisil—Dramatists Play Service Director of Nonprofessional Licensing—that male thespian Ben Parman was playing the female student, Carol, in the production. Without seeing the show, Pospisil demanded that the Theater “immediately cease and desist in any further performances.”<sup>24</sup> Regardless of whether *Oleanna* could be staged with a gender fluid performance and still capture the intention of the play, the unlawful discrimination is in the contract itself:

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origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .”); *see also* Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (“We reiterate our holdings in [*Western Airlines, Inc., v. Criswell*, 472 U.S. 400 (1985)] and [*Dothard v. Rawlinson*, 433 U.S. 321 (1977)] that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the ‘essence’ of the particular business.”); *id.* at 207 (“no ‘factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved’” (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (discrimination pursuant to bona fide occupational qualification must be “reasonably necessary” to the “normal operation” of the employer's particular business, and must concern “job-related skills and aptitudes” quoting *Johnson Controls*, 499 U.S. at 187).

22. Erwin Chemerinsky, Dean, Univ. of Cal., Irvine School of Law, Keynote Lecturer at the Elizabeth J. Cabraser 2015 Summer Brown Bag Lectures in Public Interest Law: Review of the 2014-2015 United States Supreme Court Term, (July 21, 2015).

23. *See, e.g.,* Latonja Sinckler, *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* 22 AM. U. J. OF GENDER SOC. POLICY & LAW 4, 889 (2014) (“Race as a factor in casting decisions is not inherently invidious and therefore does not need to be completely eliminated,” citing Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 6 (2007).).

24. E-mail from Craig Pospisil, Director of Nonprofessional Licensing, Dramatists Play Service to Erin Eggers, The Alchemist Theatre (June 20, 2014, 14:00 CST) (on file with author).

The gender of the characters may not be changed or altered in any way, e.g., by costume or physical change. *The play(s) must be performed with women playing the roles intended for women and men playing the roles intended for men*, unless the author has specified flexible casting possibilities.<sup>25</sup>

It is certainly the case that a character's gender can be material to a story; one need only look to *Transamerica* and *The Crying Game* to support that notion. However, Felicity Huffman's portrayal in *Transamerica* was not less compelling because she is not transgender, and Jaye Davidson's performance in *The Crying Game* worked *because* he convincingly appeared both female and male. Limiting casting options based upon talent's gender is unrelated to that talent's ability to portray male or female characters and is thus unnecessary.

While the *Oleanna* contract's first requirement that characters' genders remain unchanged *may* be more than pretextual discrimination—because gender is germane to the *Oleanna* narrative—the gendered occupational qualifications run counter to law and should be deemed unenforceable. “Should be” is key. Whether motivated by commerce or bigotry, such blatant violations of BFOQ *should be* immediately quashed. However, where the industry is concerned, courts habitually confuse discriminatory and commercial motivations with comment in the public interest.<sup>26</sup>

In 2012, a Tennessee district court dismissed a class action suit brought by two African-American men alleging racial discrimination in casting of shows *The Bachelor* and *The Bachelorette*, holding that the First Amendment protects defendants' casting decisions. The court did not discuss whether ABC's casting choices were commercial in nature—thus garnering less legal protection<sup>27</sup>—or enforce BFOQ protections against

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25. Dramatists Play Service, Inc. *Nonprofessional License* (Mar. 12 2014), at 2–3 (emphasis added).

26. See Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C.L. REV. 1153, 1199 (2012) (“Nothing in the values underlying the First Amendment requires the speaker's cost of engaging in, or stimulating, discussion of matters of communal interest to be subsidized, or permits its message to be correspondingly colored, by permitting its stimulus to be planted in a transactional message.”).

27. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (stating that the Constitution affords a lesser protection to commercial speech than to other constitutionally guaranteed expression); *Clark v. Cmty. for Nonviolence*, 468 U.S. 288, 293 (1984) (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” Citations omitted.); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564–65 (1980) (regulations affecting commercial speech do not violate the First Amendment if: 1) the regulated speech concerns an illegal activity; 2) the speech is misleading; or 3) the government's interest in restricting the speech is substantial, the regulation in question directly advances the government's interest; and 4) the regulation is narrowly tailored to serve the government's interest); Henry Cohen, *Freedom of Speech and Press: Exceptions to the First*

race discrimination in employment, but instead barred plaintiffs' claims altogether.<sup>28</sup>

Similar First Amendment arguments do not fly in other industries. Southwest Airlines once argued its policy that only attractive women could be hired as flight attendants and ticket agents was legal because Southwest intentionally projected a "sexy image [to] fulfill its public promise to take passengers skyward with love." The court ruled against the airline, concluding that Southwest's conduct was unjustified because it did not operate in a business in which "vicarious sex entertainment is the primary service provided."<sup>29</sup>

What, then, do the courts perceive as the primary service of the entertainment industry? Justice Ming W. Chin of the Supreme Court of California suggests that it is "creative expression itself."<sup>30</sup> Such a conclusion is in stark contrast to the United States Supreme Court's 1915 decision in *Mutual Film Corporation v. Industrial Commission of Ohio* in which it described "a business pure and simple, originated and conducted for profit," not speech and expression.<sup>31</sup> In 2013, President Barack Obama himself praised the entertainment industry as "one of the bright spots of our economy" without alluding to expression.<sup>32</sup> Given that tent-pole productions today often star musicians and athletes rather than trained thespians, financial gains seem to supersede even compelling performances of script.

In 1952, *Joseph Burstyn, Inc. v. Wilson* overturned the *unharmonious* language of *Mutual Film Corp.*, the U.S. Supreme Court then declaring motion pictures to be an important medium for the communication of ideas

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*Amendment*, CRS REPORT FOR CONGRESS, CRS-1 (2008) ("[T]he First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees' speech. Even speech that enjoys the most extensive First Amendment protection may be subject to 'regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.')." <http://fpc.state.gov/documents/organization/110843.pdf>.

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

29. *Wilson v. Southwest Airlines*, 517 F.Supp. 292, 302 (N.D.Tex. 1981) ("In order not to undermine Congress' purpose to prevent employers from 'refusing to hire an individual based on stereotyped characterizations of the sexes,' a BFOQ for sex must be denied where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer's business.").

30. *Lyle v. Warner Bros. Television Prod.*, 38 Cal.4th 264, 297 (2006) (Chin, J., concurring).

31. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 243 (1915).

32. Richard Verrier & Kate Linthicum, *Obama praises job growth in entertainment industry*, L.A. TIMES (Nov. 26, 2013), available at <http://articles.latimes.com/2013/nov/26/entertainment/la-et-ct-obama-speech-dwa-20131126>.

protected by the First Amendment. Still, the Court did not conclude that the primary service of the industry is such communication, and it did not address business conduct in the *creation* of motion pictures.<sup>33</sup> Contemporary First Amendment justifications seem to materialize simply as courts' easy way of avoiding important questions about an industry with a long history of discriminatory practices,<sup>34</sup> traditions that leave all but able-bodied White males poorly positioned.

That history includes numerous countermeasures. The Directors Guild of America unsuccessfully sued Warner Brothers and Columbia Pictures in 1983 for discriminatory hiring practices towards women and racial minorities.<sup>35</sup> At the 1973 Academy Awards, civil rights activist, Sacheen Littlefeather, protested the portrayal of Native Americans in film at the behest of Marlon Brando.<sup>36</sup> In 1962, P. Jay Sidney testified before the House of Representatives about industry inequities; Sidney also picketed, wrote letters, advocated boycotts, taped interactions with executives, and lobbied against television's de-facto segregation.<sup>37</sup>

In a 1969 hearing, the Equal Employment Opportunity Commission, via general counsel, announced "clear evidence" of entertainment industry discrimination in violation of Title VII of the Civil Rights Act of 1964. However, following lobbying by the film industry,<sup>38</sup> hearing chair Clifford Alexander was called before a Senate Justice subcommittee:

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33. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."); *id.* at 505–06 ("Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene film. . . . We hold only that, under the First and Fourteenth Amendments, a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'").

34. *See generally* Eileen C. Moore, *RACE RESULTS: HOLLYWOOD VS. THE SUPREME COURT; TEN DECADES OF RACIAL DECISIONS AND FILM* (Lisa Wysocky ed., 2009); *see also* Eileen C. Moore, *GENDER RESULTS: HOLLYWOOD VS. THE SUPREME COURT; TEN DECADES OF GENDER AND FILM* (Lisa Wysocky ed., 2014).

35. Maya Montañez Smukler, *Liberating Hollywood: Thirty Years of Women Directors*, UCLA CTR. FOR THE STUDY OF WOMEN 9–11 (Jan. 2011), available at <http://escholarship.org/uc/item/3pd5t9m6>.

36. Sacheen Littlefeather, Academy Awards speech on behalf of Marlon Brando (Mar. 27, 1973) (transcript available at <http://aaspeechesdb.oscars.org/link/045-1>).

37. Emily Nussbaum, *American Untouchable: The actor who fought to integrate early TV*, THE NEW YORKER (Dec. 7, 2015), <http://www.newyorker.com/magazine/2015/12/07/american-untouchable>.

38. Legislators have tried to make headway, but in confidential personal interviews with the author (2010, 2015) they report Hollywood's lobbyists as the impediment. In California, these lobbyists allegedly threaten to take the industry out of the state if restrictions are placed upon them.



[He] was “subjected to a tongue-lashing,” as one journalist described, by the powerful Senate Republican minority leader Everett Dirksen. “Stop some of this harassment of the business community . . . like your carnival hearing out there in Los Angeles . . . or I am going to the highest authority in this government to get somebody fired.”

President Nixon announced a week later that Alexander was to be replaced.<sup>39</sup>

White and male dominance within discriminatory, industry hiring practices has resulted in congressional testimony,<sup>40</sup> diversity showcases,<sup>41</sup> boycotts,<sup>42</sup> and myriad extrajudicial efforts by organizations like Racebending.com, Geena Davis Institute on Gender in Media, and Media Action Network for Asian Americans. Yet despite all of these responses, today, for example, Asian men are almost completely excluded as romantic leads.<sup>43</sup> Notwithstanding settlement of an age discrimination lawsuit in 2012,<sup>44</sup> the employment rate of industry writers still declines sharply with age.<sup>45</sup> The majority of performers with disabilities are not employed, and

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39. Eithne Quinn, *Closing Doors: Hollywood, Affirmative Action, and the Revitalization of Conservative Racial Politics*, 99 THE J. OF AM. HIST. 466–67 (2012).

40. Hearing on Equal Employment Opportunity Commission before the H. Comm. On Education and the Workforce, 105th Cong. (1997) (statement of Migdia Chinea-Varela, screenwriter and director).

41. See, e.g., *CBS Corporation Diversity Institute Introduction Page*, CBS, <https://www.cbcorporation.com/diversity/diversity-institute/introduction/> (last visited Sept. 21, 2016) (in an effort to meet its goals in Diversity and Inclusion, the Institute provides program participants with access to the decision making process in network television in acting, writing, and directing).

42. Pat Cordova-Goff, *Boycott 2015 “Stonewall” Movie*, GSANETWORK, <https://unite.gsanetwork.org/petitions/boycott-2015-stonewall-movie> (last visited Sept. 6, 2016) (“To all considering watching the newest whitewashed version of queer history, It [sic] is time that black and brown transwomyn and drag queens are recognized for their efforts in the riots throughout the nation.”). Manolo Morales and Web Staff, *‘Aloha’ move criticized by Native Hawaiian, Asian American groups*, KHON2, <http://khon2.com/2015/05/25/aloha-movie-criticized-by-native-hawaiian-asian-american-groups-2/> (last visited Sept. 6, 2016) (Guy Aoki of the Media Action Network for Asian Americans asked Hawaiians to boycott Aloha because it otherwise encourages more filmmakers to make movies about Hawai’i without using Asian actors).

43. See Victoria Namkung, *Will John Cho Be Television’s First Asian Romantic Lead?*, HUFFINGTON POST (last updated Nov. 11, 2014), [http://www.huffingtonpost.com/victoria-namkung/tvs-first-asian-romantic-lead\\_b\\_5878380.html](http://www.huffingtonpost.com/victoria-namkung/tvs-first-asian-romantic-lead_b_5878380.html).

44. See Barbara Jones, *Court Approves Settlement of Largest Age Discrimination Lawsuit in History*, AARP FOUNDATION (Apr. 13, 2012), <http://www.aarp.org/aarp-foundation/our-work/legal-advocacy/info-2012/television-writers-age-discrimination-litigation.html> (“All 23 class actions have settled, bringing this seemingly endless litigation battle to vindicate the rights of older workers to a successful conclusion. . . . Although the settlements come without admission of liability by the defendants, the litigation has triggered changes in how older writers are perceived by the industry.”).

45. Darnell M. Hunt, *The 2014 Hollywood Writers Report: Turning Missed Opportunities Into Realized Ones*, 28 (WRITERS GUILD OF AMERICA, 2014).

those who are work an average of just 4.1 days and earn less than \$5,000 per year.<sup>46</sup> Native American representation in the industry is still abysmal, at less than half a percent of all television and theatrical roles.<sup>47</sup> By adding *Scandal*,<sup>48</sup> 2012 saw a 50% increase in the number of primetime network dramas ever starring a Black woman. Geena Davis herself remarked, “If we added female characters at the rate we have been over the past 20 years, we will achieve parity in 700 years.”<sup>49</sup> Without the intervention of law, we cement a future in which—despite primary industry hubs New York City and Los Angeles being over 50% female and over 50% of color<sup>50</sup>—Caucasian males will continue to garner almost half of all television and theatrical roles and comprise over 70% of television episodic directors.<sup>51</sup>

It is not that there haven’t been positive results shepherded by the judiciary. Audiences may have noticed the frequency by which pregnant stars maintain their employment even if their characters’ storylines do not

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46. *The Employment of Performers with Disabilities in the Entertainment Industry*, SCREEN ACTORS GUILD 22 (2005).

47. See Peter Rollins, HOLLYWOOD’S INDIAN: THE PORTRAYAL OF THE NATIVE AMERICAN IN FILM 184 (2d ed. 2011) (“Hollywood has regrettably conducted its own campaign against historical and textual veracity”); SCREEN ACTORS GUILD 2007 & 2008 *CASTING DATA REPORTS* (2008) (providing the statistic that Native American representation hovers around 0.3% of all television and theatrical roles, less than half of reported national and State of California Census data).

48. See Rhonesha Byng, *Before ‘Scandal,’ These Actresses Rocked The Small Screen*, HUFFINGTON POST (Oct. 2, 2012), [http://www.huffingtonpost.com/2013/10/02/scandal-black-actresses-small-screen-video\\_n\\_4032727.html](http://www.huffingtonpost.com/2013/10/02/scandal-black-actresses-small-screen-video_n_4032727.html).

49. At UN, *Actress Geena Davis warns 700 years needed to reach gender parity in kids’ media*, UNITED NATIONS NEWS CENTRE (March 12, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50309>.

50. U.S. Census Bureau, 2010 Census Interactive Population Search (2010), available at: <http://www.census.gov/2010census/popmap/index.php>.

51. 2007 & 2008 *CASTING DATA REPORTS*, SAGAFTRA (2008), [http://www.sagaftra.org/files/sag/documents/2007-2008\\_CastingDataReports.pdf](http://www.sagaftra.org/files/sag/documents/2007-2008_CastingDataReports.pdf) (“Caucasians made up 72.5% of all roles in 2008, accounting for 74% of roles in feature films and 71.9% of roles in episodic television.”); 2003 *SAG CASTING DATA*, SAGAFTRA (2003), <http://www.sagaftra.org/files/sag/documents/03castingdatarpt.pdf> (White males are cast in about 47% of all roles, Caucasians over 73%, and males over 61%); see also Stacy L. Smith, Marc Choueiti, & Katherine Pieper, *Inequality In 700 Popular Films: Examining Portrayals of Gender, Race, & LGBT Status from 2007 to 2014*, MEDIA, DIVERSITY, & SOCIAL CHANGE INITIATIVE (2015), available at [http://annenberglab.usc.edu/pages/~media/MDSCI/Inequality\\_in\\_700\\_Popular\\_Films\\_8215\\_Final\\_for\\_Posting.ashx](http://annenberglab.usc.edu/pages/~media/MDSCI/Inequality_in_700_Popular_Films_8215_Final_for_Posting.ashx) (“film is still a White bastion. . . few Black or Asian directors work in the top-grossing sphere. Only three Black females and one Asian woman directed movies assessed in this analysis.”); *DGA Report Finds Director Diversity in Episodic Television Remains Static*, DIRECTORS GUILD OF AMERICA (Oct. 2, 2013), <http://www.dga.org/News/PressReleases/2013/100213-DGA-Report-Finds-Director-Diversity-in-Episodic-Television-Remains-Static.aspx> (“Caucasian males directed 72% of all episodes; Caucasian females directed 12% of all episodes; minority males directed 14% of all episodes and minority females directed 2% of all episodes.”).

include pregnancy.<sup>52</sup> *Scandal*'s Kerry Washington continued to work even though fans were well aware that staging character Olivia Pope behind multiple objects was more than an artistic choice.<sup>53</sup> Hunter Tylo, and a Los Angeles jury, are to thank for industry pregnancy discrimination protection (at least once there is an employment contract). Tylo was fired from the television show *Melrose Place* after she became pregnant. Despite a clause in her contract granting real parties the right of termination if she were to suffer "any material change" in her appearance—and defendants' argument that pregnancy-discrimination law carves out an exception for Actors because of the need for dramatic believability—a jury awarded Tylo nearly \$5 million in damages.<sup>54</sup>

The industry's "hidden" pregnancies reinforce that *dramatic believability* is a red herring, and one should not ignore the seemingly unlimited potential of an audience's willing suspension of disbelief.<sup>55</sup> Occasionally a fan will ask someone playing a doctor whether he can fix a broken arm,<sup>56</sup> but it is the rare viewer who thinks, e.g., Meryl Streep is actually a fashion mogul as well as Holocaust survivor, British Prime Minister, and a witch. Streep brings characters to life, but she is not those characters, and the faux environments, costumes, and time periods of countless films, plays, commercials, and television shows—supported by music that does not soundtrack real life—underscore how willing we are as humans to ignore discontinuity in order to feel entertained. That we may obsess over race, gender, age and disability and not other characteristics does not justify locking out countless workers because they do not fulfill our expectations.

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52. See, e.g., Andrea Morabito, *How shows tried to hide stars' pregnancies*, NEW YORK POST (Oct. 31, 2013), <http://nypost.com/2013/10/31/how-tv-shows-tried-to-hide-stars-pregnancies>.

53. See, e.g., Joyce Eng and Sadie Gennis, *The 20 Most Ridiculous Ways Scandal Has Hidden Kerry Washington's Pregnancy*, TV GUIDE (April 3, 2014), <http://www.tvguide.com/news/scandal-ridiculous-ways-hide-kerry-washington-pregnancy-1080017>.

54. *Would-be 'Melrose' actress wins nearly \$5 million award*, CNN (Dec. 22, 1997), <http://www.cnn.com/SHOWBIZ/9712/22/melrose.lawsuit/>; see also Tylo v. Spelling Television/Spelling Entertainment Group, No. BC149844 (Cal. Super. Ct. filed May 13, 1996).

55. Compare Samuel Taylor Coleridge, *BIOGRAPHIA LITERARIA*, Chapter XIV (1817) (arguing that audiences will set aside criticism of a tale's implausibility as long as there is "a human interest and a semblance of truth sufficient to procure . . . that willing suspension of disbelief for the moment"); with Sarah Keartes, *Game of Thrones "Dragons" Are Actually Wyverns*, NERDIST (May 7, 2016) <http://nerdist.com/game-of-thrones-dragons-are-actually-wyverns/> (where Game of Thrones audience readily accepts the existence of dragons).

56. Erin Quinlan, *'Royal Pains' star Mark Feuerstein: I'm not a real doctor — or a chicken thief!*, TODAY (June 10, 2014), <http://www.today.com/popculture/royal-pains-star-mark-feuerstein-im-not-real-doctor-or-2D79784452>.

Even if audiences were selective in their exposure<sup>57</sup>—even if they would not purchase tickets to a movie that doesn't star a White able-bodied male—such is irrelevant to the question of demographic-based hiring. Client preference does not justify employment discrimination in the absence of a BFOQ defense,<sup>58</sup> despite the fact that most inequitable industry decisions are based upon what target audiences supposedly want (and do not want) to support.<sup>59</sup> A business's discriminatory employment practices do not become bona fide simply because they are tied to financial profits.<sup>60</sup>

As viewers, we rarely think of the worker acting in those scenes, the conditions of employment, and the challenges faced on the path to that job. We do not think of the make-up artists and set designers, production assistants and extras, and whether they have yielded their dignity in order to keep working. We do not think of the thousands who never received those opportunities because they refused to portray a stereotype, would not write in a White character just for the sake of profits, or walked away from the “casting couch”. It is long past due that we start thinking of those who entertain us as employees, entitled to all of the protections intended under law.

The primary service of the Business of Show is *entertainment*; it prioritizes our excitement and engagement. When gatekeepers greenlight projects, the marketplace drives their choices. Comment in the public interest—when there is any—is only secondary at best. The U.S. Supreme Court once understood that the entertainment industry is a business

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57. Compare Andrew J. Weaver, *The Role of Actors' Race in White Audiences' Selective Exposure to Movies*, 61 J. OF COMM. 369 (April 2011) (“White participants showed significantly less interest in seeing movies with mostly Black casts than in seeing movies with mostly White casts.”); with Ralph J. Bunche, *2014 Hollywood Diversity Report: Making Sense of the Disconnect*, CTR. FOR AFRICAN AMERICAN STUDIES AT UCLA 24–28 (2014) (arguing that films with relatively diverse casts (i.e. 21-30%) excel at the box office and broadcast comedies and dramas with diverse casts (i.e. 41-50%) excel in ratings).

58. See Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (1964); see also *Vigars v. Valley Christian Center of Dublin*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (finding that fellow employees' and customers' preferences do not constitute bona fide occupational qualifications); see also 29 C.F.R. § 1604.2(a)(1)(iii) (stating that except where it is necessary for the purpose of authenticity or genuineness, the refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers does not warrant the application of the bona fide occupational qualification exception).

59. See, e.g., Mary Ann Georgantopoulos, *Sony Producer Says Black Actors Shouldn't Have Lead Roles Because International Audiences Are Racist*, BUZZFEED NEWS (Dec. 18, 2014), <http://www.buzzfeed.com/maryanngeorgantopoulos/sony-producer-says-world-is-racist> (including the producer's email that claims two-time Oscar winner Denzel Washington should not star in big-budget films as the international audience will not accept him in a leading role because of his race).

60. *Wilson*, 517 F. Supp. 292 at 302 n.25.

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organized for profit that *can* be an important medium for the communication of ideas, but is not such incarnate. Unless the idea at issue is that the lives of able-bodied White males are paramount, then the industry's discriminatory employment practices must cease. For the courts to permit otherwise is to nullify equity for thousands of workers who deserve the protection of our judiciary, real *people* who need and want to work in the profession of their choosing. Employment should not be denied because of immutable characteristics, especially when we as a nation assert these demographics should not determine one's degree of opportunity.