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Samira Paydar

I. Introduction

Director George Miller opens his Oscar nominated¹ film *Mad Max: Fury Road* in post-apocalyptic Australia.² Humanity is broken, and those who remain survive in an unforgiving wasteland of perpetual drought where the soil can no longer sustain life. A tyrant, Immortan Joe, distributes water at his whim to those thirsting. Joe's five enslaved wives, led by Joe's lieutenant Imperator Furiosa, escape his empire in search of the matriarchal clan that occupies the idyllic land of Furiosa's childhood.

The film is hailed a “feminist-revolution”³ for its focus on fierce female protagonists, who are the only individuals asking the big, dangerous question: “Who killed the world?”⁴ The power of the question is not in its answers, but in the fact that someone dared ask it. Miller's world is plagued by uncertainty: “What happened to the world? What and who caused it? Can it be fixed?” Every character has a stake in the answers, yet the male characters accept the world as it is. Immortan Joe would not ask it—it would disturb his grasp on the status quo. His army of War Boys would not ask it—they have found a system in which they can succeed. Even Max himself, an outcast and

¹ Brooks Barnes & Michael Cieply, *Oscar Nominations 2016*, N.Y. TIMES, (Jan. 14, 2016), http://www.nytimes.com/2016/01/15/movies/oscar-nominations.html?_r=0. (The film was nominated for best picture. I will update this if it wins.)

² MAD MAX: FURY ROAD (Warner Bros. Pictures 2015).

³ Kyle Smith, *Why Mad Max: Fury Road is the Feminist Picture of the Year*, N.Y. POST (May 14, 2015, 12:50 PM), <http://nypost.com/2015/05/14/why-mad-max-fury-road-is-the-feminist-picture-of-the-year/>. Don't forget to remove hyperlinks.

⁴ MAD MAX: FURY ROAD, *supra* note 1. Don't forget to insert internal cross-references.

prisoner in Joe's caste system, is too plagued by personal tragedy to look beyond his immediate survival. Miller highlights the inevitable stagnation of social justice in a society entrenched in patriarchal hierarchy.

As in Miller's world, understanding systematic discrimination in American society, particularly the entertainment industry, requires asking critical questions. Why do male narratives constitute the status quo, so that an action film with a strong female lead is marked as revolutionary? Who is behind the scenes in Hollywood, the media powerhouse that shapes the stories that reflect and influence American culture? The social hierarchy in *Fury Road* is a microcosm of the American entertainment industry, and it will take a real, legal revolution to break down the barriers to equal employment in Hollywood.

A. Identifying the Problem

Film is an instrumental medium for the perception of self and identity formation in American society, yet the opportunity to make an impact is largely reserved for an elite class: white males.⁵ Scholars have indicated the lack of racial and gender parity on screen, particularly in regards to the exclusion of actors of color and female protagonists.⁶ Systemic gender and racial discrimination persists behind the camera as well. The directorial gender gap in Hollywood is reflected in abysmal statistics on the lack of

⁵ Megan Basham, *Unmasking Tonto: Can Title VII "Make it" in Hollywood?*, 37 AM. INDIAN L. REV. 549, pincite (2013) (addressing the lack of representation of Native American actors); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 550 (2007) (examining the tension of judicial intervention in the arts to rectify the racial and gender discriminatory hiring practices that affect actors); Maureen Dowd, *The Women of Hollywood Speak Out*, THE NEW YORK TIMES, (Nov. 20, 2015), http://www.nytimes.com/2015/11/22/magazine/the-women-of-hollywood-speak-out.html?ref=collection/sectioncollection/magazine&action=click&contentCollection=magazine®ion=rank&module=package&version=highlights&contentPlacement=1&pgtype=sectionfront&_r=1 (confirming that after the Sony Pictures hack, it was revealed that "the top executives at Sony were nearly all white and male.").

⁶ Basham, *supra* note 5; Robinson, *supra* note 5.

opportunities for female artistic expression through film. Alarming, women directed just 1.9% of all top-grossing films in 2013 and 2014.⁷ In 2014 alone, men made up 95% of cinematographers, 89% of screenwriters, 82% of editors, 81% of executive producers, and 77% of producers.⁸ Broken down, the statistic implies that there are 15.24 male directors for every female director. In the past six years, only twenty-two female directors have made top-grossing films.⁹ Of those twenty-two, just three were women of color.¹⁰

The United States Supreme Court has held that “gross statistical disparities” may “alone” prove discrimination.¹¹ Therefore, these studies may not only suggest systemic gender bias in the industry, but justify a Title VII claim on behalf of women directors. However, this Comment argues that, while Title VII of the Civil Rights Act of 1964 or analog state laws require Hollywood studios to implement gender-neutral hiring practices for directors, this obligation must be balanced against the risk to studios’ freedom of artistic expression and association posed by judicial intervention. Were the Equal Employment Opportunities Commission (EEOC) or the California Department of Fair Employment and Housing to initiate suit on behalf of female directors, the outcome might well turn on whether courts will recognize directorial gender parity as a compelling state interest that overrides studios’ First Amendment rights. Certainly, a court would be unlikely to regulate the substantive content of films for the purpose of including a

⁷ Stacy L. Smith et al, *Gender Inequality in Popular Films*; Letter from American Civil Liberties Union of Southern California to the Equal Employment Opportunities Commission (May 11, 2015), <https://www.aclusocal.org/wp-content/uploads/2015/05/EEOC-FINAL-LETTER-05-11-2015.pdf>.

⁸ Dowd, *supra* note 5.

⁹ Smith, *supra* note 7; *see also* Cristen Conger, *27 Female Directors of Color You Should Watch*, STUFF MOM NEVER TOLD YOU (Feb. 18 2015, time?), <http://www.stuffmomnevertoldyou.com/blog/27-female-directors-of-color-you-should-watch/>.

¹⁰ *Id.*

¹¹ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977).

feminine perspective, however needed it may be. Ultimately, the lack of job opportunities for women directors must be balanced against the studios' interest in controlling the artistic composition of their films.

Although modern Hollywood has a gross gender disparity behind the camera, female filmmakers flourished in the early years of cinema.¹² In 1896, Alice Guy Blaché helped invent narrative filmmaking in France and Hollywood, and in 1910, she was the first woman to run her own film studio, overseeing 750 films in her career.¹³ In 1914, her protégé Lois Weber became the first American woman to direct and star in a full-length feature film, “The Merchant of Venice,” and ran her own production company.¹⁴ The screenwriter and director Dorothy Arzner invented the boom mike.¹⁵ These female pioneers made monumental contributions to the film industry, which makes the dismal representation of women in modern Hollywood even more perplexing.

Sexism in the industry is not synonymous with an absolute lack of female directors. Discrimination does not arise solely when the targeted class is not represented at all. Practically speaking, the women who direct feature films are generally either top-billed actresses or connected to prominent male movie moguls.¹⁶ Moreover, the same small pool of female directors is hired repeatedly, instead of a revolving door of opportunities for all aspiring women directors. For example, the top 600 grossing films between 2007 and 2013 were directed by only

¹² Dowd, *supra* note 4, at 5.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Dinah Eng, *Meet the Woman Who Started the EEOC Investigation into Sexism in Hollywood*, FORTUNE (Oct. 19, 2015) <http://fortune.com/2015/10/19/meet-the-woman-who-started-the-eeoc-investigation-into-sexism-in-hollywood/> (“Today, 4% of studio features are directed by women, and 100% of them are movie stars, or the wives and daughters of movie moguls, such as Angelina Jolie, Jodie Foster, or Sofia Coppola.”).

twenty-two females.¹⁷ Therefore, the mere existence of a handful of female directors does not negate the overarching systematic barriers to emerging directors in the industry.

Nor can the disparate statistics be attributed to a lack of qualified or interested women directors. Estimates place the number of women students focusing on directing as roughly equal to the number of men in prominent film schools such as USC, NYU, and UCLA.¹⁸ The substantial number of women pursuing directorial careers in film rebuts the pervasive notion that the issue is a lack of female talent, as opposed to systemic discrimination.

Furthermore, the number of female directors has dropped steadily since 1998, when women directed nine percent of the top 250 grossing films.¹⁹ Overall, women directed less than five percent of box office hits from 2002 to 2014.²⁰ According to Dr. Martha Lauzen,²¹ “[t]here are more women in the U.S. Congress than there are women directors in Hollywood.”²² Yet, women make up fifty percent of the audience and eighty percent of consumers.²³ Thus, men tell the stories that influence the way women and girl perceive themselves and how they are perceived in society. Furthermore, a study of the top 100 worldwide grossing films revealed that gender of the director does not correlate

¹⁷ Smith et al, *supra* note 6, at 4–7.

¹⁸ Lang, *NYU Students Celebrate Women in Film at Fusion Festival*, VARIETY (Feb. 26, 2015), <http://variety.com/2015/film/news/nyu-students-celebrate-women-in-film-at-fusion-festival-1201442164/>; Elizabeth M. Daley, Dean, USC School of Cinematic Arts, *Women in Hollywood: Are the Numbers Changing?* Huffington Post Blog (July 12, 2010), http://www.huffingtonpost.com/elizabeth-m-daley/women-in-hollywood---are_b_639786.html.

¹⁹ MARTHA M. LAUZEN, CENTER FOR THE STUDY OF WOMEN IN TELEVISION & FILM, THE CELLULOID CEILING: BEHIND-THE SCENES EMPLOYMENT OF WOMEN ON THE TOP 250 FILMS OF 2014 (2015), http://womenintvfilm.sdsu.edu/files/2014_Celluloid_Ceiling_Report.pdf (noting that an assessment of the 250 top-grossing U.S. movies of 2014, revealed that only 5% of directors, 14% of writers, and 25% of producers were female).

²⁰ V Renée, *Why Are Women Directors Having (Relative) Success in Independent Film, But Not in Hollywood?* No Film (May 6, 2013), <http://nofilmschool.com/2013/05/female-directors-indie-filmhollywood>.

²¹ Executive director of the Center for the Study of Women in Television and Film at San Diego State University.

²² Lauzen, *supra* note 4.

²³ See *Women in Hollywood and Gender Equality*, NATIONAL PUBLIC RADIO (June 16, 2015), <http://www.npr.org/templates/story/story.php?storyId=414958317>.

with box office sales.²⁴ Rather, when women and men filmmakers are afforded comparable budgets, the resulting box office grosses are also comparable. For example, *50 Shades of Grey*, directed by Samantha Taylor-Johnson, made a remarkable \$570 million worldwide.²⁵ *Star Wars: the Force Awakens*, a film with a female protagonist, was the highest grossing domestic film of all time, raking in \$1.75 billion worldwide.²⁶ It is a viable competitor with the current global box office record holder *Avatar*.²⁷ In other words, men dominate the film industry with no marketplace justification.

The problem has not gone unnoticed. Successful women in the industry speak out against the discriminatory practices that plague Hollywood. Kathryn Bigelow, the first and only woman to win a Best Director Oscar in the eighty-seven-year history of the Academy Awards, said, “Gender discrimination stigmatizes our entire industry. Change is essential. Gender neutral hiring is essential.”²⁸ Others recall instances where they were explicitly told, “we don’t hire women,” or “we tried [hiring a woman] once.”²⁹ Overt sexism is tangible and pervasive in Hollywood. Organizations such as Women in Film, the Alliance of Women Directors, and Women Make Movies, have been formed to address the experiences of women directors.³⁰ The only national directorial labor union, the Director’s Guild of America (DGA), has a diversity requirement that obligates employers to “make good faith efforts to increase the number of

²⁴ MARTHA M. LAUZEN, CENTER FOR THE STUDY OF WOMEN IN TELEVISION & FILM, *WOMEN @ THE BOX OFFICE: A STUDY OF THE TOP 100 WORLDWIDE GROSSING FILMS* (2008).

²⁵ *Fifty Shades of Grey*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=fiftyshadesofgrey.htm>.

²⁶ Pamela McClintock, *Box Office: ‘Star Wars’ Now Unlikely to Beat ‘Avatar’ Global Record*, THE HOLLYWOOD REPORTER (Jan. 13, 2016, 6:25 AM), *t* <http://www.hollywoodreporter.com/news/force-awakens-avatar-new-star-855065>.

²⁷ *Id.*

²⁸ Eliana Dockterman, *Kathryn Bigelow: We Must End Gender Discrimination in Hollywood*, TIME (May 12, 2015), <http://goo.gl/XAiy0r>.

²⁹ See *What’s it Like to be a Black, Female Director in Hollywood?* Take 2 (Feb. 19, 2014), <http://www.scpr.org/programs/take-two/2014/02/19/36114/whats-it-like-to-be-a-black-female-director-in-hol/> (interview with director Angela Robinson).

³⁰ Giese, *supra* note 13.

working ethnic minority and women Directors.”³¹ Despite these attempts at inclusion, the DGA’s diversity requirement operates like a quota: it allows employers to hire either male minorities or women.³² The requirement thus allows employers to elude state anti-discrimination laws. The leeway to choose either a male individual of color or a white female further alienates women of color, who slip between the cracks of these inadequate attempts at diversity. The DGA itself has an underwhelming history of inclusion. Women make up 22.6% of all DGA members including the directorial team, and 13.9% of director members.³³

While self-regulation in the industry is an attractive proposal,³⁴ it is not enough. After experiencing a career stall from which she could not recover, film director Maria Giese decided to speak out on the systemic gender bias: “I had finally reached the end of my tether. I was broke and depressed and angry. I did not feel I could sink any lower. I did not believe I had anything left to lose.”³⁵ Giese was caught in a tumultuous cycle in which she was signed for films but replaced with males as the projects approached production.³⁶ She realized that “Hollywood operates on relationships, and those in power, who are mostly white males, seem to feel they’re exempt from discrimination laws.”³⁷

³¹ DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT (2011), § 15-201, <http://www.dga.org/~media/Files/Contracts/Agreements/2011%20BA%20sc/2011%20BA%20full.pdf>. However, the DGA itself is a problematic factor in directorial gender disparity, which will be addressed in later sections of this note.

³² *Id.*

³³ *DGA Diversity – Frequently Asked Questions*, <http://www.dga.org/The-Guild/Diversity-FAQ.aspx>. The statistics for race are even lower. African Americans make up 4.2% of all members, Latinos 3.2%, Asian Americans at 2.1%, and Native Americans occupy 0.3%. *Id.*

³⁴ Robinson, *supra* note 5 (arguing for self-regulation in the industry as opposed to government intervention).

³⁵ Maria Giese, *The Battle for Female Director Voices in the U.S. Media*, *Women Directors in Hollywood*, (Sep. 21, 2015), <http://www.womendirectorsinhollywood.com/the-battle-for-female-director-voices-in-u-s-media/>.

³⁶ Eng, *supra* note 9.

³⁷ *Id.*

In 2013, Giese filed a complaint with the EEOC, urging an investigation into whether Hollywood studios' perpetual failure to implement gender-neutral hiring practices in their employment of directors violates Title VII.³⁸ The agency was reluctant to pursue an industry-wide investigation. Instead, it recommended "individual lawsuits for a woman who would directly sue a studio or production company within a 12-month window with smoking-gun evidence."³⁹ Convinced of retaliatory black listing for any woman who initiated such a lawsuit, Giese turned to the ACLU,⁴⁰ which in May 2015 sent a letter seeking action to the EEOC, the California Department of Fair Employment and Housing, and the Office of Federal Contract Compliance Programs.⁴¹ In a potential step towards a government lawsuit against the studios, the EEOC launched a formal investigation in October 2015.⁴² The agency sent out letters to female directors to determine the extent of the issue and possible remedies.⁴³ Commercial director Lori Precious, one of the women the EEOC called in to discuss the situation, said: "I would like the EEOC to take legal action against the studios, the networks and the commercial production companies to make them comply with the law. I hope they force people to change the way they do business because Hollywood is not exempt from the law."⁴⁴ The

³⁸ David Robb, *DGA Denies ACLU Claim of Secret Hiring List*, DEADLINE (May 15, 2015, 4:38 PM) <http://deadline.com/2015/05/dga-denies-aclu-claim-secret-hiring-list-1201427882/>; Eng, *supra* note 9.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ #FILMEQUALITY, <https://www.aclusocal.org/filmequality/>.

⁴² Ted Johnson, *Employment Commission to Interview Women Directors in Gender Discrimination Probe*, VARIETY (Oct. 6 2015, 4:19 PM) <http://variety.com/2015/biz/news/eec-women-directors-gender-discrimination-aclu-1201611731/>; Jason Bailey, *Federal Employment Agency is Officially Investigating Gender Discrimination in Hollywood*, FLAVORWIRE (Oct. 7 2015, 9:05 AM) <http://flavorwire.com/541419/federal-employment-agency-is-officially-investigating-gender-discrimination-in-hollywood>; David Robb, *Feds Officially Probing Hollywood's Lack of Female Directors*, DEADLINE (Oct. 6 2015, 5:15 PM) <http://deadline.com/2015/10/female-directors-hollywood-federal-investigation-eeoc-1201568487/>.

⁴³ Johnson, *supra* note 32.

⁴⁴ Robb, *supra* note 27.

EEOC's recent action shows that the grievances of women in Hollywood may have real legal implications.

Even though there are significant problems with establishing Title VII claims, particularly a systemic one embracing the industry that depends largely on statistics for its success, this Comment assumes the validity of women director's Title VII claim against the studios that employ them and focuses on whether such a statutory claim might run afoul of constitutional protections. Part I covers the structure of the industry. Part II addresses the Title VII claim. Part III focuses on First Amendment barriers to the claim, concluding that the First Amendment does not nullify the effects of Title VII. Finally, Part IV concludes with the implications of male dominated narratives on American society.

B. The Industry

"Hollywood" is a highly concentrated market. The American entertainment industry is controlled by seven media conglomerates. These massive corporations own all of the country's major studios (although there are some independent filmmakers) that produce all of the television and major movies released in the U.S. The major players are: CBS Corporation, General Electric, News Corporation, Time Warner, Walt Disney Co., Sony Corporation, and Viacom.⁴⁵ The conglomerates are both vertically and horizontally integrated, meaning that they own the studios that produce the productions and the networks that air them.⁴⁶

The conglomerates control broadcast and cable networks, studios, and production companies. A film studio is a major entertainment company or motion picture company which

⁴⁵ CHAD GERVICH, *SMALL SCREEN, BIG PICTURE: A WRITER'S GUIDE TO THE TV BUSINESS* 21 (Three Rivers Press 1st ed. 2008).

⁴⁶ *Id.* at 35.

uses its facilities to make films through production companies.⁴⁷ In Hollywood, the studio controls all aspects of production, owns the copyright to the film, and hires the employees, including the director.⁴⁸ Production companies are headed by an executive producer who oversees the entire project. Executive producers do not belong to any unions or professional guilds because they are management.⁴⁹ The term “producer” is misleading in its implication of one individual. On the contrary, there are many types of producers on any given film, and their responsibilities often overlap. Executive producers oversee financing, while line producers manage scheduling and budget, and some dabble in screen writing.⁵⁰ The list is ongoing, but the true “boss” of the production is the executive producer. In addition to funding and budget management, a film producer’s main responsibility is to hire staff (including directors, writers, and actors) and manage logistics.⁵¹ On the other hand, the director is the employee of the studio or its production company under a DGA employment contract.⁵² Occasionally, an agency or “loan out” corporation will contract with the studios to provide the directors, actors, or other employees the agency represents.⁵³ Certain “A-list” directors are afforded a high degree of authority on set, but the studios have the ultimate control in Hollywood.⁵⁴

Historically, Hollywood was monopolized by five major studios during the “Studio Era” of 1930–1949.⁵⁵ MGM, Warner Bros., 20th Century Fox, Paramount, and RKO dominated the

⁴⁷ Telephone interview with Richard Freiman, Professor of Entertainment Law, Loyola Marymount University (Aug. 7, 2015).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The Film Director, <http://www.mediacollege.com/employment/film/director.html> (last visited June 19, 2015).

⁵¹ *Id.*

⁵² Freiman, *supra* note 36.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Tom Schatz, THE STRUCTURE OF THE INDUSTRY (June 22, 2007) at 15

http://www.blackwellpublishing.com/content/bpl_images/content_store/sample_chapter/9781405133876/9781405133876_c01.pdf.

market and were all vertically integrated: they owned essentially all production companies, distribution companies, and cinemas in the U.S.⁵⁶ In 1949, the “Big 5” were forced to sell off cinema chains after the Supreme Court determined that the existing distribution scheme violated antitrust laws.⁵⁷ This decision, along with the rise of television in the 1950’s and 1960’s, marked the decline of the film industry and the Big 5’s hold over the market. However, the studios repurposed their modus operandi with a “concentrat[ion] on financing and distribution rather than production,” much like modern TV studios.⁵⁸ The studios newfound reliance on independent producers to supply projects “meant ceding creative control to independent producers and freelance directors, and also to top stars whose ‘marquee value’ gave them tremendous leverage and frequently a share of the profits.”⁵⁹ This gave rise to the prominence of film directors in Hollywood. In the 1980’s, Hollywood studios regained their footing in the industry and re-emerged as subsidiaries of the seven media conglomerates.⁶⁰

Fast forward to the early 2000s, when “conglomerate Hollywood had attained oligopoly status.”⁶¹ The conglomerates—News Corp., Sony, Time Warner, Viacom, Disney, and General Electric—reap over eighty-five percent of movie revenues and supply over eighty percent of primetime TV programming in the U.S., “by far the world’s richest media market.”⁶² The American film industry is now dominated by six major film companies—Warner Bros Pictures, 20th Century Fox, Paramount Pictures, Columbia Pictures, Walt Disney/Touchstone Pictures, and

⁵⁶ *Id.*

⁵⁷ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, pincite (1948).

⁵⁸ Schatz, *supra* note 35, at 16.

⁵⁹ *Id.*

⁶⁰ Schatz, *supra* note 35, at 22. (“The quest for synergy was spurred by multiple factors, notably the dramatic growth of home video and cable, the Reagan-era policies of deregulation and free-market economics, and the obvious impulse to enhance (and exploit) the value of their blockbuster hits.”).

⁶¹ Schatz, *supra* note 35, at 27.

⁶² *Id.*

Universal Studios—which are all subsidiaries of the major media conglomerates. The main takeaway for the entertainment sector is that directors ultimately have a very limited range of choice of employers, meaning that the policies or practices of a few can have dramatic effects across the entire industry.

Part II: The Claim

Title VII prohibits an employer “to fail or refuse to hire” any individual on the basis of “race, color, religion, sex, or national origin.”⁶³ It has two threshold requirements: the plaintiff must show the defendants meet the statutory definition of an employer, and the plaintiff must likewise qualify as an employee.⁶⁴ The plaintiff must further show, through a preponderance of the evidence, that the employer discriminates based on the plaintiff’s protected status.⁶⁵ Under Title VII, a corporation or individual is an employer if it has at least fifteen people on its payroll.⁶⁶ A Hollywood production company or studio, such as Paramount Pictures would seem to easily qualify because it employs well over fifteen individuals annually.⁶⁷ Even if particular projects are separately incorporated or created as LLCs or other entities, it remains likely that such projects, by the time they reach the stage at which a director is hired, will satisfy the statutory minimum.

Second, the plaintiff must qualify as an employee, which the statute opaquely defines as “an individual employed by an employer.”⁶⁸ The factors set forth in *Creative Non-Violence v.*

⁶³ 42 U.S.C. § 2000e-2(a) (2012).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ PARAMOUNT PICTURES, <http://www.paramount.com/inside-studio/studio/careers> (Studio career directory has at least 37 listed positions, not including staff and crew positions).

⁶⁸ 42 U.S.C. § 2000e(f) (2015).

Reid are generally recognized to be the appropriate test as part of a holistic analysis to determine whether an individual is an employee or an independent contractor.⁶⁹ The *Reid* elements are:

the hiring party's right to control the manner and means by which the product is accomplished[;] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁷⁰

The totality of these factors indicates that film directors are employees of Hollywood studios. The first and most determinative factor,⁷¹ the employer's control over the "manner and means" of the project, is evident in the context of filmmaking. While an established director is a creative force on set, she is "hired by and answerable to" the executive producer.⁷² It is easy to confuse the director of a film with its producer "since they are both 'bosses' of the film, and indeed their jobs can often overlap."⁷³ However, producers are upper-level management while directors are unionized employees with the DGA.⁷⁴ The DGA provides an at-will employment contract for directors hired by studios which outlines many facets of the director's vocation, including a minimum salary requirement, screen credit, suspension and termination, working conditions, pension, and healthcare plans.⁷⁵ In addition, the DGA employment contract specifies that a director is an employee of the production company under the statutory provisions of

⁶⁹ *Compt. for Creative Non-Violence v. Reid*, 490 U.S. 730, pincite (1989).

⁷⁰ *Id.* at 751–52.

⁷¹ Rothstein, *supra* note 56, at 184.

⁷² How Becoming a Movie Director Works, *supra* note 44.

⁷³ DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT, *supra* note 30, at § 1-301 ("Definition of a 'director' as a recognized employee, emphasizing that "the fact that the Director may also render services as a Producer and/or Writer or in any other capacity shall not take him or her out of the classification as a Director, with reference to any work he or she performs as a Director, and during the period of such work."); *see also* How Becoming a Movie Director Works, *supra* note 44.

⁷⁴ DIRECTOR'S GUILD OF AMERICA, <http://www.dga.org/> (last visited Nov. 2, 2015).

⁷⁵ DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT, *supra* note 30 at 38–43, 55–62, 158–64.

“works made for hire.”⁷⁶ That means that the work a director creates belongs to the studio for copyright purposes.⁷⁷ Directors are thus employees of the production company, and secondary to the executive producer. They have supervisory positions, but are ultimately links in a long corporate chain of command.

Directors possess artistic skill that they contribute to the studio’s films. From an artistic standpoint, directors are the true visionaries of feature films. They transform scripts into motion pictures and control everything from acting styles to shooting deadlines. Directors are required to plan locations, shots, pacing, acting styles, and anything relevant to shaping the movie’s atmosphere.⁷⁸ They also oversee cinematography and the technical aspects of production while coaching actors and coordinating staff on set.⁷⁹ In Hollywood, directors possess broad discretion in the artistic conception of films: they are afforded the highest level of creative authority and intimate involvement with the project.⁸⁰ They have full rein (and are expected) to execute their own creative interpretation of the script. Therefore, directors are how studios create art.

Arguably, a director’s artistic skill can be likened to a trade. The duration of their relationship with the studios is flexible and dependent on the particular needs of each film, as is the location of the set and the working hours. However, directors rarely provide their own tools

⁷⁶ DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT, *supra* note 30.

⁷⁷ *Id.*; 17 USCS § 201.

⁷⁸ See How Becoming a Movie Director Works, <http://entertainment.howstuffworks.com/movie-director1.htm> (last visited June 23, 2015) (noting that a director’s responsibilities include “working with the producer to cast the actors, organizing and selecting shooting locations, interpreting the script – and in some cases, writing or selecting it, approving sets, costumes, choreography, and music, giving actors direction while conducting rehearsals and shooting the film, directing the work of the crew during shooting, working with cinematographers on shot composition, and working with editors on creating a rough cut and final film”)

⁷⁹ *Id.*

⁸⁰ The relevance of this concept is discussed further in Part III.

nor do they contribute to the project's budget. Those aspects of production are provided by the studios, which are in the business of making and disseminating movies.

In contrast, the status of independent directors is more ambiguous because they often form their own production companies and do not answer to studios at all.⁸¹ Perhaps the independent sector's atmosphere of elastic employment correlates with its heightened equality: women have more success when they take career matters into their own hands. However, independent films are often afforded lower budgets and prominence in the American consumer's consciousness. Ultimately, an independent movie director more closely resembles an independent contractor as opposed to the Hollywood director who is undoubtedly employed by the studios.

Under the Title VII framework, women directors who have been denied employment opportunities based on their sex have several claims available to them. Individual lawsuits are likely to be brought as disparate treatment actions—claims that an employer intentionally treated an employee more favorably than another with similar qualifications to the plaintiff because that employee was outside the plaintiff's protected class. To bring a prima facie case of disparate treatment, a plaintiff must show:

(i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁸²

⁸¹ The independent directors could serve as a control group in analyzing standard deviation in a disparate impact analysis.

⁸² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Next, the burden shifts to the employer to assert a nondiscriminatory reason for the hiring decision.⁸³ At that point, the plaintiff has the opportunity to prove that the employer's reason was a pretext for the proscribed discrimination.⁸⁴ If the plaintiff cannot show the asserted reason is false, she must establish that it was not applied to similarly situated individuals.⁸⁵ For example, if a female employee is fired for missing too many days of work, she may still prevail if she shows that her male coworkers who took the same amount of time off were not fired. Directors such as Maria Giese who recount directly being passed over by men have the greatest likelihood of success with this claim. In *Price Waterhouse v. Hopkins*, the Supreme Court held that if gender was a factor in an employment decision at the moment it was made, that decision violates Title VII even if it was based on "a mixture of legitimate and illegitimate considerations."⁸⁶ Thus, Giese and others may be able to prove individual discrimination by comparison to the treatment of their male colleagues.

The Title VII claim is an odd creature in this zoo. The women who bring individual lawsuits are open to retaliation by Hollywood's traditional boy's club and risk being shunned professionally and socially in the industry.⁸⁷ In her memoir, Grace Jones addresses misogyny in the industry: "[Y]ou can tell why there are so few female film directors. It's the same with any job that society has decided can only be done by a man. They find ways to undermine and

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Ekokotu v. Fed. Express Corp.*, 408 F. App'x 331, 338 (11th Cir. 2011).

⁸⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) ("[W]e know that the words 'because of' do not mean 'solely because of.'").

⁸⁷ Eng, *supra* note 9 ("Most women directors don't speak out about the lack of opportunity because they're afraid of being blacklisted."); *but see* Robb, *supra* note 23 (noting that not all female directors encourage the ACLU's efforts: "As one veteran female director told the ACLU: 'For those of us who have been in the business for a while, who have managed against tremendously difficult odds to make movies or find employment in TV, even accumulate long lists of awards along the way . . . these [programs] are a slap in the face and just another way to humiliate a group of people who are already being marginalized by a flawed and biased establishment'").

undervalue a woman doing that job. And the fact that you end up saying ‘they’ makes you sound paranoid.”⁸⁸ Those who speak out seem “paranoid” because of biases—implicit or explicit—that influence the studio hiring decisions and American society. Thus, compiling proof of discrimination is a major hurdle for an individualized lawsuit.

Furthermore, the effect of legal action is uncertain. Commenting on the legal and social implications of a claim, attorney Bonnie Eskenazi⁸⁹ asked: “assuming there is an investigation and there is found to be discrimination, then how do you fashion a remedy which will actually make a difference?”⁹⁰ Eskenazi noted that unless a central regulatory body takes action, the proposed legal action will have little practical effect on job opportunities for female directors.⁹¹ Ultimately, a female director may prevail on an individual disparate treatment claim and secure damages, but the next time she looks for a job, she probably won’t be hired.

Thus, for true industry wide change, a disparate impact or a systemic disparate treatment (sometimes called a pattern-or-practice) claim would be more effective.⁹² Title VII prohibits employment practices that may appear facially neutral but operate in a discriminatory fashion.⁹³ Essentially, a disparate impact claim requires courts to focus on the effects of a particular employment practice, which may be unlawful regardless of whether the employer possessed an

⁸⁸ GRACE JONES & PAUL MORLEY, *I’LL NEVER WRITE MY MEMOIRS* (2015)

<http://www.timeout.com/london/music/grace-jones-autobiography-extract-misogyny-sectioned>.

⁸⁹ Partner at the law firm Greenberg Glusker.

⁹⁰ Johnson, *supra* note 27.

⁹¹ *Id.*

⁹² Marisa Rothstein, *Sharing the Stage: Using Title VII to End Discrimination against Female Playwrights on Broadway*, 17 *CARDOZO J.L. & GENDER* 171, 182 (2008). Rothstein expounds this issue at length in the context of female Broadway playwrights. She grounds her theory on systemic disparate treatment, asserting that a class action disparate treatment claim is better suited to counter discrimination which may otherwise be difficult to expose on an individual basis. She also states that her analysis can be applied to female film directors.

⁹³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that a general intelligence test with no relevance in measuring the ability to perform a particular job and which disproportionately screened out African American employees was unconstitutional under Title VII).

invidious purpose in its implementation.⁹⁴ Whether the particular employment practice is a policy or the cumulative result of biased decision making, it violates Title VII if it disproportionately discriminates against a protected class and has no demonstrably reasonable correlation to job performance.⁹⁵ The decentralized hiring process in Hollywood has the effect of excluding talented directors based on their sex, which is a protected status.

Given the complex structure of the film industry, the EEOC's first hurdle is to consolidate individual experiences into evidence of systematic discrimination. Systemic discrimination is usually shown by statistical evidence of a gross and long-lasting disparity between gender composition of the employer's workforce and the composition that would be expected, given the labor market from which the defendant picks its workers.⁹⁶ Thus, the EEOC must transform the interviews conducted during its investigation into statistical evidence of discrimination. Moreover, the method by which the conglomerate system excludes women from creative positions cannot be understood without a panoramic view of the industry. Hollywood studios and production companies traditionally do not employ directors who are not DGA members.⁹⁷ However, the DGA does not take on members unless they have previous work experience.⁹⁸ Therefore, each class of graduating film students—half of whom are women⁹⁹—must break into the industry on their own before they have DGA support. If it is difficult for

⁹⁴ *Id.*; see also Ricci v. DeStefano, 557 U.S. 557, 578 (2009); Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003).

⁹⁵ *Griggs*, 401 U.S. at 436.

⁹⁶ *Teamsters v. United States*, 431 U.S. 324, pincite (1977) (plaintiff showed that despite their availability and presence in the general population from which the employer selected its employees, almost no African American or Hispanic workers had been hired).

⁹⁷ See also Freiman, *supra* note 36.

⁹⁸ *Id.*; see also Howard D. Fabrick, *Unique Aspects of Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS LAW at 31 (2015). This citation is either missing the first page of the work, or is a nonconsecutively paginated journal. If the latter, cite according to BB R 16.5.

⁹⁹ Eng, *supra* note 9.

DGA-affiliated women to get jobs, it is nearly impossible for recent graduates to gain experience. This vicious cycle perpetuates the exclusion of women from the DGA and ultimately Hollywood, forcing women into the independent sector. Comparatively, independent women directors are much more common: women comprised twenty-nine percent of directors working on documentaries and eighteen percent of directors on narrative features in the American Independent Film industry.¹⁰⁰ However, not all female directors have access to the funding and resources necessary to create an independent film. The ACLU notes that it is more difficult for women to find film financing because “women have to convince men to trust [them] with [their] money.”¹⁰¹ Moreover, even when women do make independent films, they are underrepresented in that market.¹⁰² Their films “are regulated to less financially lucrative platforms” and are less likely to be distributed by the companies which have the broadest reach.¹⁰³

A major factor in systemic gender bias is the subjective, decentralized process by which directors are hired. Hiring decisions do not lie solely with the executive producer, but rather “are vested in numerous individuals who act independently of each other.”¹⁰⁴ In addition, studio

¹⁰⁰ MARTHA M. LAUZEN, CENTER FOR THE STUDY OF WOMEN IN TELEVISION & FILM, INDEPENDENT WOMEN: BEHIND-THE-SCENES EMPLOYMENT ON INDEPENDENT FILMS IN 2014–15 (2015), http://womenintvfilm.sdsu.edu/files/2015_Independent_Women_Report.pdf; see also STACY L. SMITH ET AL., SUNDANCE INSTITUTE AND WOMEN IN FILM LOS ANGELES, EXPLORING THE BARRIERS AND OPPORTUNITIES FOR INDEPENDENT WOMEN FILMMAKERS PHASE I AND II (2014), <http://www.sundance.org/pdf/press-releases/Exploring-The-Barriers.pdf>.

¹⁰¹ See Letter from American Civil Liberties Union of Southern California to Equal Employment Opportunities Commission, *supra* note 6, at 8 (quoting Nsenga Burton, *Black Women and the Hollywood Shuffle*, *The Root* (Aug. 6, 2010), http://www.theroot.com/articles/culture/2010/08/black_women_film_makers_struggle_in_hollywood.html?page=0,0).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Directors Guild of America, Inc. v. Warner Bros., Inc.*, 1985 U.S. Dist. LEXIS 16325, at *20 (C.D. Cal. Aug. 30, 1985) (“For each production, the individuals responsible for the hiring process will vary. Independent or outside producers will often have a significant degree of influence over the decision.”).

executives hire directors on subjective, merit-based factors.¹⁰⁵ In light of the position’s artistic nature, a director’s level of authority on set is also proportional to her experience and reputation.¹⁰⁶ Thus, individuals with leverage in the industry—such as Angelina Jolie or Sophia Coppola—will have more agency in the realization of their craft and ultimately the direction of their careers. Meanwhile, new female directors will have minimal power, if they are hired at all.

Moreover, the obstacle may not be limited to procedural barriers. The ACLU considers the DGA a main cause of discriminatory hiring practices and alleges that the DGA sends non-transparent gender exclusive lists to studios.¹⁰⁷ If the ACLU’s allegations are proven, female directors may also have a claim against the DGA since Title VII prohibits labor organizations from exhibiting sex discrimination in their practices.¹⁰⁸ The DGA denies the existence of a secret hiring list, stating that it does not make hiring recommendations while emphasizing its facial attempts at inclusion.¹⁰⁹ Whether or not the ACLU’s accusation has merit, blame also lies with the studio executives who categorically exclude women in employment decisions.

The decentralized hiring process is not only a barrier to female directors gaining employment opportunities, but it may be a barrier to class action suits as well. The first instance of litigation in this field was *Directors Guild of America, Inc. v. Warner Bros., Inc.*¹¹⁰ The DGA initiated a class action suit on behalf of male racial minority and female directors against

¹⁰⁵ *Id.* (“Typically, personnel responsible for filling the DGA-covered positions will look for prior experience in the type of production planned, technical competence, an ability to work effectively with the other members of the staff and specific personality traits.”).

¹⁰⁶ The Film Director, *supra* note 56 (“A first time director might be given specific instructions on how the film is to be made, but an acclaimed Hollywood director is likely to be given full creative control.”).

¹⁰⁷ See Letter from American Civil Liberties Union of Southern California to Equal Employment Opportunities Commission, *supra* note 6.

¹⁰⁸ 42 U.S.C.S. § 2000e-2 (2015).

¹⁰⁹ Robb, *supra* note 23.

¹¹⁰ *Directors Guild of America, Inc. v. Warner Bros., Inc.*, 1985 U.S. Dist. LEXIS 16325, at *20 (C.D. Cal. Aug. 30, 1985).

prominent Hollywood studios, alleging that the studios employed discriminatory hiring practices. The studios counterclaimed against the DGA, arguing a conflict of interest between the named plaintiff and the class and also that the DGA was (and is) mainly comprised of white males, so that it cannot adequately represent the class of minorities and women.¹¹¹ In 1985, at the time of the suit, the DGA's members were eighty percent white males, fifteen percent women, and four percent minorities.¹¹² The DGA had ten officers, including two women.¹¹³ None of the top officers was a member of a racial minority group.¹¹⁴ As a result, the DGA was dismissed as a representative union for the class, a ruling which doomed the suit. The court also found that the hiring process was too subjective to warrant class treatment because the plaintiffs' deposition testimony indicating that directors are hired on a word-of-mouth basis with no systematic means of inclusion for women and minorities was too speculative for the Court.¹¹⁵ Thus, a disparate impact claim comes with a serious caveat.

If Hollywood's gender exclusive veil is to be pierced, there must be government legal action with teeth. The most successful route for female directors would be to persuade either the EEOC or the California Department of Fair Employment and Housing to bring a pattern-or-practice claim on behalf of the individual victims of the studios' discriminatory hiring practice.¹¹⁶ In such a claim, the Government bears the initial burden to show that "unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers."¹¹⁷ This can be achieved by showing that a discriminatory policy exists and does not

¹¹¹ *Id.* at *18.

¹¹² *Id.* at *19.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *15.

¹¹⁶ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360–361 (1977).

¹¹⁷ *Id.* at 360.

require the Government to “offer evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy.”¹¹⁸ Thus, if the EEOC or the Department can show a system wide pattern or practice of sex discrimination by the studios, female directors have a viable form of relief and Hollywood has potential for change.

This is particularly relevant in California, the center of the film industry, but holds true in other states as well. The EEOC has already begun its investigation, and the Department is empowered to bring a claim, as well. The California Fair Employment and Housing Act prohibits workplace discrimination and discriminatory hiring practices on the basis of sex.¹¹⁹ Thus, the California Department of Fair Employment and Housing has the authority to investigate industries and take action to remedy systemic gender bias by either filing Director’s complaints or bringing class litigation.¹²⁰ Furthermore, the Department recently expanded its prosecutorial powers by forming a litigation unit that “focuses on systemic complaints” alleging “a pattern or practice of discrimination impacting a large number of complaints statewide” and allocating resources to that team.¹²¹ The broadly implemented discriminatory hiring practices in Hollywood are most vulnerable under this claim.

Another issue to consider in the Title VII claim is a possible Bona Fide Occupational Qualification (BFOQ) exception. The BFOQ allows an employer to consider “religion, sex, or national origin” (but not race) in instances where that characteristic is “reasonably necessary to the normal operation of that particular business or enterprise.”¹²² For example, a regulation

¹¹⁸ *Id.*

¹¹⁹ CAL GOV’T CODE §12940(a) (2015).

¹²⁰ *Id.*; *see also* CAL. CIV. CODE § 51 (2015); CAL. GOV’T CODE § 12961 (2015).

¹²¹ Report to the Joint Legislative Budget Committee, Department of Fair Employment and Housing (March 2015), at 3–4, [http://www.dfeh.ca.gov/res/docs/Statistics/2015/DFEH%20Report%20to%20the%20Legislature%20\(2\).pdf](http://www.dfeh.ca.gov/res/docs/Statistics/2015/DFEH%20Report%20to%20the%20Legislature%20(2).pdf).

¹²² 42 U.S.C. § 2000e-2 (2015).

excluding women from positions at an Alabama correctional facility was upheld as a proper exercise of the BFOQ because the facility's atmosphere of violence was too dangerous for women.¹²³ The Court reasoned that female officers were at risk in an environment where many male inmates had "criminally assaulted women."¹²⁴ In contrast, the United States Court of Appeals for the Fifth Circuit held that customer preference for female flight attendants did not qualify as a BFOQ.¹²⁵ Essentially, the BFOQ test is "whether 'the essence of the business operation would be undermined by not hiring members of one sex exclusively.'"¹²⁶ Under this guideline, it is difficult to see how a director's gender would influence the outcome of a film in such a way as to sanction industry-wide exclusion of female directors. Furthermore, the Supreme Court has consistently interpreted the BFOQ as "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."¹²⁷ Thus, the factual circumstances at play in *Dothard*—such as physical danger to one's self—are not relevant to the film industry. Like *Diaz*, alleged audience preference for male directors' films is insufficient grounds for a BFOQ.

Of particular relevance to this Comment and the film industry is that according to EEOC guidelines, the BFOQ exception is applicable to casting actors and actresses: "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."¹²⁸ While it may be necessary to cast a particular gender for a certain role, the gender of the director is irrelevant to the film's outcome. Gender and artistic skill are not mutually exclusive: thus, while studios have a

¹²³ *Dothard v. Rawlinson*, 433 U.S. 321, 335–36 (1977).

¹²⁴ *Id.* at 336.

¹²⁵ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

¹²⁶ *Id.*

¹²⁷ *Case name*, 433 U.S. 321 at 334.

¹²⁸ 29 C.F.R. §1604.2(a)(2) (2016).

statutory basis to avoid liability for sex discrimination in casting actors, this exception cannot apply to directors.

Part III: The Defense

To ensure the success of the Title VII claim, female directors must carefully tailor the focus of their complaint on job opportunities for women. Most commentators supporting female directors' claims recognize the need for diverse storytelling and a feminine perspective that will allow more positive identity formation for women and girls.¹²⁹ However, framing Title VII claims in this way—as opposed to framing them as providing equal employment opportunity—raises serious constitutional problems. Few would support a federal mandate requiring films to have a female centric or feminist message.¹³⁰ This distinction is crucial considering the director's artistic contribution to film production. Rather, women must gain opportunities in Hollywood while allowing studios to retain creative authority over their projects. The studios' defense to directors' claims necessarily lies within the First Amendment doctrines of protected speech, freedom of artistic expression, and freedom of association. If female directors adopt the correct approach with the least controversial policy implications they will succeed, and studios will be able to maintain artistic agency.

A. Freedom of Speech

Hollywood and the entertainment industry at large can be regulated by antidiscrimination laws without evoking the First Amendment. The studios' right to protected speech is not absolute.¹³¹ Based on the Supreme Court's holding in *AP v. NLRB*, it is possible to regulate the

¹²⁹ *Women in Hollywood and Gender Equality*, *supra* note 16.

¹³⁰ *See* Basham, *supra* note 4, at 580 and Robinson, *supra* note 4, at 1 (mentioning that audiences and industry personnel are opposed to government regulation or judicial interference of the arts).

¹³¹ *AP v. NLRB*, 301 U.S. 103, 132–33 (1937); Robinson, *supra* note 5, at 4.

entertainment industry without violating First Amendment rights. In *AP*, the Court found that a newspaper was “not immune from regulation because it is an agency of the press” and “has no special privilege to invade the rights and liberties of others.”¹³² In addition, the Supreme Court has upheld statutes that bar discrimination in the press despite the notion of protected speech within the media.¹³³ In *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, the Supreme Court considered the constitutional implications of a local ordinance that prohibited newspapers from listing “help wanted” advertisements in sex-designated columns on the newspapers’ freedom of speech.¹³⁴ Despite the Court’s acknowledgement that “the freedoms of speech and of the press rank among our most cherished liberties,” it held that those freedoms are qualified.¹³⁵ The ordinance in this case was not passed with the purpose of censoring or curbing the press, nor did it threaten the Pittsburgh Press’s ability to publish and distribute its newspaper.¹³⁶ Similarly, a regulation barring employment discrimination in Hollywood would not impair the studios’ ability to disseminate films, nor would it threaten their financial viability. The advertisements at issue in *Pittsburgh Press Co.* were ultimately found to be unprotected commercial speech: “discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the ordinance.”¹³⁷ The case establishes that prohibiting employment discrimination has no legitimate connection to the media’s exercise of free speech.

¹³² *AP*, 301 U.S. at 132. The newspaper had allegedly terminated an employee in retaliation for his attempt to organize a union. *Id.*? or else put the sentence in a parenthetical.

¹³³ *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, pincite (1973) (holding that a local antidiscrimination ordinance prohibiting newspapers from publishing vocational opportunities with racial and gendered classifications did not violate the First Amendment); *see also* Robinson, *supra* note 5, at 44.

¹³⁴ *Pittsburgh Press Co.*, 413 U.S. at 378.

¹³⁵ *Id.* at 381.

¹³⁶ *Id.* at 383.

¹³⁷ *Id.* at 388.

In contrast, a lawsuit or regulation that has the effect of curbing speech would violate the First Amendment. Lawsuits “directed at restricting the creative process in a workplace *whose very business is speech related*, present a clear and present danger to fundamental free speech rights.”¹³⁸ In *Lyle v. Warner Bros*, a group of writers of the sitcom *Friends* brought suit alleging sexual harassment after other writers made sexually explicit remarks and bigoted jokes in the workplace.¹³⁹ The court found that the tension between sexual harassment and the First Amendment peaks where the company’s work is expression itself. However, the issue of equal employment is distinguishable from that of censoring workplace speech. Suppressing the speech of writers damages the creative process. In contrast, creativity in the film industry is bolstered by allowing more women to enter the workforce.

B. Freedom of Artistic Expression

A complaint framed in terms of changing the messages conveyed by the media, rather than merely its employment practices, could trigger more serious concerns. Challenging the content and message of films—such as negative stereotyping of women or minorities, which go to the core of protected speech—is not necessary to a suit, although a change in content or sensibility may be a positive side effect of efforts to rid the industry of discrimination.

Hollywood studios have a constitutional right to challenge regulation of the substantive content of their films. The medium of film is protected under free speech and press, even if the purpose of film is merely entertainment, due to the nature of film as an artistic expression.¹⁴⁰ For instance, films cannot be censored or banned because some may consider them “sacrilegious” or

¹³⁸ *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264, 297 (2006) (Chin, J., concurring). Please review this citation.

¹³⁹ *Id.* at 272.

¹⁴⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

amoral.¹⁴¹ In her note *Unmasking Tonto*, Megan Basham establishes that the Supreme Court’s traditional maintenance of its “commitment to content deregulation” in the context of First Amendment rights and the arts extends to the practice of casting film actors.¹⁴² Basham explores the implication of this practice in regards to the racially discriminatory casting of actors—particularly the exclusion of Native American actors and the casting of white actors to fill Native American roles. She contends that actors are “artistic subjects” of filmmakers—they are instruments used to project a particular aesthetic that the government cannot proscribe or regulate, even to achieve anti-discriminatory goals.¹⁴³ She states: “For instance, it would be unconstitutional to mandate Grant Wood to diversify the racial identity of the pitchforked couple in his famous painting, *American Gothic*.”¹⁴⁴ However, while the balance of First Amendment concerns may nullify claims for actors who have faced racial discrimination, the argument does not extend to directors facing gender discrimination.

Discrimination against actors is readily observable. Viewers have a glimpse into the casting process when watching a film lacking female protagonists or major characters of color. However, discrimination against directors is subtler and insidious. The director remains behind the scenes, hidden from the audience. Directors, like film actors, are inherently artistic subjects by virtue of the skill they bring on set. Yet, unlike actors, the gender and ethnicity of a director does not facially impact a film’s image. Rather, the director’s choices in filmmaking are represented in the overall artistic quality of the film. For instance, directors like Quentin Tarantino and Tim Burton have their own immediately recognizable aesthetic.

¹⁴¹ *Id.* at 506; *Super. Films, Inc. v. Dep’t of Educ.*, 346 U.S. 587 (1954).

¹⁴² Basham, *supra* note 5, at 580.

¹⁴³ *Id.* at 578–79; *see also* Robinson, *supra* note 5 (discussing sex-based BFOQ for actors).

¹⁴⁴ Basham, *supra* note 5, at 578–79; Robinson, *supra* note 5.

A producer may argue that choosing a particular director is intrinsically artistic, and an ancillary result of that argument is that more often than not (fifteen to one) the producer will prefer the style of a male director. This argument may succeed in an individual suit involving prominent directors with an established aesthetic, but it cannot be sustained on a broader—perhaps class action—level. A studio may justify hiring Tim Burton to direct a playfully sinister animated film on one occasion, but it cannot justify hiring only male directors for its general course of production because artistry cannot be attributed to gender. In other words, a studio may rationalize hiring a particular individual, but it cannot exclude women in general. Requiring gender-neutral hiring practices does not amount to censorship of a film’s artistic message, nor does it substantially alter the artistic quality of film in such a way as to warrant constitutional protection.

C. Freedom of Association

As private entities, studio executives also have a right to freedom of association, including the right to be discriminatory in that selection. In *Boy Scouts of America v. Dale*, the Supreme Court permitted the Boy Scouts’ to dismiss a homosexual camp leader due to the organization’s First Amendment right to freedom of association.¹⁴⁵ Freedom of expressive association requires some type of public or private expression, though “associations do not have to associate for the ‘purpose’ of disseminating a certain message” to be protected.¹⁴⁶ In other words, the Boy Scouts did not need to assemble just to profess that homosexuality is not “morally straight,” but they are entitled to protection of that additional purpose.¹⁴⁷ Therefore, the presence of a homosexual camp leader would have implied that the group accepted homosexual

¹⁴⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 655.

conduct, impairing its message. Thus, the Boy Scouts could not constitutionally be held liable for violating state anti-discrimination laws.¹⁴⁸

Studios, however, cannot rely on this holding. To do so, they would have to admit that the exclusion of female directors is integral to their expressive purpose. The concession of intentional discriminatory hiring practices is a damning statement for the studios, and the industry at large, and would likely to lead to more public objections and lend legitimacy to female directors' experiences. In short, whatever the legal status of such a defense, it is hard to imagine a major studio offering it as a justification for a pattern of employment.

In *Roberts v. United States Jaycees*, the Supreme Court held that a social organization's gendered membership policy violated the Minnesota Human Rights Act, which prohibits discrimination on the basis of sex, thus establishing that freedom of expressive association is not absolute.¹⁴⁹ First, the Court considered a second form of group association distinguished from that of *Boy Scouts*, which does not require an expressive mission and is categorized as the right to associate based on a certain bond or shared experience resulting from membership in an exclusive cultural, gendered, or ethnic group.¹⁵⁰ The group must be private and exclusive, with high selectivity and shared ideals and beliefs. For example, the Jaycees were deemed large and unselective, as the only membership criterion was based on age or sex.¹⁵¹ Thus, the Jaycees "lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."¹⁵² Similarly, Hollywood studios are a powerful corporate

¹⁴⁸ *Id.* at 644.

¹⁴⁹ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

¹⁵⁰ *Id.* at 618 (explaining that freedom of group association is based on notions of personal liberty and the protection of intimate personal relationships from undue intrusion by the State).

¹⁵¹ *Id.* at 621.

¹⁵² *Id.*

force in the film industry, in no way sufficiently exclusive to warrant protected group association. Therefore, like the Jaycees chapter, Hollywood studios do not even pass the threshold for this form of constitutional protection.

The *Roberts* Court went on to hold that freedom of expressive association is qualified by any compelling state interest that cannot be achieved through alternative means, provided that the interest is unrelated to the suppression of ideas.¹⁵³ The statute did not violate the Jaycees' right of association because "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."¹⁵⁴ The Court further found that the Minnesota Human Rights Act did not intend to suppress protected speech, and the Jaycees did not demonstrate any serious burdens on its members' freedom of expressive association.¹⁵⁵ Following *Roberts*, the studios' right to freedom of association is secondary to job opportunities for female directors. If the California Department of Fair Employment and Housing takes the ACLU's letter seriously and pursues a pattern-or-practice claim, it is likely a court will rule that California has a compelling interest in eliminating gender discrimination in the workplace.

Moreover, in a case where a female lawyer sued a law firm for failing to consider her for the position of partner based on her sex, the Supreme Court ruled that Title VII applied without infringing upon the firm's constitutional rights of expression or association.¹⁵⁶ The Court recognized that while lawyers "may make a 'distinctive contribution . . . to the ideas and beliefs of our society,'" the defendant firm failed to show how that contribution would be inhibited by

¹⁵³ *Id.* at 623.

¹⁵⁴ *Id.* at 617.

¹⁵⁵ *Roberts*, 468 U.S. at 623–24.

¹⁵⁶ *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

considering a female associate for partnership on her merits.¹⁵⁷ Likewise, studios cannot successfully argue that the inclusion of female directors will substantially alter the messages communicated by their films. It is an argument akin to that of the Jaycees' in *Roberts*, which the Court considered to be "unsupported generalizations about the relative interests and perspectives of men and women."¹⁵⁸ Such an argument arbitrarily ties gender to artistic merit and has no place in the workforce. Moreover, "[invidious] private discrimination . . . has never been accorded affirmative constitutional protections."¹⁵⁹ For example, there is no constitutional right to discriminate when selecting attendees of a private school or members of a labor union.¹⁶⁰ Thus, discrimination in selecting who may direct a feature film should not be afforded constitutional protection.

Ultimately, if the Title VII claim is couched as a means to increase job opportunities for marginalized female directors, it has a better chance of succeeding than if it is presented as a means to imbue Hollywood films with a feminine perspective. As Russell Robinson notes in his comment on discriminatory actor casting, "[c]ourts can respect both equality and artistic freedom by creating procedural obstacles to discrimination and incentives for casting decision makers to think critically about whether and where in the process such discrimination is necessary, while preserving substantial creative discretion in the ultimate casting decision."¹⁶¹ It is not necessary for studio executives to relinquish artistic choice in casting directors—by widening the pool, Hollywood is exposed to a wealth of talent that is otherwise marred by gender discrimination.

¹⁵⁷ *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963)).

¹⁵⁸ *Roberts*, 468 U.S. at 629. The Jaycees argued that admitting women as voting members would alter the group's message due to women's inherently different views on matters relevant to the organization, such as federal budget, school prayer, voting rights, and foreign relations. Citation.

¹⁵⁹ *Hishon*, 467 U.S. at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

¹⁶⁰ *Id.* (quoting *Runyon v. McCrary*, 427 U.S. 160, (1976)); *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93–94 (1945).

¹⁶¹ Robinson, *supra* note 4, at 4–5.

Part IV: Conclusion

In her article on the stagnation of female directors in Hollywood, Maureen Dowd stated: “At their best, movies can be instructions in how to live and how not to live, and can help us invent the verbal and visual vocabulary with which we engage the world.”¹⁶² The identities of film-makers matter. Thus, the predominant narrative of straight white American males shapes how women see themselves.¹⁶³ With the current lack of female representation both on and off screen, it is unlikely that young girls will grow up believing they can star or direct in the feature films that influence culture. This is particularly relevant for women and young girls of color, who are arguably the most heavily impacted by the current state of the entertainment industry, as they receive even less representation than white women.¹⁶⁴ Jill Soloway, the Emmy award winning creator of Amazon’s *Transparent*, observed: “I still see storytelling for men by men that is always reinforcing the male gaze.”¹⁶⁵ Diverse storytellers are needed to account for the complexity of humanity. The lack of job opportunities, coupled with ineffective lawsuits, will inevitably chill the pursuit of careers in Hollywood by talented female directors. Government action will legitimize women director’s claims, and thus it is necessary for either the California Department of Fair Employment and Housing or the EEOC to take action and remedy the systemic gender discrimination in Hollywood.

¹⁶² Dowd, *supra* note 4, at 5.

¹⁶³ *Women in Hollywood and Gender Equality*, *supra* note 16.

¹⁶⁴ *See infra*, Part I.

¹⁶⁵ Dowd, *supra* note 4, at 8–9.

