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Advanced Entertainment Law

Seton Hall University School of Law

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TITLE VII AND FIRST AMENDMENT CHALLENGES: OVERCOMING BARRIERS TO DIVERSITY AND INCLUSION IN NEW YORK PROFESSIONAL THEATERS THROUGH “NON-TRADITIONAL CASTING” AND ALTERNATIVE SOLUTIONS

Eric L. Brown

I. Introduction

New York¹ is widely known to be a metropolis for racial and ethnic diversity because its residents are from virtually every nation on Earth and speak as many as 800 languages.² Its boroughs reflect a mixture of White, Black, Hispanic, Latino, Asian, and Middle-Eastern communities.³

The New York ethnic neighborhoods of Little Italy and Chinatown date back to the mid-19th century.⁴ Harlem and Bedford-Stuyvesant became home to African-Americans who migrated from the southern states after 1910.⁵ East Harlem, once known as Spanish Harlem, was settled by Hispanics from Latin America during the 1940s,⁶ and during the 1980s, immigrants from the Dominican Republic, Asia, Jamaica, Haiti, Russia and Africa substantially increased New York’s population.⁷

A visitor or a resident does not have to travel to one of New York’s neighborhoods or stroll down its 120,000 street blocks to experience its racial or ethnic richness.⁸ New York’s beauty and uniqueness derive from a myriad of people of different races and ethnicities that anyone can encounter while walking on its streets.⁹ Additionally, in New York, an individual can learn about the world outside of the city, and gain understanding about another race or culture simply by engaging in conversation with the Afro-Cuban mother in the subway, traveling with

the Pakistani taxi driver when one is late for an appointment across town, buying a loaf of bread from the Dominican shopkeeper at the “Spanish” bodega, or purchasing fruit and vegetables from the South Korean merchant.¹⁰ No matter where one lives, eats, drinks, shops, or visits, New York’s “colorful” residents are present to contribute their unique experiences to one’s life.¹¹

Unsurprisingly, over the past decade, New York’s population has edged closer to racial equilibrium.¹² In fact, in 2010, New York was comprised of a population that was 33 percent white, 29 percent non-white Hispanic and Latino, 23 percent black, 10 percent Asian, and 5 percent mixed race and ethnicity.¹³ Moreover, there has been a wave of white young adults, ranging in age from their late twenties to late thirties, integrating into New York’s predominantly African-American and Latino neighborhoods such as Harlem, Bedford-Stuyvesant, Bushwick, and Williamsburgh.¹⁴ Furthermore, Asians are further integrating into a wide range of neighborhoods throughout all five boroughs.¹⁵ Lastly, young immigrant minorities have increased their population in New York over the past decade, which suggests to demographers that the City’s long-term race-ethnic balance will continue to remain diverse.¹⁶

Despite New York’s recent growth in assimilation, immigration and gentrification, where the total white population is only 33 percent,¹⁷ why does its professional Equity¹⁸ theaters, ranging from world renowned, commercial Broadway to smaller, respected Off-Off Broadway¹⁹ theaters, overwhelmingly consist of white actors?²⁰ New York theater patrons “live in an increasingly interracial society, and it is not illogical to assume that they will want their world reflected on the stage.”²¹ Although theater is shown through the image of an illusion of set designs, costumes and make-up, theater artists have a responsibility to reflect the world in which we live, and theater is a medium of that expression.²²

Contrary to reflecting the diversity of New York, during five previous theater seasons²³ from 2006 to 2011, 80 percent of the roles cast in New York's theaters were awarded to Caucasian actors.²⁴ Of the remaining available roles: 13 percent were awarded to black actors, 4 percent were awarded to Hispanic actors, 2 percent went awarded to Asian-American actors, and 1 percent were awarded to others.²⁵

Clearly, there is a vast difference between New York's 67 percent population of people of color compared to New York theaters' 20 percent employment rate of people of color.²⁶ In fact, in the New York theater community, the white and non-white percentages of employed actors are almost the reverse of the white and non-white demographics of New York's total population.²⁷

Furthermore, in 2013, the Asian American Performers Action Coalition (AAPAC)²⁸ presented a study that was more revealing than the four-year study of all Broadway and Off-Broadway theatrical employment statistics.²⁹ In a study of the sixteen major not-for-profit theaters in New York, AAPAC found that these theaters, which had in the past consistently hired more actors of color than the commercial sector, actually lagged behind the large commercial Broadway theaters which had hired 25 percentage rate of employed actors of color; the highest percentage in history.³⁰ AAPAC revealed that during the 2011-12 season, the percentage of actors of color employed in not-for-profit theaters actually fell from its high of 27 percent in the 2008-09 season to 23 percent.³¹ In AAPAC's study, African-American actors were cast in 16 percent of all roles; Hispanic and Latino actors in 3 percent; Asian-American actors in 3 percent; and others, including Arab-American, Middle Eastern and Native-American in 1 percent.³²

However, in the past season, the 25 percent historical record of the roles cast in Broadway commercial theaters to actors of color distorts the reality of whether there is diversity

and inclusion of actors of color in all productions in New York theaters.³³ For example, if one exempted race specific works, and considered more integrated or race neutral works, the percentage of employed actors of color would be considerably less.³⁴ The increase in the percentage of actors of color was largely due to the continuation of *The Lion King*, and a sudden increase in the number of large all-Black or predominantly Black musicals produced on Broadway such as *Memphis*, *Porgy and Bess*, *Fela!*, and *Motown: The Musical*; and plays such as *A Streetcar Named Desire*, *Stick Fly*, and *The Trip to Bountiful*.³⁵ Also, the closing of large theatrical productions that employed a mixed-cast of Latino, Hispanic, Asian, Arab, Middle Eastern and Native American actors such as *In the Heights*, *Hair*, *South Pacific* and *The Little Mermaid* gave the illusion that the percentage of African-American actors had increased.³⁶

So, what is the problem? Is there discrimination against actors of color by live-stage theatrical employers in New York? What actions must an actor of color or a theatrical employer take in order to increase the amount of employment opportunities available actors from racial minority groups? Is there a legal remedy or non-legal remedy to his dilemma?

The historical data suggests that there is something amiss in the hiring of actors of color in New York.³⁷ In 1985, almost three decades ago, the Actors' Equity Association (Actors' Equity) which is located in New York and represents live theatrical performers, completed a four-year study and found what it believed to be institutional racism³⁸ within the professional theater.³⁹ Over 90 percent of the actors hired in America were Caucasian.⁴⁰ Although recent employment statistics have improved to some degree, the low percentages of employment among actors of color are still sufficiently low enough to warrant concern in New York, a city with a 67 percent non-white population.⁴¹

The problem of discrimination in New York theaters has been recognized by various leading theatrical organizations and unions.⁴² In 1995, Actors' Equity joined The Broadway League; the Casting Society of America, The Dramatists Guild, and the Society of Stage Directors and Choreographers, and signed a Document of Principle which states:

We . . . agree to endorse the goals of diversity, inclusion, and the principles of equal opportunity for all who work in the theater industry and condemn racism, prejudice, discrimination and exclusion in the theater . . . While we recognize that there can be no interference with the artistic integrity or contractual rights of the author, director, or choreographer, we urge all member of the theater to challenge traditional stereotypes.⁴³

Although these theatrical trade organizations "endorse the goals of diversity and inclusion," they are limited in the actual enforcement of these goals due to certain rights afforded theatrical decision-makers when casting and hiring actors for their productions.⁴⁴

New York theater decision-makers: producers, directors, choreographers, and playwrights; remain exclusively Caucasian.⁴⁵ There are no assurances that these crucial players will unilaterally challenge, change, or eradicate their discriminatory practices.⁴⁶ Without the ability of key theatrical trade organizations to enforce diversity or inclusion in regards to the employment of actors of color, due attention is needed either through legal action, changes in employment law, or individualized or group non-litigious efforts.⁴⁷ Without the aforementioned actions, theatrical decision-makers are likely to continue discriminatory practices that result in disproportionately low numbers of employed actors of color.⁴⁸

Discriminatory practices within New York theater are not overt, but takes place in more subtle, less obvious ways that makes it difficult for an actor to prove.⁴⁹ One may infer that there is discrimination through employment statistics concerning the actors of color.⁵⁰ However, this paper will demonstrate that more than statistical percentages are needed for an actor of color to bring a race discrimination law suit against theatrical employer.⁵¹

Discriminatory practices have been revealed directly from statements made by New York theater decision-makers.⁵² These statements inform and warn us that discrimination exists within the New York theater community. For example, Nancy Piccione, director of casting at Manhattan Theater Club, has stated that when she auditions actors of all ethnicities for roles that might not be the obvious role for them based on their ethnic background, she sometimes receives responses from theatrical producers concerning why she made the choice to audition actors in which the producer had no intention to hire.⁵³ Similarly, there are instances when non-white casting directors are resistant to the notion of auditioning or casting actors of color in roles typically reserved for white actors even when race is not essential to the portrayal of the characters, geographical setting, or historical period of the production.⁵⁴

In order to equal the playing field, and to increase diversity and inclusion of actors of color in the New York theater, the theatrical community as whole must confront and challenge casting practices that are prevalent among theatrical employers.⁵⁵ By its very subjective nature, the casting process is inherently filled with the risk of inadvertently excluding racial groups from opportunities to audition and seriously contend for the vast majority of the roles offered in the theater.⁵⁶ Thus, a compelling problem arises when theatrical decision-makers' subjective view, based on preconceived notions; not reality, talent, or theatrical training, permeates throughout the New York theater industry, adversely reducing employment opportunities for actors of color.⁵⁷

The focus of this paper is on the legal protections that Congress and the courts provide to New York theatrical employers concerning their hiring practices, and the challenges these protections present to actors of color in obtaining employment. In Section II, this paper will explain current federal employment legislation, Title VII, and how this Act, in its current form,

may present insurmountable barriers to actors of color if they were to challenge the casting and hiring practices of New York theatrical employers.

In Section III, this paper will demonstrate how the First Amendment further protects theatrical employers; however, why it is important to advocate for the right of artistic expression despite its often disparate effects on actors of color.

In Section IV, this paper will reveal past and present efforts to increase the number of actors of color that are employed in the New York theaters. Further, Section IV will explore the aims and goals of theatrical trade unions that advocate for diversity and inclusion of actors of color, and whether their efforts have been successful. Moreover, Section IV will interpret how directors and producers use different casting methods not only to increase diversity and inclusion of actors of color, but to achieve their artistic goals. Lastly, Section IV will address past and current controversies concerning various the casting methods used to increase diversity and inclusion of actors of color.

In Section V, this paper will recommend legal and non-legal solutions other than the different casting methods that could increase the amount of actors of color in the New York theater despite the challenges presented by Title VII and the First Amendment. Finally, Section VI will conclude with a summarization concerning why efforts to increase diversity and inclusion of actors of color in the New York theater must yield to the First Amendment right of freedom of speech to preserve an individual's artistic expression.

At this point, in Section II, this paper will focus on the statutory language, precedential cases, and congressional history that underlie Title VII. Additionally, as a framework, Section II will hypothesize an African-American actor's pursuit in being cast by a casting director in a role as an "engineer" within a theatrical production.⁵⁸ Furthermore, Section II will analyze how a

discrimination law suit under Title VII would apply to this African-American actor as well as any actor of color who seeks legal relief from the court due to a theatrical employer's direct or indirect discrimination based on race.

II. Title VII of the Civil Rights Act of 1964

A. Purpose and Intent of Title VII

Title VII of the Civil Rights Act of 1964 governs discrimination in the workplace.⁵⁹ Congress' intent was to provide formal procedures to eliminate employment discrimination based on race, color, religion, or national origin.⁶⁰ In Griggs v. Duke Power Co., the Supreme Court stated: "Congress did not intend by Title VII . . . to guarantee employment opportunities to every person regardless of qualifications."⁶¹ Title VII "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."⁶² However, Congress requires "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."⁶³

B. Unlawful Employment Practices

Section 2000e-2(a) provides that it shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁶⁴

Section 2000e-3(b) prohibits the publication of "any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race or color."⁶⁵

Under Title VII, an actor could bring an action against an employer under two racial discriminatory theories: 1) disparate treatment and 2) disparate impact.⁶⁶ Disparate treatment occurs when an employer commits a discriminatory act against an employee or applicant.⁶⁷ Disparate impact occurs when an employer's practices or policies cause systematic discrimination against a specific class of employees or applicants.⁶⁸

C. Disparate Treatment Action

The United States Supreme Court established the basic framework for a disparate treatment action in McDonnell Douglas Corp. v. Green.⁶⁹ In order to establish a prima facie case of racial discrimination due to disparate treatment, a plaintiff must show:

(i) that he belongs to a racial minority group; (ii) that he applied and was qualified for the job for which the employer seeks 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.⁷⁰

A disparate treatment action focuses on the intent of the employer.⁷¹ A plaintiff must prove discrimination through either direct or sufficient circumstantial evidence to imply discriminatory intent beyond a preponderance of the evidence.⁷² Once the plaintiff establishes a prima facie case, there is a rebuttable presumption that a discriminatory act occurred.⁷³ An employer must rebut this presumption by providing a reason for the plaintiff's rejection so that the employer may avoid a direct verdict in favor of the plaintiff.⁷⁴ The employer must only offer nondiscriminatory reasons why the plaintiff was rejected.⁷⁵ The employer does not need to persuade the court that it was motivated by its proffered reasons.⁷⁶ Depending on the jurisdiction,⁷⁷ the employer may also have to produce a reason that was available to it at the time the employer made its decision not to hire an applicant or promote an employee.⁷⁸ Once the employer successfully rebuts the presumption of discrimination with a nondiscriminatory reason for rejecting the plaintiff, the burden shifts once more to the plaintiff to show by a preponderance

of the evidence that the employer's asserted reason is actually a pretext to an intentional discriminatory act.⁷⁹ In all, under a disparate treatment action, the burden of persuasion always remains with the plaintiff.⁸⁰

In seeking employment as an actor, an individual has a small chance of prevailing in a discriminate treatment discrimination law suit.⁸¹ For example; suppose a qualified African-American actor's agent submits his headshot⁸² to a casting director for the role as the "engineer" in a drama.⁸³ However, the casting director does not audition the actor because she perceives "engineer" as being Caucasian. Thus, due to casting director's subjective thought of the "engineer" as a Caucasian, she only auditions Caucasian actors for the "engineer" role, and inadvertently blocks all non-Caucasian from having an opportunity to audition for the producer. According to the disparate treatment theory, there was no discriminatory act under these circumstances because the casting director choice to not audition the African-American was not due to dislike or thoughts of inferiority against African-Americans.⁸⁴

Additionally, the African-American actor alleging discrimination, would have difficulty showing that he both applied for and was rejected for the job.⁸⁵ First, the actor would have to show that the casting director actually reviewed his headshot.⁸⁶ Second; if the actor proves that the casting director reviewed his headshot, he would then have to show that the casting director did not audition him solely due to invidiousness towards his race or thoughts that African-Americans would be inferior in the "engineer" role.⁸⁷ However, in this hypothetical, the casting director did not intentionally discriminate against the actor.⁸⁸ The casting director either did not audition actor because her subjective mind did not "see" or "read" an African-American as the "engineer" in the drama.⁸⁹ Third, the actor would have to show that the casting director possessed the authority to hire him, and in most cases, the casting director has no hiring

authority.⁹⁰ Finally, in a disparate treatment race discrimination suit, the actor would have to overcome the casting director's assertion of a bona fide occupational qualification defense.⁹¹

D. Bona Fide Occupational Qualification (BFOQ) Exception

Under Section 2000e-2(a) of Title VII, once a plaintiff has established a prima facie case based on racial discrimination due to disparate treatment, the employer may assert a bona fide occupational qualification (BFOQ) defense under the exception of Section 2000e-2(e)(1).⁹² The exception allows employers to discriminate on the bases of sex, religion, and national origin as long as the discrimination is based on a "bona fide occupational qualification reasonably necessary to the normal operation" of the employer.⁹³ The exception does not apply race.⁹⁴ In fact, Congress expressly rejected race as a BFOQ.⁹⁵

The Equal Opportunity Employment Commission (EEOC) and Congress narrowly construe the BFOQ to apply only to sex, religion, and national origin.⁹⁶ "Occupational qualification" refers to a requirement that affects an employee's ability to perform his job.⁹⁷ The term "reasonably necessary" is subject to an objective standard.⁹⁸ When an employer uses the BFOQ exception to defend itself against a discrimination suit, the court applies a business necessity test.⁹⁹ The business necessity test requires the employer demonstrate that a particular employment practice of hiring an applicant on the basis his "sex, religion, and national origin," is related to the applicant's ability to do a particular job, and it relates to the "essence" or "central mission" of the employer.¹⁰⁰

Under Title VII, the Fifth Circuit has stated that the "business necessity test, is not a business convenience test based on customer preferences."¹⁰¹ For example, in Diaz v. Pan American World Airways, the airline argued that being female was a BFOQ for its flight attendants because women were better at "providing reassurance to anxious passengers, giving

courteous personalized service, and . . . making flights as pleasurable as possible.”¹⁰² The Fifth Circuit rejected the airline’s argument as being related to the essence or central mission of its business.¹⁰³ In applying the “business necessity” test, the court held that “customer preference may be taken into account when it is based on the company’s inability to perform the primary function or service it offers.”¹⁰⁴ The court explained that the essence of the airline’s business was to mechanically and safely transport passengers, and women flight attendants were not “reasonably necessary to the normal operation” of the airline’s business to mechanically and safely transport passengers.¹⁰⁵ Thus, the airline’s employment practice of discrimination against men in favor of women for its flight attendant positions was not a BFOQ on the basis that “most men may not perform” in a manner that the airline perceived that its customers would prefer.¹⁰⁶

In the context of casting an actor in a theatrical production, a casting director may use the BFOQ exception to defend a disparate treatment action against an actor only when it concerns the actor’s religion, sex, or national origin.¹⁰⁷ Therefore, in the aforementioned hypothetical,¹⁰⁸ the BFOQ defense would not be available to the casting director if an African-American actor brought a discrimination law suit against her for not auditioning him for a role as the “engineer” in the drama because a BFOQ is not based on racial discrimination.¹⁰⁹

However, if the actor was an African-American female claiming discrimination on the basis of sex, the casting director may assert a BFOQ defense.¹¹⁰ “The EEOC has interpreted Title VII as allowing sex as a BFOQ in hiring actors if necessary for the purpose of authenticity.”¹¹¹ Still, under the disparate treatment theory, the African-American actress would have to demonstrate that the casting director possessed invidious intent to discriminate.¹¹² or successfully challenge the validity of whether the casting director’s rejection was pretext to a discriminatory act.¹¹³ Further, the actress would have to show that the “engineer” role remained opened, and that

the casting director or producer was still seeking an actress with the same qualifications.¹¹⁴ If the actress is unable to establish a prima facie case based on disparate treatment, an alternative option would be a racial discrimination action based on a disparate impact theory.¹¹⁵

E. Disparate Impact Action

Under Title VII, a prima facie case of racial discrimination due to disparate impact is established when:

(i) a [plaintiff] demonstrates that a[n] employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the [plaintiff] makes the demonstration described in subparagraph (C) with respect to an alternative employment practice.¹¹⁶

However, under the disparate impact theory, if the employer first demonstrates that its employment practice does not cause a disparate impact, then the employer is not required to demonstrate that such a practice is a business necessity.¹¹⁷

Under subparagraph (C), if the employee meets its burden of demonstrating that the employer's practices causes a disparate impact, the employer must demonstrate that the challenged employment practice is a business necessity.¹¹⁸ If the employer meets its burden of demonstrating that its employment practice relates to a business necessity, the plaintiff may still prevail if he demonstrates that an alternative practice could achieve the employer's legitimate business interest, and the employer fails to adopt this alternative practice.¹¹⁹

The employer may not use a business necessity defense against a plaintiff's claim of intentional discrimination.¹²⁰ Thus, according to the Act, unlike a discrimination law suit based on disparate treatment, a disparate impact action does not depend on the employer's intent.¹²¹ In Griggs v. Duke Power Co., the Supreme Court stated that “. . . Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply motivation.”¹²² “Good

intent or the absence of discriminatory intent does not [allow] employment procedures or testing mechanisms that operate [to impede minority groups from employment opportunities] and are unrelated to measuring [their ability to perform in a certain job].”¹²³ Thus, Title VII allows an action when the employer’s practices are facially neutral but discriminatory in effect.¹²⁴

In Griggs, Duke Power Company (Duke Power) had abandoned an overt policy of limiting African-Americans to working within its Labor Department.¹²⁵ However, Duke Power’s new policy required a high school diploma and successful performance on two tests: a general intelligence test and a comprehension test; for initial consideration for a position, or transfer, or promotion to any of its other departments which paid higher wages.¹²⁶ Duke Power stated that the reason for instituting these new requirements was to “improve the overall quality of [its] work force.”¹²⁷

In a class action law suit against Duke Power, African-American employees alleged that the performance test requirements were not related to the jobs within the other departments.¹²⁸ Further, the African-American employees claimed that the performance test requirements operated, in fact, to render them, as a group, ineligible for transfer to the higher paying positions within Duke Power’s other departments.¹²⁹ However, Duke Power maintained that Title VII allowed “‘any professionally developed ability test’ that is not ‘designed, intended or used to discriminate because of race . . .’”¹³⁰ Duke Power further argued that it lacked discriminatory intent because it had provided financing to employees to cover two-thirds of the costs of obtaining a high school diploma.¹³¹

The Supreme Court rejected Duke Power’s arguments and referenced the Equal Employment Opportunity Commission’s (EEOC) guidelines concerning job-related tests.¹³² The EEOC interpretation explains: “[t]he fact that a test was prepared by an individual or

organization claiming expertise in test preparation does not, without more, justify its meaning of Title VII.”¹³³ Since EEOC’s guidelines must be supported by Congress’ goal in the enactment of Title VII¹³⁴ . . . to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.¹³⁵ Thus, under Title VII, “practices, procedures, tests neutral on their face, and neutral in the terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹³⁶

The Supreme Court noted that Congress had placed on the employer the burden of showing that any given requirement is related to performing the job in question.¹³⁷ In this case, the evidence demonstrated that employees who had not completed high school or taken the intelligence tests in the past, performed satisfactorily and made progress in the departments where Duke Power had implemented the test requirements.¹³⁸ Moreover, the promotion records of employees that had not met the new testing criteria suggested that the requirements were not needed to support Duke Power’s purported policy of advancement within the company.¹³⁹ Thus, the Court found that neither the intelligence tests nor the high school diploma requirement were related to a successful performance of the jobs within Duke Power’s higher paying departments.¹⁴⁰ Overall, the Court concluded that Duke Power had failed to show that the high school diploma and test requirements supported its genuine business need of improving “overall quality of [its] work force.”¹⁴¹

By analogy, a group of qualified African-American actors who was not auditioned by the casting director nor submitted to a producer of the drama because the casting director did not subjectively envision someone other than a Caucasian actor in the role as the “engineer,” could have a race discrimination claim based on the disparate impact of the casting process.¹⁴² Here, the casting director does need to have intentionally discriminating against the actor based on his

race.¹⁴³ The casting director's process of reviewing agents' submissions of headshots of African-American actors automatically denies this identifiable group of actors of employment opportunities despite their qualifications.¹⁴⁴ If the actors were to file a class action disparate effect discrimination law suit against the casting director, the issues would be: 1) whether the casting director's process disproportionately rendered qualified African-American actors as group ineligible for the "engineer" role based on their race; 2) whether being Caucasian is a requirement for the "engineer" role; and 3) whether the casting director's actions prohibited the African-Americans, as an identifiable group, ability to be considered for an opportunity to audition for the producer, the actual theatrical employer.¹⁴⁵

In this example, although the casting director did not intend for her casting process to automatically impede all qualified African-American for consideration of the "engineer" role, her good faith intention would not be a valid defense under the disparate impact theory.¹⁴⁶ Furthermore, since race is not a BFOQ, the casting director would be precluded from attempting to justify that being Caucasian is a requirement to successfully portray the "engineer" role.¹⁴⁷ Thus, the casting director would have to justify some other reason for maintaining a casting process which adversely excludes African-American actors as a group.¹⁴⁸ Nonetheless, the very nature of the entertainment industry and the auditioning process insulates the casting director from being sued under the disparate impact theory as well.¹⁴⁹

First, as noted in Griggs, a disparate impact discrimination law suit is generally brought as a class action.¹⁵⁰ In the hypothetical of the casting director auditioning actors for the "engineer" role, an African-American actor would have to search for other African-Americans actors who were discriminated against in the same manner, then convince them to join him in a class action law suit against the casting director.¹⁵¹ Second, the actors must collectively consider

their available time, the amount of financial resources needed to hire an attorney,¹⁵² and whether filing a law suit against a casting director who would probably have the support of a producer backed by wealthy investors, would be worth their efforts.¹⁵³ Here, the actors would most likely fear retaliation by their agents who may refuse to submit the actors' headshots for projects in the future, and more harmful, actors may fear that other casting directors will refuse to audition them with or without an agent's submission of the actors' headshots, thus effectively terminating their career in the New York theater industry.¹⁵⁴ Third; if the casting director is not the employer, the the producer, as the employer, is not required to guarantee a job on the basis of the actors' qualifications.¹⁵⁵ Lastly, the actors would have to overcome the casting director's or producer's assertion of a business necessity defense which protects employers from liability when a class action law suit is brought against them claiming disparate effect due to race discrimination.¹⁵⁶

F. Business Necessity Defense

Unlike disparate treatment discrimination cases, after the plaintiff has established a prima facie case under disparate impact theory, the employer must show that its practice which is discriminatory in effect is justified by a business necessity that relates to the performance of the job that the plaintiff seeks.¹⁵⁷ Congress has recognized the need for employers within the entertainment industry to cast actors with certain appearances where race is considered essential to the character and script of a project.¹⁵⁸ The congressional note states:

Although there is no exemption in Title VII for the occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro . . .¹⁵⁹ Thus, where race is necessary for the credibility of a role in a movie or television project, casting directors can select actors based on the way they look, not their race, without violating Title VII.¹⁶⁰

G. The Entertainment Industry's Authenticity Requirement as a Business Necessity Defense

The legislative history of Title VII indicates that Congress may not have intended for the Act to pertain to casting actors in the entertainment business.¹⁶¹ In 1964, Senators Clark and Case explained that although race was not a BFOQ which could possibly exempt an employer for casting based on race, a director of a play could specify the desire to cast someone with “the appearance of a Negro in the role of a Negro so that the play would be authentic as possible.”¹⁶²

In Miller v. Tex. State Bd. of Barber Exam'rs, in dicta, the Fifth Circuit indicated that in the parameters of a facially neutral discriminatory practice, there could exist circumstances that permit an employer to hire based on an applicant's race as a business necessity.¹⁶³ For example, in the context of law enforcement, a state could assign black officers to infiltrate an all-black criminal organization where a white man would not pass without notice as long as the black officers were allowed to work on other law enforcement assignments where their race was not a factor in their placement.¹⁶⁴

In Miller, using the aforementioned example as a framework, in dicta, the Fifth Circuit stated, that it could be possible for a police department to assign a black man to work as an undercover investigator at all-black barber shops because it would be difficult to successfully disguise a Caucasian man as a “shoeshine boy in or as a patron of an all-black barber shop.”¹⁶⁵ Further, the court stated that the assignment of a black man as undercover investigator would not be discriminatory providing that the assignment was given to the officer in a racially neutral manner as an officer who could successfully disguise himself.¹⁶⁶ Similarly, in the context of employment in the entertainment industry, the court explained, in dicta, that it is possible for an entertainment employer to use the business necessity defense when casting an actor to play a certain role based on race.¹⁶⁷ The court stated: “that it is likely that a black actor could not

appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.”¹⁶⁸

Applying the preceding analogy to the hypothetical of the African-American actors that were not considered by the casting director for an audition for the “engineer” role; if the actors were to demonstrate through in a class action law suit that casting process had an adverse effect concerning employment opportunities available to them and other similarly situated African-American actors, then the casting director could invoke the business necessity defense.¹⁶⁹ In this example, the casting director would either have to show that her process did not present barriers to African-American actors as a group for being considered for the “engineer” role;¹⁷⁰ or the casting director could demonstrate that being Caucasian was essential to the functioning of the “engineer” role to add authenticity to the drama.¹⁷¹ For example, a Caucasian man as the “engineer” would add authenticity to a play that is set in Antebellum South Carolina during 1820.¹⁷² If the casting director succeeds in either of the aforementioned tasks, the actors still have another opportunity to prevail under the disparate impact theory by demonstrating that there was an alternative method available to the casting director to maintain the authenticity of the drama without a Caucasian in the “engineer” role.¹⁷³ However, the casting director may ultimately have a First Amendment defense that she or the producer has chosen a Caucasian actor as the “engineer” based on their freedom of artistic expression.¹⁷⁴

III. The First Amendment Right: Freedom of Artistic Expression

A. The First Amendment of the United States Constitution

The First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁷⁵ Further, the Constitution requires the government to remain “neutral in the marketplace of ideas.”¹⁷⁶ “However, the

Supreme Court has held that not all speech is entitled to the protections of the First Amendment.¹⁷⁷

Since the casting of actors may be considered as a medium of expression, a casting director or theatrical producer may assert a First Amendment defense concerning their casting preferences.¹⁷⁸ Furthermore, an actor's performance may be "considered a statement in which the actors are the 'words' cast by the director [or producer] to express that statement, [thus] the casting decision should be protected as other words and types of expressive conduct"¹⁷⁹

Although no court has ever decided the issue of "freedom in casting" in the context of a Title VII discrimination law suit,¹⁸⁰ the United States Supreme Court has held that "specific applications of antidiscrimination laws violated the First Amendment."¹⁸¹ For example, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), a unanimous Court "resolved that parades are protected speech."¹⁸² In this case, a veteran's council that organized an annual St. Patrick's Day parade claimed that their right of expression granted by the First Amendment allowed their organization to exclude GLIB from participating in the parade.¹⁸³ On the other hand, GLIB wanted to march in the parade "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of Irish immigrants to show that there [were] such individuals in the community."¹⁸⁴ Further, GLIB wanted to march in the parade with its members carrying a "shamrock-strewn banner with the simple inscription" of their organization's name.¹⁸⁵ A Massachusetts state antidiscrimination law required the council to allow GLIB to participate in the parade.¹⁸⁶ In holding that the application of the commonwealth's antidiscrimination law violated the First Amendment, the Court stating that in this instance, the exclusion of a group based on their sexual orientation was permitted in order for the council express their own message separate from GLIB's intended message.¹⁸⁷

Furthermore; since the legislative history of Title VII may not have intended the Act to apply to casting actors in the theater industry,¹⁸⁸ “one [may] defer to the United States Constitution since it supersedes a statute.¹⁸⁹ The Supremacy Clause of the Constitution states:

This Constitution, and the Laws of the United States which shall be made Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁹⁰

Thus, a theatrical employer may invoke its First Amendment right when an actor of color files a law suit claiming racial discrimination due to the casting practices used by casting directors and producers even though the practices have a disparate effect concerning the employment opportunities available to minority groups.¹⁹¹ “In essence, no matter how offensive the casting process may be to the audience or other actors,” a First Amendment defense is “an important legal weapon” that protects the theatrical employer when it inadvertently excludes and discriminates against actors of color.¹⁹²

B. The *Miss Saigon* Freedom of Speech Dilemma

Theater producer, Cameron Mackintosh, incited the most publicized controversy concerning the exercise his First Amendment right to freedom of speech in the casting of the musical, *Miss Saigon*, for the Broadway stage.¹⁹³ In London, British actor, Jonathan Pryce played the role of “the Engineer,” a character described as a half-French and half-Vietnamese “Eurasian.”¹⁹⁴ Mackintosh had planned to allow Pryce to portray “the Engineer” role in “yellow-face” during the New York production of the musical.¹⁹⁵ Asian theater, David Henry Hwang and B.D. Wong, brought Mackintosh’s intended plan to the attention Actors’ Equity due to their concern that the theater community lacked available roles for Asian actors.¹⁹⁶ Subsequently, Actors’ Equity rejected Mackintosh’s application requesting its assistance in obtaining approval for Pryce to work as an actor in the United States.¹⁹⁷ Actors’ Equity stated that it “could not

‘condone or be a part of a casting decision that it strongly [viewed] as an affront to the Asian community and [was] insensitive to [the] efforts being made by the entire theater community to accurately reflect the multi-racial society in which we live.’¹⁹⁸

In response, to Actors’ Equity rejection of a Pryce being cast in the principle role as “the Engineer,” Mackintosh stated that “the debate [was] no longer about the casting of *Miss Saigon*, but about the art of acting itself.”¹⁹⁹ In addition, Mackintosh claimed that there was no legal basis for the rejection of the Pryce, therefore he cancelled the Broadway production despite record advance ticket sales of \$25 million.²⁰⁰ Mackintosh refused to continue production of the musical unless given artistic control.²⁰¹ Moreover, Mackintosh’s Equity production contract stated: “there can be no interference with the contractual rights or artistic discretion of the Playwright, Director, or Choreographer”²⁰² This “no interference” clause provided evidence that Actors’ Equity recognized the ultimate importance of artistic expression in casting actors.²⁰³

C. A Practical Application of Casting as Freedom of Speech in the New York Theater

Proponents of the idea that casting actors is a form of artistic expression, advocate that a director’s or producer’s choice of an actor is protected by the right to freedom of speech guaranteed by the First Amendment.²⁰⁴ Alisa Solomon, a dramatist and theater critic, states that the goal of the theater director is to tell the truth based on his or her perception of reality.²⁰⁵ A director may choose to cast a particular role solely based on his or her discretion.²⁰⁶ In addition, a director should have the artistic freedom to “read” race as a fact in the story.²⁰⁷ For example, Solomon states that the casting based on race in the Broadway drama, *The Trip to Bountiful*, did not “make the play about race or about being black, but neither [did] it pretend that the characters and the audience [were] not aware of who [the characters were] historically.”²⁰⁸ However, in respect to casting black actors in roles traditionally played by white actors, the director of *The*

Trip to Bountiful had the opportunity to exercise his freedom of speech.²⁰⁹ In the context of intentionally casting black actors in lead roles, the director could bring “new insights,” to the theater’s audiences by way of his “reinterpretation” of a well-established play through a particular cultural lens of an African-American.²¹⁰

IV. Non-Traditional Casting

A. The Challenges

The benefit of the business necessity defense for theatrical employers is that it gives instruction to the theatrical employer concerning how it can cast actors without violating Title VII.²¹¹ The defense protects the theatrical employer by allowing it to enhance the authenticity of the characters portrayed in staged theatrical productions, and simultaneously discourages actors of color from challenging the disparate effects of the employer’s casting process.²¹² Furthermore; if a theatrical employer were to fail in asserting the business necessity defense while litigating a disparate impact class action suit, the First Amendment offers additional protection as to the employer’s preference concerning the employer’s preference of one actor over another.²¹³ Arguably, the business necessity and First Amendment defenses provide an environment that cultivate exclusion.²¹⁴ Given these limitations, alternative solutions to the current law are needed to “equal the playing field” so that more employment opportunities are available to actors of color in the New York theater.²¹⁵ One of the earliest efforts to increase diversity and inclusion of actors of color in the theater is the practice of “non-traditional casting.”²¹⁶

B. “Non-Traditional Casting:” Definition and Purpose

In response to Actors’ Equity’s four-year study completed in 1986 which indicated that 90% of the actors employed in professional theater were Caucasian, Actors’ Equity conceived of “non-traditional casting” to increase employment of actors of color in the theater.²¹⁷ In the same

year, Actors' Equity along with the Casting Society of America, the Dramatists Guild, The League of American Theater and Producers, and The Society of Stage Directors and Choreographers, formed the Non-Traditional Casting Project to end "neglect" by theater employers, and to encourage them to consider and hire actors on the basis of their talent and merit, not the color of their skin.²¹⁸

The Non-Traditional Casting Project's intention was to diversify a "Eurocentric, Western repertoire" of theater productions by including actors who, for decades, had been for systematically excluded and discriminated against due to their race or ethnicity.²¹⁹ However, the Project advocated that when an actor of a particular race or ethnicity was essential to promote the authenticity of a character or play, as protected by the business necessity rule, employers were to remain sensitive to that need, and not cast actors as tokens to fulfill a racial or ethnic quotas.²²⁰

C. Types of "Non-Traditional Casting"

In 1967, Broadway's earliest practice of "non-traditional casting" occurred when producer David Merrick recast a successful all-star, all-White cast of *Hello, Dolly!* with an all-Black cast co-starring Pearl Bailey and Cab Calloway.²²¹ In 1976, *The Wizard of Oz* was retold and re-cast with black actors in the Tony Award winning production of the *The Wiz*.²²²

Today, "non-traditional casting" has several definitions and purposes.²²³ This paper distinguishes six types of 'non-traditional casting:' 1) "non-traditional casting" of veteran theater artists;²²⁴ 2) "non-traditional casting" of notable entertainers;²²⁵ 3) "non-traditional recasting" of a revival;²²⁶ 4) "colorblind casting;"²²⁷ 5) "multi-racial casting" or "multi-cultural casting;"²²⁸ and 6) "reverse colorblind casting."²²⁹ In addition, some "non-traditional casting" methods are intended to add new interpretive insight to a playwright's work instead of demonstrating the universality of the play.²³⁰

(1) “Non-Traditional Casting” of Veteran Theater Artists

The most recognized method of “non-traditional casting” is to purposely cast an actor in a role where the race, ethnicity or sex of the character has previously been established in the consciousness of the public.²³¹ This method of casting is consistent with the former Non-Traditional Casting Project’s goal to increase employment of actors of color in theater roles where the character’s race, ethnicity, or sex was not essential to the portrayal of the character.²³² However, this type of casting is usually reserved for the most acclaimed Broadway veteran actors such as: James Earl Jones; Morgan Freeman; Audra McDonald; Lillias White; Vanessa Williams; Daphne Rubin-Vega; Melba Moore; and Laurence Fishburne, after they have achieved substantial success portraying racial specific roles such²³³

(2) “Non-Traditional Casting” of Notable Entertainers

Another “non-traditional casting” method employs notable entertainers in roles traditionally known to be portrayed by Caucasian actors.²³⁴ Theatrical employers typically use this type of casting when they seek to hire notable television and film actors or famous recording artists for large production musicals.²³⁵ Beginning in the 1990s, patrons of Broadway theaters began to see African-American recording artists portray iconic characters in long-running, award-winning Broadway musicals such as *Les Miserables*, *Beauty and the Beast*, *Chicago*, and *Jekyll & Hyde*.²³⁶ This form of “non-traditional casting” is inapposite to the goals stated by the Non-Traditional Casting Project because the casting of commercially successful recording artists, who do not typically pursue nor rely on being cast in staged musicals on Broadway, continually allows theatrical employers to deny opportunities to qualified, unemployed actors.²³⁷

(3) “Non-Traditional Recasting” of a Revival

After a long absence, in the early 2000s, the revival of re-casting a play traditionally consisting of Caucasian actors with an all-Black, Latino, or Asian cast has once more become a successful trend among theater producers.²³⁸ In 2008, Stephen Byrd produced a Broadway revival of Tennessee Williams' *Cat on a Hot Tin Roof* featuring an all-Black cast which starred James Earl Jones and Phylicia Rashad as "Big Daddy" and "Big Mama," respectively.²³⁹ The drama had previously been performed on Broadway during four separate seasons between 1955 and 2003.²⁴⁰ Byrd's production of *Cat on a Hot Tin Roof* was the first time that the drama was staged with an all-Black cast.²⁴¹

During the 2012-2013 theater season, a non-traditional recasting variation appeared where the principal characters are recast with non-white actors and the supporting characters are portrayed by white actors.²⁴² Most recently, in April 2013, Horton Foote's *The Trip to the Bountiful* was revived on Broadway at the Stephen Sondheim Theatre, and was cast with renowned African-American television and film actors in the lead roles which were traditionally portrayed by white actors.²⁴³

However, some individuals oppose recasting traditional all-white theatrical productions with casts comprised of actors of color.²⁴⁴ In 1996, renowned playwright, August Wilson, stated that an actor of color who played role conceived for a white person denied something in himself – "everything from his culture to the way he [talks] and [thinks]." In particular, Wilson stated:

To mount an all-black production of *Death of a Salesman* or any other play conceived for white actors as an investigation of the human condition through the specifics of white culture, is to deny [people of color of their] own humanity, [their] own history, and the need to make [their own investigations from the cultural ground on which [they] stand as [people of color].

You got all the actors working over there, celebrating European culture instead of here celebrating black culture.²⁴⁵

(4) "Colorblind Casting"

Another name for “non-traditional casting” is “color-blind casting.”²⁴⁶ Contrary to “non-traditional casting,” the goal of “colorblind casting” is either to minimize, erase or ignore an actor’s race, and allow the actor to play the role without skin color being a factor in his or her interpretation of the character.²⁴⁷ The concept of colorblind casting appears to work effectively in British, Russian, and American classic plays by William Shakespeare, Henrik Ibsen, and Tennessee Williams, where the audience tends to know the play and the characters well, and accepts that the actor “just happens to be” portrayed by actors of color.²⁴⁸

However, in a recent colorblind casting of updated-modernized versions of classical plays, a director subsequently allowed the actors to “play” on the differences in their race without letting race overshadow the plot or theme.²⁴⁹ In director David Leveaux’s contemporary update of *Romeo and Juliet*, Caucasian Hollywood actor Orlando Bloom plays a motorcycle-driving “Romeo” and African-American Condola Rashad plays Broadway’s first black “Juliet.”²⁵⁰ The actors have commented that they were not looking to make the play about race but chose not to ignore it.²⁵¹ The central conflict of the play is that the “ancient grudge” brings the families apart, “not the color of the lover’s skin.”²⁵²

In the contemporary Broadway theater, the producer can cast based on sheer talent where one of the goals of the production is to display an actor’s unmistakable acting ability or vocal power.²⁵³ For example, Filipino actress Lea Salonga²⁵⁴ was successfully cast in her first Broadway role as the French orphan “Eponine” in *Les Miserable*,²⁵⁴ and African-American actress Audra McDonald was successfully cast as an opera student in the play *Master Class*.²⁵⁵

Opponents of “colorblind casting” argue that this method of casting is not sensible and should not exist.²⁵⁶ In support of August Wilson’s aforesaid arguments, opponents state that “the characters’ races affect their history, their place in society, and their effect on the audience.”²⁵⁷

Furthermore, opponents argue that casting actors of color has an impact on Caucasian individuals' social views of people of color therefore the actor's racial characteristics should be explored and not ignored when an actor portrays a role traditionally reserved for a Caucasian actor.²⁵⁸

(5) Multi-Racial or Multi-Cultural Casting

“Multi-racial” or “multi-racial casting” generally occurs when the script of a theatrical production specifically requires that the actors are of different, and many times, specific ethnic or racial backgrounds.²⁵⁹ Usually, the theme or social commentary of the production depends upon overt ethnic and racial conflicts or inter-racial romantic relationships.²⁶⁰ For example, Broadway's *Memphis* tells the story of an African-American female singer who falls in love with her manager-promoter, a white young man who loves “black music,” and becomes the city's popular disc jockey in a segregated southern city.²⁶¹ Here, it may have been the playwright's unspoken intention to create a multi-racial cast by way of writing a musical that explores how “black” music and dance became popular among America's white youth during the Rock-and-Roll era, and affected the collective consciousness of the nation.²⁶² In *Memphis*, similar to the popular Broadway musical *Hairspray*,²⁶³ the casting director and producer were forced to hire a multi-racial cast specifically comprising of blacks and whites in order to convey the theme of the musical and the reality of its plot.²⁶⁴

In contrast to the “multi-racial casting” that was observed in the production of *Memphis* where the struggle between the races was a central aspect of the plot, there are musicals and plays that imply very little about the characters' race.²⁶⁵ In *Rent*, writer, director, and producer Jonathan Larson chose a multi-racial cast to subtly inject racial undertones and subplots into the

production rather than depend on the overt expression of animosity or tension between the characters due to race as displayed in *Memphis*.²⁶⁶

**(6) “Reverse Colorblind Casting:” Caucasian Actors in Non-White Roles
The *Miss Saigon* Dilemma Revisited**

Audiences usually show strong objection when a Caucasian actor is cast in role written or traditionally reserved for an actor of color.²⁶⁷ Most notably, in 1990, New York’s Asian-American community became outraged over a white actor’s performance in *Miss Saigon* while his face was painted yellow.²⁶⁸ Supporters of the various forms of non-traditional casting of actors of color, argue that non-traditional casting was never intended to provide employment opportunities in the theater to Caucasian actors.²⁶⁹ When actors of color are not given the opportunity to portray characters of their race, the existing problem of exclusion becomes magnified, and there is a reversal of gains in the numbers of employed non-Caucasian actors in the theater.²⁷⁰

Sharon Jensen, President of the Alliance for Inclusion in the Arts, formerly the Non-Traditional Casting Project, states that “until there is genuine equality throughout our society, [“non-traditional casting” is] not a two-way street.”²⁷¹ For instance, in the context of equality; if an Asian, Hispanic, or American Indian actresses do not have the opportunity to portray characters specifically written for them, then they are mostly unemployable in the theater industry where no greater than 4 percent, 3 percent, and 1 percent of the roles are written for them, respectively.²⁷²

What’s more, an Asian, Hispanic, or American Indian’s actress’s ability to grow professionally as an actor by portraying roles that are not specific to her race or ethnicity is limited.²⁷³ Ann Nestor Serrano, a Puerto Rican actress has stated that she is not embarrassed to play a “Hispanic” but she does not want her career to be limited to playing Hispanics.²⁷⁴ Yet, the

business necessity doctrine and First Amendment right that is presumably afforded to theatrical employers reinforce this limitation on this Puerto Rican actress's career.²⁷⁵ Thus, these defenses that are meant to protect individuals, actually allows Serrano to be harm by excluding her from portraying characters written for her in an employment market where less than 4 percent of the roles are available to her.²⁷⁶

On the other hand, referring to the career limitations that challenge actors of color, Tisa Chang, the former artistic director of the Pan-Asian Repertory Theater in Manhattan, said that she “would not wish to include a Caucasian actor with a group of Asian actors to represent a Japanese-American family.”²⁷⁶ Chang further stated that she “[did] not see Japanese-American families being portrayed with an integrated cast.”²⁷⁷ In the same manner, under the business necessity doctrine and the First Amendment, a different artistic director would have the liberty to follow the same view as Chang, and cast roles that excludes the Japanese-American or Puerto-Rican actresses simply because the artistic director does not “see” these actresses as being a part of a Caucasian family or community.²⁷⁸ However, in an industry that has an average 20 percent employment rate for all actors of color, the unchanging casting and hiring practices of theatrical employers underscore why “minority” communities react negatively to “reverse colorblind casting” of Caucasian actors in roles traditionally reserved for actors of color.²⁷⁹

(7) The Success of Non-Traditional Casting

Although there have been some successes in “non-traditional casting” in New York theaters, opportunities for actors of color are still not proportionate to the city's minority population.²⁸⁰ The proliferation of available roles for actors of color during the late nineties was welcomed, but not considered a breakthrough when currently only 20 to 25 percent of the roles cast in New York are awarded to minorities; a city where there is 67 percent minority

population.²⁸¹ Further, the vast majority of plays and musicals produced in New York continue to have racially segregated casts.²⁸² Since the force of “non-traditional casting” of actors of color is limited by the law, and the practice of “non-traditional casting” arguably frustrates the director or producer’s freedom of expression, other actions are needed to increase the amount of actors of color that are employed in New York theaters and hired for non-race specific roles.²⁸³

V. Alternative Solutions

A. Challenging the “Low Sales” Assumption

Neil Pepe, artistic director of the Off-Broadway Atlantic Theater Company, established by writer David Mamet and actor William H. Macy, has stated that, “[they] certainly believe that racial and ethnic diversity among [their] artists only adds depth and complexity to the work.”²⁸⁴ Asian-American and Tony Award winning playwright of *M. Butterfly*, David Henry Hwang has stated that limits placed upon casting actors not only hurt the people being discriminated against, but it hurts the institutions doing the discrimination as well.²⁸⁵ However, many New York theatrical productions that employ the largest amount of actors, produce plays and musicals that were written during a period when people of color were not included in the story.²⁸⁶ More importantly, Broadway producers thrive financially by staging revivals of these older theatrical works and operate under the assumption that they cannot include actors of color in order to remain profitable.²⁸⁷

Furthermore, many casting directors, the producers “front-men,” are still resistant to the idea of mixed-race biological families in a theater productions.²⁸⁸ Casting directors hold strong to the notion that all-white family dramas are a staple of American theater; therefore rarely cast actors of color.²⁸⁹ In addition, producers demand that their plays are cast with

Caucasian actors to sustain marketability and to attract a white audience who are the majority of theater-goers.²⁹⁰

Before producing a play, producers consider factors such as audience appeal and economic prospects of a play.²⁹¹ When money is on the line, theater producers tend to err on the side of caution and go with the safest choice.²⁹² When producers think to cast a role with an actor of color, particularly in the case of a high profile role on Broadway, they tend to cast a well-known “name.”²⁹³ This practice not only reduces opportunities for recently “trained” actors of color seeking employment, but virtually eliminates Asians, American Indians, Middle-Easterners, among others, from being considered for roles because there are not these “name” actors to consider.²⁹⁴

However, theater producers may have been casting their plays and musicals based on the faulty assumptions that only white theater patrons will buy tickets.²⁹⁵ Their assumptions could be challenged because it is illogical to assume that audience members who live in an increasingly interracial city will consistently prefer to see theater productions that reflect realities uncommon to their environment.²⁹⁶ Moreover, the League of American Theater Producers production contract with the Actors’ Equity Association, in fact, demonstrates that it is the organizations’ joint intention that employment opportunities be improved to reflect not only its multi-racial actor community, but the multi-racial community where a play is staged.²⁹⁷ Douglas Aibel, artistic director of the Vineyard Theater, an Off-Broadway theater, has stated that, “[he] thinks audiences become more diverse when there’s more diversity onstage.”²⁹⁸

The “non-traditional casting” concept for theater employment has proven to be financially viable, as well as artistically well-received by theater patrons.²⁹⁹ Broadway’s 2013 revival of Edward Horton’s *The Trip to Bountiful* attracted sizeable black audiences throughout

its run on Broadway.³⁰⁰ In addition, the drama's total audience rivaled the production of Tennessee Williams's *Cat on a Hot Tin Roof* which featured an all-Caucasian, Hollywood cast.³⁰¹ Furthermore, the preceding revival of *Cat on a Hot Tin Roof*, featuring an all-African-American cast was more successful than its successor.³⁰² Similarly, Tennessee William's *A Streetcar Named Desire*, featuring a mixed cast of African-American and Hispanic actors, also had successful and extended runs on Broadway.³⁰³

Furthermore, Marcia Pendleton, a marketing and advertising consultant for the arts, has noted that a production with a notable cast and special marketing efforts will prevent mixed reviews by Caucasian theater critics from diminishing sale tickets to plays or musicals that features actors of color.³⁰⁴ Pendleton further notes that patrons from targeted ethnic communities are likely to buy tickets for theatrical productions when the actors on the stage look like them regardless of theater critics' opinions.³⁰⁵ Although *The Trip to Bountiful* received mixed reviews, Cicely Tyson's performance steadily attracted African-American audiences, and the success portraying a role traditionally portrayed by a white woman, was evidenced by the African-American audience singings having impromptu sing-a-longs with Ms. Tyson during her performances.³⁰⁶

B. Actor and Audience Activism

Actors and theater patrons may have to make stronger efforts to increase public awareness about the under-representation of actors of color in the New York theater.³⁰⁷ Oskar Eustis, artistic director at the Public Theater, has urged Asian-American actors to "make noise" and consider protesting or picketing theaters to urge producers and casting directors to think in a more counter-intuitive manner when casting roles.³⁰⁸ Ms. Piccione, director of casting at the Manhattan Theater Club, has noted that as a result of black actor protests for more "non-

traditional casting” over several decades, jobs eventually came in greater numbers.³⁰⁹ Stephen C. Byrd, the Broadway producer who cast a mixed-raced revival of *Streetcar Named Desire* has advocated for an “Occupy Broadway” movement to push for more racial diversity in the theater.³¹⁰

However; actor and audience activism pose a potential problem of exacerbating the problems concerning low employment, diversity, and inclusion of actors of color in New York theaters.³¹¹ Efforts to bring public awareness concerning casting and hiring practices in the theater could anger producers and provoke them to cancel theatrical productions that include actors of color in an effort to assert their First Amendment rights of freedom of artistic expression in the selection of actors.³¹²

As an alternative to street protests, actors and audience members could create more effective dialogue with theatrical employers without placing blame.³¹³ Instead of being “upset, fed-up, frustrated, irritated, indignant, and disillusioned” about the lack of diversity in New York theater, further efforts could be made to educate, inform, and challenge leaders of the theater community concerning the effects of their casting practices.³¹⁴ Slogans and sit-ins may have assisted black performers over time in increasing the amount of roles available to them, but it may be time to take the emotion out of the issue of “non-traditional casting,” and present cold numbers, pie charts and bar graphs to theater producers.³¹⁵

There is evidence that theater producers are willing to listen and make changes to their casting practices when they are more informed about how they are perceived by the public.³¹⁶ For example, Neil Pepe, artistic director of the Off Broadway Atlantic Theater Company, has stated that statistical results of a survey scoring the theater company lowest in terms of the diversity of their casts, was a welcome reminder that there are many groups of artists in New

York that are underrepresented on their stages.³¹⁷ Furthermore, Oskar Eustis, the artistic director of the famed Public Theater that was once targeted publicly for hiring white actors to play Asian characters, attended a meeting of the Asian American Performers Action Coalition at Fordham University at Lincoln Center.³¹⁸ Eustis acknowledged that the group's thoughts about "non-traditional casting" and its impact upon their careers would force him to make it a higher priority at his institution.³¹⁹ "This is what pressure is supposed to do to institutions."³²⁰

C. Private Right of Action

Actors and theatrical trade associations which advocate for greater diversity and inclusion in the theater could lobby the United States Congress and the New York State Legislature to create a private right of action statute for performing artists.³²¹ The proposed statute could be similar in form to the various State Unfair and Deceptive Acts and Practices statutes (UDAPs), and could provide for attorney's fees and costs, statutory, and treble damages.³²² With a private right of action, actors could be encouraged to file discrimination law suits when they believe that they were a victims of race discrimination, and attorneys could be more willing to represent actors.³²³

As case law develops, and more concrete legal guidance comes from the federal or state courts, the possible threat of expensive and time-consuming law suits might induce theatrical employers to change their hiring practices to avoid on-going litigation.³²⁴ Still, attorneys would probably have a financial disincentive to litigate for actors in a private right of action due to the insurmountable hurdle of overcoming the business necessity and First Amendment defenses most likely to be asserted by theatrical employers.³²⁵ Moreover, actors of color may fear retaliatory action of being "shut out" of auditions by casting directors and producers, or their agents who must maintain cordial relationships with theatrical employers.³²⁶

Overall, Congress may have little political will or cohesion to either pass legislation concerning employment in the performing arts or consider a private right of action as a viable solution to creating more employment opportunities for actors of color.³²⁷ On the other hand, New York State would probably have an interest in increasing employment opportunities for actors of color given that the population of New York City comprises of 67 percent of people of color.³²⁸ Still, without a Congressional amendment to Title VII, the business necessity defense would probably shield employers from liability in a discrimination law suit regardless of any state statute that attempts to provide greater legal protection to entertainers through a private right of action.³²⁹

D. Initiatives for Formal Theater Training for Actors of Color

Many “starry-eyed,” talented actors of color are simply not adequately trained in order to successfully thrive in the extremely competitive New York theater industry.³³⁰ In addition to the lack of available dramatic roles, actors of color are further hindered in their employment endeavors because they are not formally trained in singing and dancing; areas where more opportunities exist as ensemble players in a musical.³³¹ During the *Miss Saigon* controversy, Actors’ Equity hinted that there was an issue concerning the supply of actors of color who were properly trained for the rigors of the New York theatrical stage.³³² Subsequently, Actors’ Equity mandated that Cameron Mackintosh, producer of *Miss Saigon*, offer vocal training to Asian actors so that they could be qualified to at least audition for roles in the musical.³³³

Only the talented and the well-trained actor of color can survive in an industry where its practices restrict their employment opportunities in an ultra-competitive environment.³³⁴ Veteran New York acting instructor and educator, William Esper has stated that “never has the American

actor been subjected to so much intense competition and needed so many skills in order to survive.”³³⁵

Furthermore, most opportunities in the New York theater are reserved exclusively for actors who have completed undergraduate and graduate theater programs at universities awarding them a Bachelor of Fine Arts or a Master of Fine Arts degree, or completed two years at a New York acting conservatory.³³⁶ Generally, each year these institutions privately showcase the talents of its graduating students by allowing them to produce their own professionally staged shows to be viewed exclusively by New York theater agents, personal managers, casting directors, and producers.³³⁷ Thus, due to having more familiarity of the talent and potential of students from these institutions of higher learning, theatrical decision-makers need only look to them during the initial phases of casting principal and ensemble roles for the theater.³³⁸

Given that proper training is a key element gaining employment as an actor, the theatrical trade unions, in particular Actors’ Equity, could further their outreach efforts to ensure that middle and high school students are aware of the necessity of university or conservatory training if they wish to pursue a career in the theater.³³⁹ Moreover, as New York State has instituted a minimum pro bono requirement³⁴⁰ for licensed attorneys who wish to practice law in the state, Actors’ Equity could require that its members dedicate time informing interested middle and high school students about the importance of formal theater training.³⁴¹ Through outreach programs, students of color could be made aware of the public and private universities, affordable and expensive, that are available to provide them with the necessary training in movement, voice, speech, stage combat, dialects, script analysis, and acting.³⁴² In addition, there are acting conservatories with intensive theater training programs for students who do not wish

to spend four to seven years in a university setting.³⁴³ In all, these institutions have the necessary faculty and facilities to properly train actors of color for the demands of a career in the theater.³⁴⁴

E. Playwright and Lyricist Initiatives

Similar to the previous recommendation that Actors' Equity require its members to mentor students of color, The Dramatists Guild could increase its outreach efforts in New York City's middle and high schools where there are large populations of students of color as well.³⁴⁵ Providing instruction to New York's middle and high school students of color in the art of playwriting and songwriting could probably result in more young people of color considering and pursuing careers in these aforementioned fields. Naturally, efforts that aim to increase familiarity with the playwriting and songwriting process could provide students with the necessary foundation and confidence to attempt publication and production of their work.

Moreover, as aspiring dramatists these students will mostly create artistic works that express the uniqueness of their race and culture, thus, inevitably create employment opportunities for actors of color to portray the characters and interpret the songs on the stage with enhanced authenticity.³⁴⁶ For instance, *Miss Saigon* served as a source of employment for Asian-Americans; however, actors were not satisfied with the playwright's portrayal of Asian culture on the stage.³⁴⁷ Tom Kouo, who played the lead role of "Thuy" in *Miss Saigon*, stated:

I am grateful for *Miss Saigon* . . . [b]ut in the end, it's still written by two French guys who don't really understand who they are writing about, no matter how hard they might want to. Being in the show, you realize that you're not represented here. You're out there performing, speaking words written by people who don't know what you really say, how you really say it."³⁴⁸

F. Producing

In the past, actors of color and producers have shown their ability to be self-determined in the production of theater projects which created employment opportunities for them in New

York theater.³⁴⁹ In 1916, African-Americans of the Drama Committee of the National Association for the Advancement of Colored People (NAACP) were the first non-white individuals to produce a play in New York.³⁵⁰ Additionally, despite the harshness of the Great Depression, new African-American theater groups formed and provided employment opportunities for actors of color.³⁵¹ In fact, Langston Hughes's *Mulatto* played continuously for over two years during the Great Depression.³⁵²

Lack of diversity in the talent pool that produces New York theaters may be a reason why there is a disproportionate number of Caucasian actors compared to actors of color employed in the theater.³⁵³ Today, more African-American, Latino, and Asian-American Hollywood entertainers in the industry should join the small number of producers that are providing employment opportunities on Broadway.³⁵⁴ While Hollywood does not seem to provide the desired opportunities to showcase actors of color in principal roles, artistic growth and enthusiastic audiences await superstar television and film actors to make a contribution to the "Great White Way."³⁵⁵ Overall, Hollywood actors and performers of color could and should use their prestige, influence, and financial resources to produce shows that will continue to diversify New York theaters.³⁵⁶

There are many stories to be told and many that are yet to be written for the New York stage.³⁵⁷ There are many talented New York actors that can breathe life into these stories.³⁵⁸ The limits and challenges that Title VII and the First Amendment present, does not have to be an ultimate barrier to actors of color. The law protects all; not only Caucasian producers of theatrical works. Thus, the law can protect the works and casting choices of producers of color. So; until there is equality in casting and hiring actors of color by all theatrical decision-makers, why not embrace the artistic protections that the nation's laws provide, and start to produce the

racially integrated works and race specific work that actors of color desire? Why not use the law to some advantage? Not only does the law provide for greater artistic freedom in the theater, New York theater patrons anxiously await it!

VI. Conclusion

This paper has examined how Title VII, in its current form which potentially allows theatrical employers to persist in discriminatory casting and hiring practices without being challenged within the legal system. “Non-traditional casting” efforts has made some strides in the attempt to provide more opportunity to actors of color in the New York theater, but “non-traditional casting” appears to be limited in its scope and its reach. Ultimately, “non-traditional casting” must yield to the theatrical producer’s right to artistic expression.

Theater is about telling a story based on the truth as an individual perceives it. If a theatrical producer’s perception of the truth is to cast all characters in a play with Caucasian actors, then that is that producer’s artistic choice. Theater patrons are free to support this producer in his artistic endeavor or to reject his expression by not going to see his production. In the same vein, patrons are free to support directors and producers who produce theatrical shows in a manner that is a reflection of their life and experiences. Thus, ultimately, a theatrical producer should have the final word concerning whether to cast a play with or without consideration of race. This right is guaranteed by the First Amendment and his artistic preference as expressed through the actors he chooses to cast should not be constrained by other laws. Artistic expression is a vital right and should be respected in the theater.

Endnotes

¹ The name “New York” refers to the City of New York that encompasses the boroughs of Manhattan, Brooklyn, Queens, Staten Island, and the Bronx.

² Sarita Dan, Around the World in 5 Boroughs: It’s the People, Not the Places, NEWYORKNATIVES.COM, June 3, 2013, http://newyorknatives.com/around-the-world-in-5-boroughs-its-the-people-not-the-places/#.UnWRAoLD_IU. See also INFOPLEASE, New York, Ethnic Diversity, <http://www.infoplease.com/encyclopedia/us/new-york-city-united-states-ethnic-diversity.html> (last visited Nov. 28, 2013).

³ See Center for Urban Research, NYC Population Change, <http://www.urbanresearchmaps.org/plurality/narrative.htm> (last visited Dec. 3, 2013). The Center for Urban Research provides a breakdown of racial demographics changes for each neighborhood in major cities in the United States. See also Sandra Fernandez, Hispanic vs. Latino: What’s the Difference?, HISPANIC HOUSTON BLOG, <http://hispanichouston.com/2013/08/07/hispanic-vs-latino-whats-the-difference/>, (last visited Nov. 2, 2013). Fernandez explains that Hispanic denotes an origin from Spain or the Spanish language, and Latino denotes an ancestry from Latin America. For instance, an individual of Portuguese descent from Brazilian is considered to be a Latino; not a Hispanic, because he or she has ancestors from Portugal.

⁴ See INFOPLEASE, supra note 2.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ See Dan, supra note 2. See also Stephanie Garlick, One Sociologist’s Epic Quest: Walk New York City, All 120,000 Blocks, THE ATLANTIC CITIES, Nov. 1, 2013, <http://www.theatlanticcities.com/neighborhoods/2013/11/one-sociologists-epic-quest-walk-new-york-city-all-120000-blocks/7431/>, Nov. 1, 2013. Garlock reviews sociologist and City College of New York professor William Helmreich’s book, THE NEW YORK NOBODY KNOWS: WALKING 6,000 MILES IN THE CITY (2013).

⁹ See Dan, supra note 2.

¹⁰ Id.

¹¹ Id.

¹² Sam Roberts, Slower Racial Change Found in Census of City, N.Y. TIMES, July 28, 2011, http://www.nytimes.com/2011/07/29/nyregion/census-finds-slight-stabilizing-in-new-york-city-racial-makeup.html?_r=0.

¹³ Id.

- 14 Id.; See also Center for Urban Research, supra note 3.
- 15 See generally Center for Urban Research, supra note 3.
- 16 Roberts, supra note 12.
- 17 Id.
- 18 See PERFORMING ARTS DICTIONARY, <http://www.performing-arts-dictionary.org/EQUITY> (last visited Dec. 3, 2013). “Actors’ Equity” or “Equity” refers to the Actors’ Equity Association union that represents live theatrical performers, designers, and stage managers.
- 19 See What’s The Difference Between Broadway, Off-Broadway, and Off-Off-Broadway?, TALKINGBROADWAY.COM, <http://www.talkinbroadway.com/faq/#broadway> (last visited Dec. 3, 2013). There are several definitions for Off-Off Broadway theater. The term Off-Off Broadway theater for this paper encompasses production companies that hire actors under the Actors’ Equity performance contract for live-staged, theatrical performances at venues which have less than 100 seats or are generally larger than the traditional Broadway theaters located in Times Square of Manhattan. Large Off-Off Broadway theaters considered in this paper’s employment statistics are Madison Square Garden Theater, Radio City Music Hall, Lincoln Center for the Performing Arts, The Apollo Theater, The Beacon Theater, Tribeca Performing Arts Theater, and the Brooklyn Academy of Music, among others. Small, under 100-seat Off-Off Broadway theaters included in the employment statistics are not-for-profit organizations such as the Nuyorican Poets Café located in the East Village of Manhattan, and La MaMa Experimental Theater Club located in the Lower East Side of Manhattan. This paper’s statistics do not include live-staged, theatrical performances that are not governed by the Actors’ Equity performance contracts.
- 20 Patrick Healy, ARTSBEAT; Pointed Talk About the Barriers for Asian-Americans at the Casting Door, N.Y. TIMES, Feb. 15, 2012.
- 21 Mabel Ng, Note, Miss Saigon: Casting for Equality of an Unequal Stage, 14 HASTINGS COMM. & ENT. L.J., 14 Hastings 451, 472 (1992). Cf. D. Robert Lohn and Milner S. Ball, Commentary-The Advocate’s Duty, Legal Advocacy, Performance, and Affection, 16 GA. L. REV. 853, 856 (Summer, 1982). Theater is intended to elicit the reality of offering and receiving among actors and between the actors and the audience.
- 22 Arnold Mungioli, Diversity and Inclusion: The State of the Art, <http://www.mungiolitheatricals.com/frame.html> (last visited Dec. 3, 2013). Mungioli is award-winning Broadway casting director who has cast several productions including: *Fela!*; *Ragtime*; *Candide*; *Barrymore*; and *Show Boat*.
- 23 See generally PLAYBILLVAULT.COM, <http://www.playbillvault.com/> (last visited Dec. 3, 2013). A theater season generally begins in September and ends in August.

24 Healy, supra note 20. The percentages include professional commercial and not-for-for
profit theater companies in the five boroughs: Manhattan, Brooklyn, Queens, Staten
Island, and the Bronx.

25 Id.

26 Id.

27 Id.

28 See generally ASIAN AM. PERFORMERS ACTION COAL.,
<http://www.aapacnyc.org/index.html> (last visited Dec. 3, 2013). “The mission of AAPAC
is to expand the perception of Asian American performers in order to increase their
access to and representation on New York City’s stages. AAPAC was started by a group
of Asian American performers who came together in the summer of 2011 after this
question was posted on Facebook: “Where are all the Asian actors in mainstream New
York theatre?”

29 Andrew Gans, New Study Indicates Broadway Shows Employ Higher Percentage,
PLAYBILL, Feb. 15, 2013, <http://www.playbill.com/news/article/175077-New-Study-Indicates-Broadway-Shows-Employ-Higher-Percentage-of-Minority-Actors-Than-Not-for-Profit-Sector>.

30 Id.

31 Id.

32 Id.

33 See Sharon Jensen, Non-Traditional Casting Is Not a Two-Way Street, THE
STAGE.CO.UK BLOG (July 25, 2013, 4.00 PM)
<http://www.thestage.co.uk/columns/mister-producer/2013/07/non-traditional-casting-is-not-a-two-way-street/>, (discussing the distortion of the 90 percent employment rate of
white actors in professional theaters as being much higher when considering that most of
the African-American actors were in the cast of *Dreamgirls*). Sharon Jensen is the
executive director of the Alliance for Inclusion in the Arts in New York, N.Y., previously
known as the Non-Traditional Casting Project.

34 Id.

35 See generally PLAYBILLVAULT.COM, supra note 23. (last visited Dec. 1, 2013). *The
Lion King* is currently on Broadway. *Memphis* opened on October 19, 2009, remained on
Broadway throughout the entire 2011-2012 season, and closed on August 5, 2012. *Stick
Fly* opened December 9, 2011 and closed on February 26, 2012. *Porgy and Bess* opened
on January 12, 2012 and closed on September 23, 2012. *A Streetcar Named Desire*
opened on April 4, 2012 and closed on July 22, 2012. *Fela!* opened on July 12, 2012 and
closed on August 4, 2012; *Motown: The Musical* opened on April 14, 2013 and is
currently on Broadway. *The Trip to Bountiful* opened on April 23, 2013 and closed on
October 9, 2013. See also Chris Witherspoon, Black Actors Believe Broadway is Far

From Colorblind, THEGRIO.COM, Jun. 10, 2011, <http://thegrio.com/2011/06/10/the-state-of-black-broadway/>; (stating that the ensemble of *The Book of Mormon* contains twelve black actors to portray Ugandan villagers during a Mormon missionary trip). *The Book of Mormon* opened on March 24, 2011 and is currently on Broadway.

36 PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013). *In the Heights* closed on April 5, 2011; *Hair* closed September 10, 2011; *South Pacific* closed on August 22, 2010; and *The Little Mermaid* closed August 30, 2009.

37 See Jensen, supra note 33.

38 See generally Brown v. Board of Education [Brown I], 347 U.S. 483 (1954) and Brown v. Board of Education [Brown II], 349 U.S. 294 (1955). Institutionalized discrimination occurs when there unjust and discriminatory mistreatment of an individual or group of individuals by organizations such as governments, corporations, private and public institutions or other society entities.

39 See Jensen, supra note 33. The Actors' Equity Association's four-year study was based on all professional theatrical productions in the United States.

40 Id.

41 Roberts, supra note 12.

42 See EEO Document of Principle, BROADWAYLEAGUE.COM, http://www.broadwayleague.com/members/index.php?url_identifier=eoo=document-of-principle (last visited Sept. 6, 2013). The Broadway League is the national trade association for the Broadway industry. The Broadway League's 700-plus members include theatre owners and operators, producers, presenters, and general managers in North American cities, as well as suppliers of goods and services to the commercial theatre industry. Each year, League members bring Broadway to more than 30 million people in New York and more than 200 cities across the U.S. and Canada.

43 See EEO Document of Principle, ACTORSEQUITY.ORG, <http://www.actorsequity.org/benefits/DocOfPrinciple.asp> (last visited Sept. 20, 2013).

44 Id. The Document of Principle states that "there can be no interference with the artistic integrity or contractual rights of the author, director, or choreographer"

45 See Jensen, supra note 33.

46 Id. Jensen states: "Philosophically, the world – including theater . . . is one in which everyone has the same opportunity, the same shot. However, we are far from that utopia . . . Non-traditional casting was intended to open up what was primarily a Euro-centric, Western repertoire to artists systematically excluded and discriminated against for reasons such as the [color] of their skin."

47 Id. Jensen states that the goal of non-traditional casting “[is] to end the often unwitting neglect by . . . leaders and for decision-makers to consider and hire artists on the basis each one’s merit individual talent and merit.”

48 Id.

49 See Healy, supra note 20. Healy describes the practices of theatrical producers as “being the elephant in the room” within the New York theater community. Healy questions whether “producers and theaters are mostly casting white actors because they want to appeal to as much as possible to white audience members, who make up the majority of theater-goers.” See also Jensen, supra text accompanying notes 44-45 and cf. Witherspoon, supra note 35 (opining that “[m]any of the classic Broadway shows were written in a time when the stories of people of color were [not] being told, therefore one rarely sees the black actors in Rogers & Hammerstein shows like *Oklahoma!*, *South Pacific*, *The King and I*, and *The Sound of Music*.” However, there has been a substantial presence of actors of color in the latest productions of *South Pacific* and *The King and I* due to setting of the musicals on a South Pacific island and Bangkok, Siam (currently known as Thailand), respectively. See also PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013). In 1996, Lou Diamond Phillips, a Hollywood actor of Filipino descent, made his Broadway debut as the “The King of Siam” in *The King and I*.

50 See supra notes 20-32 and accompanying text.

51 See infra Part II and Part III.

52 See generally Arnold Mungiolli, supra note 21 (last visited Dec. 3, 2013).

53 Healy, supra note 20.

54 See Mungiolli, supra note 21 (last visited Dec. 3, 2013). During a discussion about a revival of the Broadway musical, *Cabaret*, Mungiolli commented about a discussion with a non-white casting director who thought that the idea of an African-American actress in the role of “Sally Bowles” as being absurd and a violation of the truth of the time and period of the story. On the other hand, Mungiolli, also commented that a producer went off on a tirade when he cast a black woman as an aunt in *Carousel*, a musical set in a small New England town during the mid-1900s. In this particular incident, the producer’s argument was that a black woman portraying an aunt went against the validity of the production because during the time period, race could not be ignored in the story line.

55 See Jensen, supra text accompanying notes 45-48; see also Healy, supra text accompanying note 49.

56 Jensen, supra text accompanying notes 45-48.

57 Id.

58 See Bonnie Chen, Note, Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater, 16 HOFSTRA LAB. & EMP. L.J. 515, 523 n. 75 (1999); basing the hypothetical on Jim Sollisch, Need for Affirmative Action Still

Exists, DET. NEWS (Apr. 4, 1996) Sollisch states: “If you’re in a position to hire an engineer, let’s say, and the script in your head reads engineer as a ‘white male,’ you will look for a white male. It’s not that you would discriminate against a qualified African-American candidate – it’s that you wouldn’t be in a position to consider an African-American candidate.”

59 See 42 U.S.C. § 2000e to 2000e(17).

60 See Bonnie Chen, supra; citing to H.R. Rep. No. 88-914, at 7.

61 Id.; Citing to Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

62 See Griggs, 401 U.S. at 431.

63 Id.

64 42 U.S.C. § 2000e-2(a).

65 42 U.S.C. § 2000e-3(b).

66 See Heekyung Esther Kim, Note, Race as a Hiring/Casting Criterion: If Laurence Olivier Was Rejected for the Role of Othello, Would He Have a Valid Title VII Claim?, 20 HASTINGS COMM./ENT. L.J. 397, 403 (Winter, 1988).

67 Id.

68 Id.

69 Id. at 404; citing to McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1972).

70 See McDonnell, 411 U.S. at 802.

71 Id.

72 Id.

73 Id.; citing to Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

74 Burdine, 450 U.S. at 255.

75 McDonnell, 411 U.S. at 802

76 Burdine, 450 U.S. at 254.

77 Chen, Id. at 531; citing to Turnes v. AmSouth Bank, 36 F.3d 1057, 1061 (11th Cir. 1994). Some circuit courts require employers to offer discriminatory reasons that were available to the employer at the time a discriminatory act occurred.

78 Id.

79 See Burdine, 450 U.S. at 253; see also Chen, Id. at 531 and note 143; citing to Meeks v. Computer Assoc. Int'l, 15F.3d 1013, 1019 (11th Cir. 1994) (stating that the employer's burden of offering reasons for rejecting an applicant is "exceedingly light).

80 Burdine, 450 U.S. at 255.

81 See Angela Onwuachi-Willing, Article, There's Just One Hitch, Will Smith: Examining Title VII, Race, Casting Discrimination on the Fortieth Anniversary of Loving v. Virginia, 2007 WIS. L. REV. 319, 337 (2007); see also Russell K. Robinson, Article, Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms, 95 Cal. L. Rev. 1, 2 and n.5 (Feb. 2007). There is no published decision concerning the hiring practices of an entertainment entity where an actor has filed a law suit alleging racial discrimination during the casting practice. Professor Robinson notes that the only published decision regarding casting appears in the context of a sex discrimination law suit addressed as an equal protection claim in Cook v. Babbitt, 819 F. Supp. 1, 4 (D.D.C. 1993). In this case, "a female Civil War enthusiast claimed that the National Park Service (NPS) personnel denied her the opportunity to portray a male soldier in a re-creation if produced for the public." Id. See also Jenkins v. Metropolitan Opera Ass'n, 2000 WL 713412 (2d Cir. 2000) (holding that an African-American opera singer was not discriminated against during an audition because of deficiencies in her singing voice therefore there was no violation of Title VII in an unpublished Second Circuit summary judgment case).

82 See HEADSHOTS 101, at <http://www.headshots101.com/what-is-a-headshot.html>. A headshot is a picture with a resume attached that is used by actors and actresses to obtain auditions with agents, casting directors, and producers. (last visited Dec. 3, 2013).

83 See Chen, supra text accompanying note 58.

84 See McDonnell, 411 U.S. at 802.

85 Id. An employee must show that he applied for the job to establish a prima facie case.

86 See Angela Onwuachi-Willing, supra note 81, at 343 n.4 (2007) (noting the "collaborative nature and multilayered independent structure of casting can obscure the source of discriminatory hiring decisions in the entertainment industry). Casting directors received dozens to hundreds of headshots from agents or directly from actors. There is no guaranty that the agent will review each headshot for each role. Agents may only review headshot submissions from agents or actors in which they have an established, on-going relationship.

87 See Kim, supra note 66, at 406; citing to Griggs, 401 U.S. 424 at 429 and 431.

88 See Griggs, 401 U.S. 424 at 429-31 (the Supreme Court discussing that the employee must show intentional discrimination through direct or circumstantial evidence).

89 McDonnell, Id. at 802. See also Kim, supra, Id. at 405; citing to Gregory J. Peterson, The Rockettes: Out of Step with Times? An Inquiry into the Legality of Racial Discrimination in the Performing Arts, 9 COLUM.-VLA J.L. & ARTS 351, 356 (1985).

90 See Onwuachi-Willing, supra, Id. at 343 n.4 (noting that casting directors usually
“assemble the pool of actors” to be submitted to decision-makers, and generally have the
least decision-making authority in the casting process).

91 See infra § II(D): Bona Fide Occupational Qualification (BFOQ) Exception.

92 Id. §§ 2000e-2(a) and 2000e-2(e).

93 § 2000e-2(e)(1).

94 See Chen, supra note 58, at 524-25; citing to § 2000e-2(a)(1); see also Miller v. Texas
State Bd. of Barber Exam’rs, 615 F.2d 650, 652 (5th Cir. 1980) (stating that because
“race is conspicuously absent from the [BFOQ] exception; . . . the bare statute could lead
one to conclude that there is no exception for either intentional or unintentional racial
discrimination”).

95 Onwuachi-Willing, supra note 81, at 336; citing to 110 Cong. Rec. 2550 (1964).

96 See Chen, supra note 58, at 524-25; citing to Diaz v. Pan Am. World Airways, Inc., 442
F.2d 385, 387 (5th Cir. 1971) (stating that the BFOQ should be interpreted narrowly).

97 See Chen, supra note 58, at 525; citing to UAW v. Johnson Controls, Inc., 499 U.S. 187,
201(1991).

98 Diaz, 442 F.2d at 388.

99 See Johnson Controls, Inc., 499 U.S. at 201. See also Kim, supra, Id. at 413; citing to
H.R.DOC. NO. 7152, 110 CONG.REC.7213 (1964). (Senators Clark and Case discussing
the limited scope of Title VII and the right to discriminate on the bases of religion, sex,
and national origin under the bona fide occupational qualification in the following
examples: “the preference for a French restaurant for a French cook, the preference of a
professional baseball team for male players, and the preference of a business which seeks
the patronage of members of particular religious groups for a salesman of that religion.”).

100 Johnson Controls, Inc., 499 U.S. at 203.

101 Onwuachi-Willing, supra note 81, at 337; citing to Diaz 442 F.2d at 388.

102 Diaz, 442 F.2d at 387.

103 Id.

104 Id.

105 Id. at 389.

106 Id. at 388-89.

107 See § 2000e-2(e)(1).

108 See Chen, supra text accompanying note 58.

109 See McDonnell, 411 U.S. at 802.

110 See Chen, supra note 58, at 525.

111 Id.; citing to C.F.R. § 1604.2(2) (1997).

112 See McDonnell, 411 U.S. at 802.

113 See Burdine, 450 U.S. at 253

114 See McDonnell, 411 U.S. 792 at 802.

115 See infra § II(E): Disparate Impact Action.

116 42 U.S.C. § 2000e-2 [Sec. 703(k)(1)(A)].

117 42 U.S.C. § 2000e-2 [Sec. 703(k)(1)(B)(ii)].

118 42 U.S.C. § 2000e-2 [Sec. 703(k)(1)(A)]; supra note 116 and accompanying text.

119 42 U.S.C. § 2000e-2 [Sec. 703(k)(1)(B)(ii)].

120 42 U.S.C. § 2000e-2 [Sec. 703(k)(1)(C)(2)].

121 See Kim, supra note 66, at 406; citing to Griggs, 401 U.S. 424 at 431.

122 Griggs, 401 U.S. 424 at 432.

123 Id. (commenting on the lower courts’ interpretation of Title VII, the Supreme Court stated that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”).

124 Id. at 431 (stating that “[t]he act proscribes not only overt discrimination but also practices that are discriminatory in operation”).

125 Id. at 427. “Negroes were employed in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four ‘operating’ departments in which only whites were employed.”

126 Id.

127 Id. at 431.

128 Id. at 425-26.

129 Id.

130 Id. at 434-36; citing to § 703(h). Section 703(h) was not included in the House version of the Civil Rights Act but was added to the Senate’s version after debate. “For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group

formerly subject to job discrimination . . . Senators Case of New Jersey and Clark of Pennsylvania, [co-managers] of the bill . . . issued a memorandum explaining that the proposed Title VII ‘expressly protects the employer’s right to insist that any prospective applicant . . . must meet the applicable job qualifications . . . later Senator Tower offered an . . . amendment [to the bill] which was adopted . . . [requiring] requiring that employment tests be job related comports with congressional intent” not to “permit an employer to give any test . . . so long as it is professionally designed [where] discrimination would exist under the guise of compliance with the statute.”

131 Id. at 432.

132 Id. at 433.

133 Id. at 434-36, note 9; citing to EEOC Guidelines of Employment Testing Procedures (1966).

134 Id. at 430-31. The Supreme Court states that, “[t]he administrative interpretation Title VII by the [EEOC] is entitled to great deference . . . Since [Title VII] and its legislative history support the [EEOC’s] construction, this affords good reason to treat the guidelines as expressing the will of Congress.”

135 Id. at 429-30

136 Id. at 430.

137 Id. at 432; see also Chen, Id. at 528-29 and n.126, citing to Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 659-60 (1989). The Court shifted the burden of persuasion in demonstrating that a discriminatory policy is justified to the employee and maintained that the burden of production remained with the employer. Chen states, “[b]ecause the decision limited the civil rights protections that were available under Griggs, Congress responded by overruling Wards Cove and reinstating Griggs” where the burden of proof returned to the employer. See H.R. Rep. No. 102-40(II), at 6, reprinted in 1991 U.S.C.C.A.N. 694, 699.

138 Griggs, 401 U.S. at 431-32.

139 Id. at 432.

140 Griggs, 401 U.S. at 431.

141 Id. Concerning the high school diploma requirement, the Supreme Court stated that “[h]istory is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and degrees are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.” Id. at 433.

142 See Griggs, Id. at 432.

143 Id.

144 Id. at 431

145 Id. at 431-32.

146 Id. at 432.

147 See supra § II(D): Bona Fide Occupational Qualification (BFOQ) notes 107-09 and accompanying text.

148 See supra § II(E): Disparate Impact Action text note 119 and accompanying text.

149 See Onwuachi-Willing, supra note 81, at 343. Onwuachi-Willing calls for a “brave actor to break new ground by filing an official challenge to a casting decision that was influenced by raced-based customer preferences” of film audiences; citing to, Robinson, supra, Id. at 6 and n.12; Professor Robinson notes that the “clubby, relationship-driven nature of the entertainment industry” as a factor that keeps actors from filing racial discrimination lawsuits at a rate similar in other industries. See also Kim, supra note 66, at 405-6; (stating that the “intense competition for the leading roles may deter an actor from even filing a complaint for fear of being labeled a troublemaker amongst decision makers in the entertainment industry”). Citing to Peterson, supra note 89.

150 See Griggs, 401 U.S. at 426. The nature of discrimination suit under an adverse impact theory generally would require a large group of employees or applicants to show the negative effect of an employer’s practice upon a specific group of individuals that are have the same or similar claims.

151 Id.

152 See Kim, Id. at 408 (discussing the practical problems of bringing an adverse impact discrimination law suit).

153 Id. (discussing the likelihood that a defendant employer would have more resources and better access to relevant information).

154 See supra text accompanying note 149

155 See Kim, Id. at 408; citing to Griggs, 401 U.S. at 430 (stating that Congress did not intend for Title VII “to guarantee a job to every person regardless of qualifications”).

156 See infra § II(F): Business Necessity Doctrine.

157 See Kim, Id. at 407 and n.55; citing to the Civil Rights Act of 1991.

158 See Onwuachi-Wallig, supra, Id. at 336 (stating that the drafters of Title VII recognized “the need of the entertainment industry to cast actors with certain appearances where race was necessary to the functioning of the project and acknowledged that [decision-makers] could hire someone with appearance of a black person . . . in casting for a role of a black person in a . . . show”).

159 Id.; citing to 110 CONG.REC. 2550 (1964).

160 110 CONG.REC. at 7217.

161 See § II(F): Business Necessity Defense, supra text accompanying note 157.

162 See Kim, Id. at 413; citing to 110 CONG.REC. 7217 (1964).

163 See Kim, Id. at 411; citing to Miller v. Tex. State Bd. State Bd. of Barber Exam'rs, 615 F.2d 650, 653 (1980) (stating that “Griggs v. Duke Power Co. involved a facially neutral discriminatory practice, but the opinion has no language which absolutely requires that the doctrine be so limited).

164 See Miller, 615 F.2d at 654; see generally Baker v. City of St. Petersburg, 400 F.2d 294 (1968). The black officers in this example would have to be assigned to other assignments where their race was not a factor to avoid Equal Protection challenges under the Fifth and Fourteenth Amendments of the United States Constitution.

165 See Miller, 615 F.2d at 654.

166 Id.

167 Id.

168 Id.

169 See § II(F): Business Necessity Defense, supra notes 157-60 and accompanying text.

170 See § II(E): Disparate Impact Action, supra note 129 and accompanying text.

171 See supra note 162 and accompanying text.

172 See § II(E): Disparate Impact Action, supra note 119 and accompanying text.

173 Id.

174 See infra § III: First Amendment Right: Freedom of Artistic Expression.

175 Patricia Worthy, Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue, 18 HASTINGS COMM. & ENT. L.J. 509, 540 (Spring 1996), citing to the U.S. Const. amend. I; see also Gitlow v. New York, 268 U.S. 652, 666 (1925).

176 Worthy, supra note 175, at 540; citing to FCC v. Pacifica Found., Inc., 438 U.S. 726, 745-46 (1978).

177 Worthy, supra note 175, at 540-41; citing to Near v. Minnesota, 238 U.S. 697, 716 (1931) & nn.132-38. (stating that “[t]he availability of First Amendment protection [depends] on whether the particularized conduct constitutes speech or expression”). Also citing to: Cohen v. California, 403 U.S. 15, 15-26 (1971) (stating that “absent the expression of ideas or communication, there is no First Amendment protection); see also Miller v. California, 413 U.S. 15 (1973); Beauharnais v. Illinois, 343 U.S. 250 (1952); New York v. Ferber, 458 U.S. 747 (1982); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); and

Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (stating that “the government has the power to regulate the content of specified classes of speech, including obscenity, libel, child pornography, and words which by their very utterance incite violence or inflict injury).

178 See Kim, supra note 66, at 413 (stating that “the First Amendment is implicated [as a defense in casting preferences] because [a] production of a play . . . is a medium of expression for its director”).

179 Kim, supra note 66, at 413-14; citing to Jennifer L. Sheppard, Theatrical Casting - Discrimination or Artistic Freedom?, 15 COLUM.-VLA J.L. & ARTS 267, 280 (1991).

180 Kim, supra note 66, at 414. See also Robinson, supra note 89, at 45 (stating that “[theatrical employers] would likely argue that Title VII, as applied to casting, is content-based regulation and, as such, is presumptively unconstitutional”).

181 Robinson, supra note 89, at 47. See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

182 Robinson, supra note 89, at 47; citing to Hurley, 515 U.S. at 562-64.

183 Hurley, 515 U.S. at 562-64.

184 Id. at 540.

185 Id.

186 See Id. at 562-64.

187 See Id. at 573-74 (stating that “once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the [council’s] speech itself to be the public accommodation” in “[violation of] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”). See also Lois L. Krieger, Note, “Miss Saigon” and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 SYRACUSE L. REV. 839, 849 and nn.60-61 (1992); citing to New York State Club Ass’n v. City of New York, 487 U.S. 1 (1998) (noting that the United States Supreme Court “[reaffirmed the principle that ‘discrimination might in some cases be justified in order to preserve expressive integrity’”); but see Roberts v. United States, 468 U.S. 609 (1984) (holding “that whatever impact a state civil rights statute had on a private organization’s freedom of expression was justified by the state’s compelling interest in eradicating discrimination).

188 See § II(F): Business Necessity Defense, supra notes 157-60 and accompanying text; see
also § II(G): The Entertainment Industry’s Authenticity Requirement as a Business
Necessity Defense, supra notes 161-62 and accompanying text.

189 See Kim, supra note 66, at 412-14; cf. Robinson, supra note 81, at 17 (stating “I
recognize that those who prioritize the First Amendment may resist using legal pressure
to diversity casting.” These individuals “might say” that the First Amendment
“automatically trumps antidiscrimination laws, such as Title VII, which are mere
statutes.” However, “[s]ome civil rights advocates . . . might point to the commercial
nature of contemporary [theater] to question whether it is truly “speech” and argue that
equality concerns in the employment context override somewhat marginal First
Amendment claims”).

190 U.S. CONST. art. VI, § 2.

191 See Kim, supra note 66, at 414-15 (explaining that possible criticism of First Amendment
protection during the casting process “stands as a general obstruction to all progressive
legislative efforts” thus guaranteeing a privileged class of actors who have access to the
employment opportunities).

192 Id.

193 Chen, supra note 58, at 518-19. In March 1987, Cameron Mackintosh produced the
original Broadway production of *Les Miserables*. The musical opened on Broadway on
March 12, 1987 and closed on May 18, 2003.

194 Id.

195 Id. Chen states that “yellow face” uses makeup in a grotesque and exaggerated manner to
parody and degrade the physical characteristics of an Asian, similar to the “black face”
practices of the minstrel shows.

196 Id.; see also PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013). In 1988,
David Henry Hwang was awarded numerous prestigious awards for his drama *M.
Butterfly*: the Tony Award for the category of “Play;” the Drama Desk Award for
“Outstanding New Play;” and the Outer Critics Circle Award for “Outstanding Featured
Actor in a Play;” and the New York Drama Critics’ Circle Award for “Outstanding New
Broadway Play.” In addition, B.D. Wong received several awards for the portrayal of
“Song Liling” in the drama: the Tony Award “Featured Actor in a Play;” the Drama Desk
Award for “Outstanding Featured Actor in a Play;” and the Outer Critics Circle Award
for Outstanding Debut Performance.

197 See Ng, supra note 21, at 456-57. Actors’ Equity Association explains that its decision to
reject Cameron Mackintosh’s application for a non-resident white actor, Jonathan Pryce,
to portray a Eurasian in *Miss Saigon* to be based on moral grounds and the concern for
creating employment opportunities for its minority members. However, since Pryce held
star status, Actors’ Equity could not block production of the musical based solely on

casting Pryce. Under a standard production contract between a producer and Actors' Equity, non-resident alien may not be employed under an Actors Equity contract in the United States unless Actors' Equity approves. Producers must obtain support from Actors' Equity when applying to the Immigration and Naturalization Service for the actor's temporary admission and subsequent employment. To qualify for employment, a non-resident alien must: (1) attain "star" status; (2) provide unique services; or (3) be part of a unit company of internationally recognized status. Pryce qualified for employment because he had won the Olivier Award, London's internationally recognized equivalent to the Tony Award, for his performance in London which demonstrated his acclaim. Additionally, Pryce had previously starred on Broadway in the *Comediens* which he received a Tony Award. Thus, Mackintosh would have prevailed in arbitration concerning obtaining Actors' Equity's support for Pryce's application to work as an actor in the United States. See also PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 1, 2013). Jonathan Pryce was awarded the Tony Award in the category of "Actor in a Musical," and a Drama Desk Award and an Outer Critics Award for "Outstanding Actor in a Musical" for his portrayal of the "Engineer" in *Miss Saigon*.

198 See Ng, supra note 21, at 456-57.

199 Id.

200 Id. at 456.

201 Id.

202 Id. at 459. The "no interference" clause in a production agreement expressly favors a director's or producer's casting preferences.

203 Id.

204 See Kim, supra note 66, at 414. Kim states that "where the artist intends to make an assertion or expression of [his or] her work, [he or] she has the right to do so in any way [he or] or she so desires, even if another person may oppose it . . . [h]owever, a director's invocation of his [or her] First Amendment rights may be limited to where the racial castinf is an essential element of the plot and attempts to transmit some sort of societal message to the audience."

205 Alisa Solomon, Essay, ¶ 13, The Not-So-Bountiful Trip to Broadway (Apr. 24, 2013), <http://howlround.com/the-not-so-bountiful-trip-to-broadway>; see also ALISASOLOMON.COM, <http://alisasolomon.com> (last visited Dec. 3, 2013). Professor Alisa Solomon currently teaches at Columbia University's Graduate School of Journalism, where she directs the Arts & Culture concentration in the Master of Arts program. A theater critic and general reporter for the *Village Voice* from 1983 to 2004, she has also contributed to *The New York Times*, *The Nation*, *Tablet*, *The Forward*, *Howlround.com*, *killingthebuddha.com*, *American Theater*, *TDR – The Drama Review*, and other publications. Her first book, Re-Dressing the Canon: Essays on Theater and

Gender, won the George Jean Nathan Award for Dramatic Criticism. She earned her BA (double-majoring in Drama and Philosophy) at the University of Michigan's Residential College, and her Master of Fine Arts and Doctorate (in Dramaturgy and Criticism) at the Yale School of Drama.

206 See EEO Document of Principle, supra notes 42-44 and accompanying text.

207 Solomon, supra note 194, at ¶ 13. Professor Solomon states that even when the actor's race is not essential to the character, it does not necessarily follow that a director must extradite all particularities of the actor's race when casting or directing him in the role.

208 Id. In *The Trip to Bountiful*, the director adds a new dimension to the play when choosing to specifically cast a white actor to play the role of the Sherriff who searches and then assists the lead character, the elderly Mrs. Watts, in the Jim Crow South, portrayed by Cicely Tyson, a veteran African-American actress. In 2013, Ms. Tyson was awarded the Tony Award for "Actress in a Play," Broadway's highest honor, for her portrayal of Mrs. Watts. See also PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013).

209 See Solomon, supra note 194, at ¶¶ 3-8, 13. Regional theater director, Timothy Douglas, originally had the idea to stage a production of *The Trip to Bountiful* with African-American actors as the principle characters. In 2011, Douglas premiered the drama at the Cleveland Play House. In 2013, Broadway director, Michael Wilson premiered the drama at the Stephen Soundheim Theater in New York City. The original cast consisted of: Cicely Tyson; Cuba Gooding, Jr.; Vanessa Williams; and Condola Rashad. Ms. Rashad was nominated for a Tony Award in the category of "Featured Actress in a Play" for her portrayal of "Thelma" in the production. *The Trip to Bountiful* was written by Horton Foote and, originally premiered on Broadway in 1953 with an all-white cast. See PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013).

210 Solomon, supra note 194, at ¶ 13.

211 See supra § II(G): The Entertainment Industry's Authenticity Requirement as a Business Necessity Defense.

212 Id.

213 See supra §§ II(G): The Entertainment Industry's Authenticity Requirement as a Business Necessity Defense and III(A): The First Amendment of the United States Constitution.

214 Id.

215 See infra § IV(B): Non-Traditional Casting: Definition and Purpose.

216 Id.

217 Ng, supra note 21, at 460.

218 Id.; see also Sharon Jensen, EEO Project, EEO Document of Principle, THE BROADWAY LEAGUE, <http://broadwayleague.com> (last visited Nov. 30, 2013). The Broadway League, EEO Document of Principle, available at http://www.broadwayleague.com/members/index.php?url_identifier=eeo-document-of-principle. Actors' Equity Association, the Casting Society of America, the Dramatists Guild, the League of American Theatres and Producers, and the Society of Stage Directors and Choreographers, endorse the goals of diversity, inclusion, and the principles of equal opportunity for all who work in the theatre industry; and condemn racism, prejudice, discrimination and exclusion in the theatre.

219 Jensen, supra note 33.

220 Id.

C. Types of Non-Traditional Casting

221 See BROADWAYREVIEWED.COM BLOG, <http://www.broadwayreviewed.com/1513/the-1968-african-american-cast-of-hello-dolly-and-pearl-bailey>, (posted Sep. 17, 3013); see also William Ruhlman, Review, *Hello, Dolly!*, ALLMUSIC, <http://www.allmusic.com/album/hello-dolly!-mw0000616686> (last visited Nov. 3, 2013). The original Broadway musical starred Carol Channing, Ginger Rogers, Martha Raye, and Betty Grable who performed 1,500 performances before the production was recast with an all-Black cast re-opening the show on Nov. 12, 1967.

222 See Clive Barnes, Stage, The Wiz: Black Musical Shows Vitality and Style, N.Y. TIMES, Jan. 6, 1975, <http://thewiztheatrecompany.com/thewizhistory.html#4>. "This show took the characters out of the comfort of Kansas and set them in the big city, complete with junkyards and disco clubs."

223 See Krieger, supra note 187, at 845. Krieger distinguishes four different types of non-traditional casting: 1) "societal casting," in which minorities are cast in roles they perform every day in society, but from which they are usually excluded due to discriminatory hiring practices; 2) "cross-cultural casting," in which a play is set in an entirely different cultural world from that which the author intended; 3) "conceptual casting," in which the actor is cast in a role specifically in order to have his race or ethnicity add an extra dimension to the performance; and 4) "blind casting," in which actors are cast according to their talents and qualifications, not their physical characteristics.

224 See infra § IV(C)(1): "Non-Traditional Casting" of Veteran Theater Artists.

225 See infra § IV(C)(2): "Non-Traditional Casting" of Notable Entertainers.

226 See infra § IV(C)(3): "Non-Traditional Recasting" of a Revival.

227 See infra § IV(C)(4): "Colorblind Casting."

228 See infra § IV(C)(5): "Multi-Racial Casting" or "Multi-Cultural Casting."

229 See infra § IV(C)(6): “Reverse Colorblind Casting:” Caucasian Actors in Non-White Roles, *The Miss Saigon Dilemma Revisited*.

230 See Solomon, supra note 205, ¶ 12. Solomon comments on Halle Foote’s statement about how the universal the meaning of *The Trip to Bountiful* remained despite the revival of the play with African-American actors cast in the principle roles.

231 See Ng, supra 21, at 460 (referring to “casting of ethnic minority . . . [a]ctors in roles in which race, ethnicity, or sex is not germane”).

232 Id.

233 See generally PLAYBILLVAULT.COM, supra note 23 (last visited Dec.3, 2013). African-American actor James Earl Jones was awarded the Tony Award for “Best Actor in a Play” for his portrayal of “Jack Jefferson” in *The Great White Hope* before being cast as “Lennie” in *Of Mice and Men* and “Othello” in *Othello*. African-American actor Morgan Freeman received an Academy Award nomination for his portrayal of “Hoke Colburn” in the film version of *Driving Miss Daisy* before being cast as “Frank Elgin” in *The Country Girl*. African-American actress Audra McDonald was awarded the Tony Award for “Featured Actress in a Musical” for her portrayal of “Carrie Pepperide” in *Carousel* before being cast in non-race specific role of “Sharon” in *Master Class* where McDonald was awarded her second Tony Award for “Featured Actress in a Play.” Lillias White successfully portrayed “Effie White” in the original version and revival of *Dreamgirls* before being cast as “Miss Jones” in *How to Succeed in Business Without Really Trying*. White subsequently was awarded the Tony Award for “Best Featured Actress in a Musical” for the role of “Sonja,” a prostitute in *The Life*. Vanessa Williams was awarded the Theatre World Award for the portrayal of “Aurora/Spider Woman” in *Kiss of the Spider Woman* before being cast the “Witch” in *Into the Woods*. Laurence Fishburne was awarded the Tony Award for “Best Featured Actor in a Play” for the portrayal of “Sterling” in *Two Trains Running* before being cast as “Henry II” in *The Lion in the Winter*. See also Ben Brantley, Theater Review, ‘Les Miserables:’ Didn’t We Just See This Revolution?, N.Y. TIMES, Nov. 10, 2006, <http://www.nytimes.com/2006/11/10/theater/reviews/10mise.html?pagewanted=all> (noting that Hispanic-American Broadway actress, Daphne Rubin-Vega, who originated the role of “Mimi” in *Rent*, cast to play “Fantine” in the Broadway revival of *Les Miserables*; the longest-running Broadway musical that originally opened in 1987) Rubin-Vega was nominated for a Tony Award and was awarded a Theatre World Award for “Best Actress in a Musical” for her portrayal of “Mimi Marquez” in *Rent*, and received a Tony Award nomination for “Featured Actress in a Play” her portrayal of “Conchita” in *Anna in the Tropics* before being cast as French character “Fantine” in the Broadway revival of *Les Miserables*. See also Harry Haun, An Affinity for Fantine: Tony-Winner Steps into “Les Miz”, PLAYBILL.COM, Dec. 12, 1995, <http://www.playbill.com/features/article/64173-An-Affinity-for-Fantine>. After twenty five years, Melba Moore, of the original production of *Hair* and, *Purlie*, for which she was awarded a Tony, Drama Desk, Theater World Award for her portrayal of “Lutie Belle,” returned to Broadway in the role of “Fantine” in *Les Miserable*. Cf. NPR Staff, ‘Pippin Star’ Star Patina Miller Soars On Broadway, NPR, Aug. 26, 2013,

<http://www.npr.org/2013/08/26/214893476/pippin-star-patina-miller-soars-on-broadway> (noting that a black actress revived the role as “Lead Actor” in *Pippin*, originated by Broadway legend Ben Vereen forty years ago). Miller was awarded the Tony Award for “Actress in a Musical” for her portrayal of “Lead Actor” in the 2013 revival of *Pippin*. The role of “Lead Actor” had originally been cast with African-American male actors.

Non-Traditional Casting of Notable Names

234

See generally PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 3, 2013). African-American Recording Artist Toni Braxton portrayed “Belle” in *Beauty in the Beast* and “Aida” in *Aida*. African-American Recording Artist Michelle Williams of Destiny’s Child portrayed “Aida” in *Aida* and “Roxie Hart” in *Chicago*. African-American Recording Artist Shanice portrayed “Eponine” in *Les Miserables*. African-American Recording Artist Jody Watley portrayed “Betty Rizzo” in *Grease*. African-American Recording Artist Usher Raymond portrayed “Billy Flynn” in *Chicago*. African-American Television Personality Wayne Brady portrayed “Billy Flynn” in *Chicago*. African-American Radio and Television Host Wendy Williams portrayed “Matron ‘Mama’ Morton” in *Chicago*. African-American Recording Artist Jordin Sparks portrayed “Nina” in *In the Heights*. Hispanic-American Recording Artist Ricky Martin portrayed “Marius” in *Les Miserables* and “Che” in *Evita*. Television Actor Corbin Bleu portrayed “Usnavi” in *In the Heights* and “Jesus” in *Godspell*. African-American Recording Artist Deborah Cox portrayed “Aida” in *Aida* and “Lucy Harris” in *Jekyll & Hyde*. African-American Recording Artist Heather Headley portrayed “Aida” in *Aida* in which she was awarded the Tony Award “Actress in a Musical” and the Drama Desk Award for “Outstanding Actress in a Musical.”

235

Id.

236

Id.

237

See Jensen, supra note 218 and accompanying text. One of the goals of the Non-Traditional Casting Project was to end neglect of actors of color seeking employment in the theater.

(3) “Non-Traditional Re-Casting” of a Revival

238

See Tambay A. Obenson, Kenny Leon Planning ‘Fatal Attraction’ Broadway Adaptation (With An All-Black Cast?), INDIEWIRE (Jul. 9, 2012 12:49 PM), <http://blogs.indiewire.com/shadowandact/kenny-leon-planning-fatal-attraction-broadway-adaptation>. Obenson blogs about the success of bringing an “all-black cast version of a popular work” to the theater while discussing Kenny Leon’s next project. See also Michael Musto Thu, Baayork Lee is Presenting An All-Asian Version of Hello, Dolly!, VILLAGE VOICE (Apr. 11, 2013 11:15 AM), http://blogs.villagevoice.com/dailymusto/2013/04/baayork_lee_is.php. Musto Thu blogs about the announcement to cast and produce an all-Asian adaptation of *Hello Dolly!* Baayork Lee is an Asian-American actress that was a member of the original *A Chorus Line* cast on Broadway.

239 See Linda Armstrong, *Cat on a Hot Tin Roof: An all-Black Cast in this Broadway revival*, THE NETWORK JOURNAL, Mar. 2008, <http://www.tnj.com/archives/2008/march/cat-on-a-hot-tin-roof>. *Cat on a Hot Tin Roof* opened on March 6, 2008 at the Broadhurst Theatre in New York, N.Y. The cast included James Earl Jones as “Big Daddy,” Phylicia Rashad as “Big Mama,” Anika Noni Rose as “Maggie,” and Terrence Howard as “Brick.” The drama featured Broadway actors: Lou Myers and Count Stovall; and televisions and film actors; Lisa Arrindell Anderson and Giancarlo Esposito.

240 See PLAYBILLVAULT.COM, *supra* note 23 (last visited Dec. 1, 2013). *Cat on a Hot Tin Roof* was produced during six separate theater seasons in a Broadway theater: (1) March 24, 1955 – November 17, 1956; (2) September 24, 1974 – February 8, 1975; (3) March 21, 1990 – August 1, 1990; (4) November 2, 2003 – March 7, 2004; (5) March 6, 2008 – June 22, 2008; and (6) January 17, 2013 – March 30, 2013.

241 Id.

242 Ben Brantley, Theater Review, *Home is Where the Years Disappear, The Trip to Bountiful at the Soundheim Theater*, N.Y. TIMES, Apr. 23, 2013, available at http://theater.nytimes.com/2013/04/24/theater/reviews/the-trip-to-bountiful-at-the-stephen-sondheim-theater.html?pagewanted=all&_r=0. African-American actor, Cicely Tyson, was cast as the matriarch Mrs. Carrie Watts, and was supported by African-American actors, Cuba Gooding, Jr., Vanessa L. Williams, Condola Rashad, and white actor Tom Wopat who portrayed the “Sheriff” who is sent to search for Mrs. Watts in the Deep South during 1953.

243 Id.

244 See Janet I-Chin Tu, *A Story To Tell -- Playwright August Wilson, Now Settled In Seattle's Misty Nest, Writes About The The Black Experience Like No Other Storyteller*, SEATTLE TIMES, Jan. 18, 1998, available at <http://community.seattletimes.nwsourc.com/archive/?date=19980118&slug=2729219>. August Wilson was awarded the Pulitzer Prize for *Fences* and *The Piano Lesson*, the Tony Award for *The Piano Lesson*. His other plays include: *Joe Turner’s Come and Gone*, *Radio Golf*, *Gem of the Ocean*, *Ma Rainey’s Black Bottom*, *King Hedley II*, *Seven Guitars*, and *Two Trains Running*.

245 Id. “In the summer of 1996, Wilson stunned the 500 people attending a conference of the Theater Communications Group, a national network of nonprofit drama institutions. Wilson presented a speech about the role of race in cultural identity, the underfunding of black theaters in America and, most controversially, his denunciation of color-blind casting, the practice of casting African-Americans and other non-Caucasians in roles originally created for white performers.” Tu states that “[t]o understand Wilson's opposition to color-blind casting, you have to appreciate that much of his life's work has been about [investigating], articulating and even helping to forge an African-American culture and identity (emphasis on the African heritage) that doesn't take second place to the dominant European culture in America.”

246 Ng, supra note 21, at 460.

247 See Solomon, supra note 205, at ¶ 12.

248 Id.

249 See ABC News, ‘Romeo and Juliet’ Breaks Barriers as It Makes Return to Broadway, ABC NEWS GO (Sep. 27, 2013 6:57 PM), <http://abcnews.go.com/blogs/entertainment/2013/09/romeo-and-juliet-breaks-barriers-as-it-makes-return-to-broadway/>.

250 Ben Brantley, Theater Review, Such Sweet Sorrow, N.Y. TIMES, Sep. 19, 2013, <http://theater.nytimes.com/2013/09/20/theater/reviews/orlando-bloom-and-condola-rashad-in-romeo-and-juliet.html>. *Romeo and Juliet* opened at Broadway’s Richard Rogers Theater in New York, N.Y. on Sept. 19, 2013.

251 ABC News, supra note 249.

252 Id.; but see Brantley, supra note 250 (commenting on the fact that the principle actors are white and black “may underscore the division between the families,” however “it registers as irrelevant when they’re together).

253 See Jensen, supra note 218 and accompanying text.

254 See PLAYBILLVAULT.COM, supra note 23 (last visited on Dec. 1, 2013). After portraying the role of “Eponine” in *Les Miserables*, the show’s producers cast Lea Salonga in *Miss Saigon* in which she was awarded the Tony Award for “Actress in a Musical.” In the 2014 Broadway revival of *Les Miserable*, the producers cast African-American actress Nikki M. James in the role of “Eponine.” Cameron Mackintosh, the producer who challenged Actors’ Equity for the right to have total artistic control in the casting of the original production *Miss Saigon* cast both Salonga and James in the role of the French orphan girl in *Les Miserables*.

255 See Michael Kilian, Equal Opportunity Escapes Actors, CHI. TRIB., Aug. 13, 1998, http://articles.chicagotribune.com/1998-08-13/features/9808130242_1_lynn-thigpen-roles-minorities (commenting on Audra McDonald’s acclaim on Broadway that has allowed her to play a servant in *Ragtime* and other non-race specific roles such as “Sharon,” an opera student *Master Class*). Audra McDonald was awarded the Tony Award for “Featured Actress in a Play” for her portrayal of “Sharon” in *Master Class*.

256 Disorderly Dreams, “On Colorblind Casting,” MORIAHBOARD.LIVEJOURNAL.COM, (May 24, 2011, 4:34 PM) <http://moriahbard.livejournal.com/43622.html>. Generally, the author of the blog is referring to “colorblind casting” in film.

257 Id.

258 Id. The blogger stated: “Gene Roddenberry [creator, screenwriter and producer of the original *Star Trek* television series] understood [the effects on society when casting an

actor of color]. [Roddenberry] purposely cast diverse actors in *Star Trek* because he envisioned a peaceful, diverse future for Earth. His series takes place in a fictional, science fiction environment, but he understood the power his portrayal of race had. He cast Nichelle Nichols as “Lieutenant Uhura,” a character that could probably have been played by an actress of any race. Casting a black actress in such an important role was rare for the 1960s, and having the character take part in television's first interracial kiss was enormously controversial. But Roddenberry wanted to make a statement, and the civil rights movement supported him. When [Nichols] seriously considered leaving the show, Dr. Martin Luther King, Jr. told her [that] she had to stay on because she was providing an important role model for young African-Americans [and others]. Race in casting makes a huge social impact.”

259 See Christopher Blank, Stage Review: Broadway play ‘Memphis’ is ‘highest compliment’ for Bluff City, COMMERCIAL APPEAL, Oct. 20, 2009, <http://www.commercialappeal.com/news/2009/oct/20/stage-review-broadway-play-memphis-high-complim/>. *Memphis* is a Broadway musical that is set in the 1950s, and “revives memories of segregation, racial violence and a time when an intimate relationship “black and white lovers” was a dangerous and socially forbidden thing.

260 Id. Blank comments that the plot of *Memphis* may be simple, but the significance of the civil rights movement, time period in which the musical is set, “wasn’t just a political movement, . . . a cultural one.”

261 Id.

262 Id. Blank explains that in the 1950s when white youngsters “fell in love with black music, they challenge the older generations’ racial prejudices. See also Charles Isherwood, Theater Review, Memphis: A D.J. Who Shook, Rattled and Rolled, N.Y. TIMES, Oct. 19, 2009, <http://www.nytimes.com/2009/10/20/theater/reviews/20memphis.html>. *Memphis* is written by David Bryan of Bon Jovi and Joe Pietro.

263 See Isherwood, supra note 262 (comparing *Memphis* to *Hairspray*’s popular music and racial divide in Baltimore during the 1960s).

264 See Blank, supra note 259. A black and white cast was necessary to demonstrate the racial tension between the races during the 1950s.

265 See SporkGoddess, Do You Think It’s Important for Rent to Have a Multiracial Cast?, BROADWAYWORLD.COM (Apr. 19, 2010 6:56 PM), <http://www.broadwayworld.com/board/printthread.php?thread=1014665&boardid=1> (posting “The show’s book mentions absolutely nothing about their races in reference to their daily struggle. But I do believe the racial thing brings different aspect of thought to the audience and to the actor’s performance. And professional casting companies would most likely not cast a white Colins”).

266 Id. at Apr. 4, 2019 3:36 AM (posting that “this story has a lot to do with acceptance. We just accept the roles as is and the diversity not because the book or someone says, but rather we accept it because [it’s] in front of us, living”).

267 See Kilian, supra note 255.

268 See Randy Gener, Asian-Americans: Why Can't We Get Cast In NYC?, NPR, Feb. 15, 2012, <http://www.npr.org/2012/02/14/146890025/asian-americans-why-cant-we-get-cast-in-nyc>.

269 See Jensen, supra note 33. Jensen responded to a guest post on the Mister Producer blog criticizing “colour-blind” casting.

270 Id. Jensen comments that the theater is almost exclusively controlled by Caucasian individuals, and that there is a need for the “creative team to be sensitive to accurately representing the cultural needs of a [play] and casting. . . .”

271 Id.

272 See William H. Honan, Casting for Change; Meeting Airs Frustrations of Minority and Disabled Actors, CHI.TRIB., Feb. 1, 1990, http://articles.chicagotribune.com/1990-02-01/features/9001100027_1_able-bodied-actress-ethnic-minorities-actors-equity-association (using the example given by Donna Couteau Brooks of the Sac and Fox nation in Stroud, Oklahoma, of an American Indian actress seeking work as an actor portraying an Indian); see also Healy, supra 20, notes 24-27 and accompanying text.

273 Honan, supra note 272; see also Healy, supra 20, notes 24-27 and accompanying text.

274 Honan, supra note 272.

275 See generally supra §§ II(G): The Entertainment Industry’s Authenticity Requirement as a Business Necessity Defense and III(A): The First Amendment of the United States Constitution.

276 Honan, supra note 272.

277 Id.

278 See generally supra §§ II(G): The Entertainment Industry’s Authenticity Requirement as a Business Necessity Defense and III(A): The First Amendment of the United States Constitution.

279 Healy, supra 20, notes 24-27 and accompanying text.

280 See generally Healy, supra 20, notes 24-27 and accompanying text.

281 Id.

282 See supra text accompanying text note 33; and see supra notes 33-36 and accompanying text.

283 See Ng, supra note 21, at 456-57 (describing how non-traditional casting does not rectify the non-inclusion of Asian-Americans in the theater because it prevents considerations of race to remedy the situation).

284 Gener, supra note 268.

285 Id.

286 Witherspoon, supra note 35.

287 Id.

288 Healy, supra note 20.

289 Id.

290 Id.

291 Philip Boroff, Princeton Numbers Cruncher Confirms Bias in Theater, BLOOMBERG
TIMES, June 24, 2009, <http://www.bloomberg.com/apps/news?pid>.

292 Gener, supra note 268.

293 Id.

294 Id. “Trained” actors are generally those that have completed a two-year acting
conservatory training, a Bachelor of Fine Arts, or a Master of Fine Arts in drama.

295 Healy, supra note 20.

296 See Ng, supra note 21, at 473.

297 Id. at 455. Actors’ Equity formally rejected Broadway producer, Cameron Mackintosh’s
application for a white actor to be cast in a principal role as a Eurasian pimp in the
Broadway production of *Miss Saigon*. In addition, Jonathan Pryce is not a United States
citizen.

298 Healy, supra note 20.

299 Solomon, supra note 205, at ¶ 15.

300 Id. During the opening week of *The Trip to Bountiful*, the Sondheim Theatre sold 77
percent of its approximately 1,000 seats each night. Solomon states that there were a
sizeable number of black patrons. See also PLAYBILLVAULT.COM, supra note 23 (last
visited Dec. 1, 2013). According to Playbillvault.com, during the 2012-2013 season, the
play sold 69.53% of its available seats throughout its official run on Broadway from
April 23, 2013 to October 9, 2013. The play began previews on March 30, 2013, and was
extended into the 2013-2014 season.

301 See PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 1, 2013). *Cat on a Hot Tin
Roof*, featuring an all-Caucasian cast, and sold 73.51% of its available seats during the
2012-2013 season. This play had a run from January 17, 2013 to March 30, 2013. Its
previewed date was December 18, 2012.

302 Id. During the 2007-2008 season, *Cat on a Hot Tin Roof*, featuring an all-African American cast, sold 91% of its available seats. This revival of *Cat on a Hot Tin Roof* previewed on February 12, 2008. The play opened on March 6, 2008 and closed June 22, 2008. Also see LONDONBROADWAY.COM, <http://london.broadway.com/shows/cat-hot-tin-roof-london/photos/cat-on-a-hot-tin-roof-london-show-photos/> (last visited Dec. 1, 2013). Due to the play’s Broadway success, the producers revived the play on the West End in London, England.

303 See PLAYBILLVAULT.COM, supra note 23 (last visited Dec. 1, 2013). The revival of *A Streetcar Named Desire* featured a mixed African-American and Hispanic cast, and sold 65.25% of its available seats. The drama previewed on April 3, 2012; opened April 22, 2012 and closed July 22, 2012.

304 Solomon, supra, Id. at para. 15. Marcia Pendleton is the president and founder of Walk Tall Girl Productions, a boutique marketing, audience development and group sales agency for the arts.

305 Id.

306 Id. Solomon noted that the black audience members willingly joined Ms. Tyson as she sang a “rousing” hymn during her performance as “Mrs. Carrie Watts.”

307 Healy, supra note 20.

308 Id.

309 Id.

310 Id.

311 See Kim, supra note 66, at 417.

312 See Ng, supra note 21, at 456. Cameron Mackintosh cancelled the production of *Les Miserables* and, defended his right to have artistic control over the selection of actors cast in the musical.

313 Gener, supra note 268.

314 Id.

315 Id.

316 Id.

317 Id.

318 Id.

319

Id.

320

Id.

321

See N.Y. GEN. BUS. §§ 349-50, Ch. 20, Art. 22-A. In 2013, New York has proposed the Consumer Protection from Deceptive Acts and Procedures that provides private “right of action to an injured person” from violations of the statute to recover his “actual damages or fifty dollars, whichever is greater, or both such actions. The court may also, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney’s fees to a prevailing plaintiff.”

322

See Id.; see also 15 U.S.C.A. §§ 13 and 45. Statutory and treble damages could be an alternative method of calculating damages for actors where actual monetary damages based on Actors Equity scale wages would not deter racial discrimination by producers or would not be worth the time and expense of filing a law suit.

323

See Onwuachi-Willing, supra 81, at 342 (stating that “[c]ases that challenge the use of race . . . in casting in general could move writers to include an explicit call for a diverse group of actors in their scripts, spur agents to send more actors of color to try out for roles in which the race of the character is not specified, or result in the hiring of a more racially diverse group of writers, directors, and producers).

324

Id.

325

See generally supra §§ II(G): The Entertainment Industry’s Authenticity Requirement as a Business Necessity Defense and III(A): The First Amendment of the United States Constitution.

326

See Onwuachi-Willing, supra note, at 343.

327

See Benjamin R. Freed, Parsing Arena Stage’s Scheduling Changes, WASH. CITY PAPER, Nov. 16, 2011, <http://www.washingtoncitypaper.com/blogs/artsdesk/theater/2011/11/16/parsing-arena-stages-scheduling-changes/>; (discussing Congress’ fight over support for the arts and its effects on non-profit institutions).

328

See generally Center for Urban Research, supra note 3; see also Roberts, supra notes 12-13 and accompanying text.

329

See generally supra § II(G): The Entertainment Industry’s Authenticity Requirement as a Business Necessity Defense.

330

See Ng, supra note 21, at 457. In reversing its position concerning the denial of Cameron Mackintosh’s application for a white actor to portray the Eurasian pimp in *Miss Saigon*, Actors’ Equity Association took into consideration Mackintosh’s willingness to provide vocal training for Asian actors to qualify them for consideration for roles in his Broadway musical.

331 See Armstrong, supra note 239. *Dreamgirls* and Tony Award-winning actress, Anika Noni Rose, stated that she relished the opportunity to be on Broadway in a purely dramatic production, for which she is better trained than musicals. See also NYTIMES.COM, Biography, Anika Noni Rose, <http://www.nytimes.com/movies/person/355460/Anika-Noni-Rose/biography> (last visited Dec. 1, 2013). Rose trained as an actor at the American Conservatory Theater in San Francisco, CA.

332 See supra accompanying text to note 330.

333 Id.

334 See generally William Esper, To MFA or Not to MFA? That is the Question, ESPERSTUDIO.COM., http://esperstudio.com/?page_id=38, (last visited Dec. 1, 2013). William Esper is an internationally recognized authority on the work of Sanford Meisner. He is the co-author (with Damon DiMarco) of The Actor's Art and Craft: William Esper Teaches the Meisner Technique, published by Anchor/Random House in 2008. He is a graduate of Western Reserve University as well as the Neighborhood Playhouse School of the Theater where he was trained as an actor by Sanford Meisner. In 1962, he undertook training as a teacher and director with Meisner and proceeded to work closely with him as a teacher and director for the next 15 years. Mr. Esper was on the staff of the Neighborhood Playhouse from 1965 to 1977 and was Associate Director of the Playhouse Acting Department from 1974 to 1977. In 1977, he founded the Bachelor of Fine Arts and the Master of Fine Arts Professional Actor Training Programs at Rutgers University's Mason Gross School of the Arts. He led the department until 2004. In 1965, Mr. Esper founded the New York studio where he has taught concurrently with his work at the Neighborhood Playhouse and Mason Gross School of the Arts. He continues to teach at his studio today.

335 Id.

336 Id.

337 Id.

338 Id.

339 Id.

340 See NYCOURTSGOV, New York State Unified Court System, The Legal Profession – Pro Bono, Pro Bono Bar Admissions Requirements, <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml> (last visited Dec. 3, 2013). On September 14, 2012, the New York State Court of Appeals adopted a new rule requiring applicants for admission to the New York State bar to perform 50 hours of pro bono services.

341 Esper, supra note 334; see also ACTORSEQUITY.ORG, Education and Outreach,
http://www.actorsequity.org/EducationOutreach/edoutreachhome.asp (last visited Dec. 3,
2013). The Actors' Equity Association offers has a "Schedule An Equity Outreach
Seminar" where a representative from Actors' Equity could bring an "Outreach Seminar"
to a school or student group could visit Actors' Equity at its New York City Office.

342 Esper, supra note 334

343 Id.

344 Id.

345 See Ng, supra note 21, at 472-73. Ng suggests "increasing ethnic minority representation
on the board of trustees of theater, arts, and education programs targeted at public high
school students, theater productions specifically directed toward ethnic minority
audiences, comprehensive internship programs for college and university students
considering careers in professional theater" See also DRAMATISTSGUILD.COM,
http://www.dramatistsguild.com/eventseducation/, (last visited Dec. 1, 2013). The Guild
offers varied outreach events to members across the country to writers, no matter their
age or level of experience. Some programs include the Dramatists Guild Fellows
Program, seminars, Director/Dramatist Exchanges, Songwriter/Bookwriter Exchanges,
and town hall member meetings across the country.

346 Cf. Jensen, supra note 33. Jensen comments that the theater is almost exclusively
controlled by Caucasian individuals, and that there is a need for the "creative team to be
sensitive to accurately representing the cultural needs of a [play] and casting. . . ."

347 Chen, supra note 58, at 539.

348 Id.

349 Peter Ukpokodu, African American Males in Dance, Music, Theater, and Film, 569
ANNALS AM. ACAD. POL. & SCI. 71, 80 (2000). Ukpokodu discusses the history of
African-Americans in American theater.

350 Id. at 79. In 1916, Angela Grimke' wrote *Rachel* for the Drama Committee of the
National Association for the Advancement of Colored People (NAACP). The play was
the first play written, produced and performed by African-Americans in the New York
theater. The play was produced at the Neighborhood Theater in New York City. In 1912,
Lester Walton, an African American theater critic, formed the Lafayette Theater Stock
Players in Harlem. The Lafayette Theater Stock company influenced the formation of the
Lincoln Theatre Troupe at the Lincoln Theatre in New York, where in 1915 Scott Joplin
presented a folk opera about real African American life, *Treemonisha*.

351 Id.

352 Id.

353 See Witherspoon, supra note 30. Witherspoon writing about an established African-American actor's view that Broadway "lack of diversity in shows largely lies in the absence of black talent behind the scenes producing and directing shows." See also VICTORLIRIO.COM, <http://www.victorlirio.com/1/post/2012/06/interview-on-underrepresentation.html> (last visited Dec. 3, 2013). Asian actor and Artistic Director of Diverse City Theater Co. in New York stated in his blog: "We, obviously, want to see ourselves represented on . . . Broadway. Stories about us, about people like us. In my opinion, if we want more content about Asians on Broadway, then we need to produce it ourselves. I cannot hold the commercial establishment responsible for the lack of content about Asians. For example, Hispanic-Americans represent a larger part of the national population than African Americans. But, there is more commercial theater about the African-American experience because there are African-Americans who rise up to leadership roles as producers producing theater about them. They are important members of the commercial theater establishment. Asians with wealth, on the other hand, do not take risks in the theater. Generally speaking, they are too fiscally responsible and probably do not view commercial theater as a sound financial investment because of the uncertainty of the return."

354 See Id.; see also Keli Goff, Black Producers Still Rare on Broadway, THE ROOT, Apr. 30, 2013, http://www.theroot.com/articles/culture/2013/04/black_broadway_producers_how_comm_on_are_they.html. "When it comes to those producers who are responsible for conceptualizing a project and bringing it to the stage, it may come down to just two. [Stephen Byrd and Alia Jones are] probably the only African-Americans on Broadway who . . . produce, choose the project, director, etc. . . . Alia Jones has been called the only woman of color . . . working as a lead producer on Broadway today. Their company, Front Row Productions, is responsible for such Broadway successes as . . . *Cat on a Hot Tin Roof*, [*A Streetcar Named Desire*, *The Trip to Bountiful*, and *Romeo and Juliet*]."

355 See Armstrong, supra note 239 (quoting Lou Myers stating: "[What is] great about [*The Trip to Bountiful* revival of an American classical drama featuring African-American actors in the principal roles] is . . . at times Broadway has been able to set the tone that other places in the industry follow.").

356 See Witherspoon, supra, Id. Broadway actor, Eric L. Christian stating: "I would like to see more black writers, choreographers, and lyricists bringing their stories to Broadway. The people of color who have a certain amount of monetary clout, need to produce it, back it and get it on Broadway to tell the story." See also Adam Hetrick, Jay-Z, Will and Jada Smith Added to *Fela!* Producing Team, PLAYBILL.COM, Nov. 16, 2009, <http://www.playbill.com/news/article/134628-Jay-Z-Will-and-Jada-Smith-Added-to-Fela-Producing-Team>; Adam Hetrick, Grammy Winner Alicia Keys to Produce Lydia R. Diamond's *Stick Fly* On Broadway, PLAYBILL.COM, June 27, 2011, <http://www.playbill.com/news/article/152201-Grammy-Winner-Alicia-Keys-to-Produce-Lydia-R-Diamonds-Stick-Fly-On-Broadway>; Ernio Hernandez, Oprah Winfrey Joins Producers of Broadway's *The Color Purple* Musical Adaptation, PLAYBILL.COM, Sept. 26, 2005, <http://www.playbill.com/news/article/95320-Oprah-Winfrey-Joins-Producers-of-Broadways-The-Color-Purple-Musical-Adaptation/I%3E-Musical-Adaptation>;

357 See Id.

358 Id.