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Theatrical Casting — Discrimination or Artistic Freedom?

by Jennifer L. Sheppard*

I. INTRODUCTION

The recent casting of non-Asian actors for lead roles in the Broadway production of the London musical *Miss Saigon* has created a controversy and caused a small rift within the theater community. This is due mainly to opposition by Asian actors, who feel that because the roles were specifically written for an Asian and Eurasian, Asian actors should have been afforded the opportunity to star in the musical. Their discontent stems from frustration over the lack of employment opportunities for minority actors, particularly for starring roles.

This article examines two aspects of the theatrical casting process highlighted by this controversy: casting or audition requirements for race-neutral roles, and race-specific casting for racially defined roles. It considers whether the apparent lack of employment opportunities for minority actors is the result of unintentional illegal discrimination by the theater industry, and hence a civil rights violation, or whether casting procedures with a seemingly disparate impact on minorities are necessitated by the business needs of the theater industry.

Accepting the latter premise, a suggestion is made that theatrical casting procedures, including those which use an actor's race as a criterion in filling race-specific roles, be included within existing exceptions to the civil rights legislation. It is also argued that casting decisions are a form of speech protected by the First Amendment. Since a legal challenge to casting decisions should fail, it is ultimately suggested that an increase in employment opportunities for minority actors should be sought through non-legal means.

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II. THE MISS SAIGON CASTING CONTROVERSY

Recently, concerns have surfaced in the theatrical community regarding casting decisions and the lack of employment opportunities for minority actors. The controversy began when the Actors' Equity Association ("Equity"), the labor union that represents professional performers and stage managers in the legitimate theater in the United States, received complaints regarding the appearance of the English actor Jonathan Pryce in the Broadway production of the highly successful London musical *Miss Saigon*. Pryce, a Caucasian, plays the starring role of the Engineer, a Eurasian (half-French, half-Vietnamese) bar and brothel owner who helps reunite an American soldier and his Vietnamese girlfriend in Saigon in 1975, during the last days of the Vietnam War.

David Henry Hwang, the Tony Award-winning author of *M. Butterfly*, and B.D. Wong, who won a Tony Award for best supporting actor in that play, initiated the complaints by writing to Equity to oppose the casting of Pryce. They expressed concern about the scarcity of roles available to Asian actors.¹ Wong wrote, "[t]here is no doubt in my mind of the irreparable damage to my rights as an actor that would be wrought if (at the threshold of the 21st century) Asian actors are kept from bringing their unique dignity to the specifically Asian roles in 'Miss Saigon'"² Hwang and Wong were soon joined in their opposition by other Asian members of Equity and by Equity's Committee on Racial Equality.

In response to these highly publicized complaints, the Council of Actors' Equity (the "Council") met to discuss the casting of Pryce as the Engineer. Approximately one-half of the Council's seventy-nine members were present, when on August 7, 1990, the Council voted twenty-three to eighteen³ to reject the application made by Cameron Mackintosh, the producer of *Miss Saigon*, for approval of Pryce's employment as a non-resident alien actor and for sponsorship of Pryce for a visa from the Immigration and Naturalization Service. The announcement of Equity's decision stated:

[Equity] cannot appear to condone the casting of a Caucasian actor in the role of a Eurasian This casting choice is especially disturbing when the casting of an Asian actor in this role would be an important

1. Mervyn Rothstein, *Producer Demands a Free Hand to Cast 'Miss Saigon' Roles*, N.Y. TIMES, Aug. 22, 1990, at C11.

2. Mervyn Rothstein, *Union Bars White in Asian Role; Broadway May Lose 'Miss Saigon'*, N.Y. TIMES, Aug. 8, 1990, at A1.

3. *Lost Courage, Lost Play*, N.Y. TIMES, Aug. 9, 1990, at A22.

and significant opportunity to break the usual pattern of casting Asians in minor roles.⁴

The announcement also noted that "the producer retains the right to bring this matter to arbitration [under Rule 4 of the standard production contract]."⁵

Mackintosh's reaction to Equity's decision was that the Union was "totally disregarding the rights and needs of 'Miss Saigon's' creative team in relation to casting the star role of the Engineer in this production [T]hey are insisting on ignoring the list of artistic qualifications we consider essential to perform the part of the Engineer in a star manner."⁶ According to Mackintosh, such qualifications include talent, experience and charisma.⁷ Mackintosh later added that, "the fundamental issue of this controversy is that the artistic integrity of the authors and the creative team has been questioned, and our right to cast whomever we consider to be the most suitable talent in any role, regardless of race or ethnic background, has been undermined."⁸

The producer revealed, however, that he had not in fact held open auditions for the role of the Engineer, since he felt that Pryce was ideal for it. This revelation angered some, and led Paul Winfield, a black actor, to urge that "[w]hat few job opportunities there are for minority actors must not be taken away before . . . [the actors] have had a chance to audition."⁹ Ellen Holly, a black actress, also recognized a familiar dilemma: "[o]nly whites are given the opportunities that propel them to stardom, and [that stardom] enables them to co-opt roles for which nonwhites would be the more logical choice."¹⁰

Mackintosh did offer a written commitment to seek qualified Asian actors to serve as replacements or understudies for Pryce in the Broadway production, and to originate the role in future companies of *Miss Saigon*.¹¹ He did not, however, guarantee that an Asian would actually be cast. Mackintosh maintained that "artistic freedom of

4. Actors' Equity Association Press Release, Aug. 7, 1990, at 1.

5. *Id.* at 3.

6. Alex Witchel, *Actors' Equity Attacks Casting of 'Miss Saigon'*, N.Y. TIMES, July 26, 1990, at C15.

7. *Id.*

8. Rothstein, *supra* note 1.

9. Paul Winfield, *Equity Was Right the First Time*, N.Y. TIMES, Aug. 18, 1990, § 1, at 25.

10. Ellen Holly, *Why the Furor Over 'Miss Saigon' Won't Fade: 'The Ideal World We All Long For' Is Not the World We Live In*, N.Y. TIMES, Aug. 26, 1990, § 2, at 7.

11. Actors' Equity Association Press Release, Aug. 16, 1990, at 2 [hereinafter Press Release].

choice cannot be compromised," and that he would not allow himself to become a victim of "an inflexible casting process."¹²

The day after it announced its decision not to approve the casting of Pryce, Equity began receiving copies of a petition from Union members requesting that the Council re-evaluate its decision. Within nine days, over 600 members had endorsed the petition.¹³ In response, the Council decided to reconvene, and at a special meeting held on August 16, 1990, it voted to approve the application for Pryce to appear on Broadway. Interestingly, under the terms of its own production contract, it was not in fact permissible for Equity to withhold its approval. The contract provides that if the non-resident alien seeking approval is a "star," the application is to be granted.¹⁴ Pryce had previously been certified as a "star" by Equity for an appearance on Broadway in 1984.¹⁵

In a statement released by Equity announcing its second decision, the Union emphasized the importance of Mackintosh's commitment to consider Asian actors to eventually succeed Pryce.¹⁶ Equity conceded that the justification for its original decision was controversial but explained that the Council had been influenced by "past and present discrimination and the lack of employment opportunities available to ethnic minority actors."¹⁷

Four months after Pryce's appearance was approved, Mackintosh submitted an application for Lea Salonga, a Filipino actress, to play the starring female role in *Miss Saigon*, that of a young Vietnamese prostitute who becomes the girlfriend of an American soldier. Mackintosh stated in the application that he had auditioned 1,200 Asian-Americans for the role in an extensive nationwide search, but had been unable to locate someone with Salonga's "unique ability" or professional potential.¹⁸ Equity's Alien Committee, feeling that an Asian-American actress should have been afforded the opportunity to star in the role, rejected the application. The Council upheld the rejection, and Mackintosh took the dispute to arbitration.¹⁹ On January 7, 1991, a union-management arbitrator, Daniel Collins, ruled

12. Rothstein, *supra* note 1.

13. Press Release, *supra* note 11, at 1.

14. Agreement and Rules Governing Employment under the Production Contract, Rules 3(B) & (C) [hereinafter Agreement and Rules].

15. *Lost Courage, Lost Play*, *supra* note 3.

16. Press Release, *supra* note 11, at 2.

17. *Id.*

18. Mervyn Rothstein, *Filipino Actress Allowed in 'Saigon'*, N.Y. TIMES, Jan. 8, 1991, at C11.

19. *Id.*

that Salonga could appear in the role.²⁰ The Executive Secretary of Equity stated that Collins's decision was based on the grounds that "no Asian-American . . . had both the physical capacity to play the role [or] any significant theatrical experience."²¹

Both Pryce and Salonga came to Broadway in *Miss Saigon*, and thus, this particular dispute has been settled. Nevertheless, the issues raised remain. Do producers have the right to cast their shows any way they choose? Does "artistic freedom demand[] that the choice of performers for stage roles be based on the [judgment] of the author and producers"?²² Or, does such artistic "freedom" result in unintentional or even intentional discrimination, and render true the statement that "[a]ctors of color live in a world where almost all roles are denied them because of their race [They] are silently and automatically excluded from consideration for the majority of offered roles simply because they would be 'inappropriate.'"²³

The following discussion considers whether the lack of employment opportunities for minority actors is the result of illegal discrimination by the theater industry under Title VII of the Civil Rights Act,²⁴ mandating that casting procedures be regulated; or whether it is the result of a legitimate exercise of business judgment and artistic freedom, requiring that such procedures be protected.

III. THEATRICAL CASTING REQUIREMENTS AND TITLE VII OF THE CIVIL RIGHTS ACT: UNINTENTIONAL DISCRIMINATION OR BUSINESS NECESSITY?²⁵

Title VII of the Civil Rights Act of 1964²⁶ (the "Act") prohibits discrimination in employment. The Act provides in pertinent part that:

20. Mervyn Rothstein, *American to Share 'Saigon' Lead*, N.Y. TIMES, Jan. 29, 1991, at C11.

21. Rothstein, *supra* note 18. See Agreement and Rules, *supra* note 14, Rule 3(B)(2), which states that a non-resident alien actor may qualify for employment if the actor "will be providing unique services which cannot be performed by any current member of Equity, and . . . there is no citizen of the United States or resident alien domiciled in the U.S. capable of performing such services."

22. *A Common-Sense Role*, BOSTON GLOBE, Sept. 17, 1990, at 16.

23. "Miss Saigon": *We Still Need Affirmative Action*, N.Y. TIMES, Sept. 2, 1990, § 2, at 9 (letter to the editor).

24. 42 U.S.C. §§ 2000e-2000e-17 (1988).

25. For an excellent analysis of racial discrimination in the performing arts, particularly in the fields of dance, ballet and opera, prior to the Supreme Court's decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), see Gregory J. Peterson, *The Rocketts: Out of Step With the Times? An Inquiry Into the Legality of Racial Discrimination In the Performing Arts*, 9 Colum.-VLA J.L. & Arts 351 (1985).

26. *Id.*

It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.²⁷

The Supreme Court has established that in addition to open or intentional discrimination, unintentional racial discrimination falls under the prohibitions of Title VII. Such unintentional violations occur through the use of hiring practices that are neutral on their face but discriminatory in their effect. The Court first articulated this interpretation of the Act in *Griggs v. Duke Power Co.*²⁸

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.²⁹

In *Griggs*, the defendant power company instituted a policy of requiring both a high school diploma and satisfactory scores on two general intelligence tests for initial hiring at its plant, as well as for departmental transfers within the company. It was found that the defendant adopted these requirements without any intent to discriminate against blacks, and that they were applied in the same manner to whites and blacks alike. The requirements, however, had the effect of rendering a disproportionate number of blacks ineligible for employment and transfer, presumably due to the inferior education they had received in segregated schools.

The Supreme Court referred to the legislative history of Title VII, pointing out that Congress did not intend Title VII to guarantee a job to every person regardless of his or her qualifications:

There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, and he may hire, assign and promote on the basis of test performance.³⁰

Nevertheless, the Court held that in order to be valid and non-dis-

27. *Id.* at § 2000e-2(a)(1).

28. 401 U.S. 424 (1971).

29. *Id.* at 429.

30. *Id.* at 435 (quoting 110 CONG. REC. 7213 (1964)).

criminary, tests or other employment requirements must bear a "demonstrable relationship to successful performance of the jobs for which [they are] used."³¹ "The touchstone is *business necessity*. If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."³² Mere "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."³³ Since the record in *Griggs* failed to show any correlation between the requirements of a high school diploma and intelligence tests and successful job performance, the Court held both requirements to violate the Act.

In the theater industry, requirements for the employment of actors generally consist of a successful audition and a certain amount of past stage experience and training. These requirements are neutral on their face, and there is no reason to suspect that they are habitually used with the intent to discriminate against minority actors. There does seem to be some indication, however, that these hiring practices operate to exclude minority actors from many theatrical roles, particularly starring roles. As indicated above, many minority actors complain that it is a struggle for them to get cast. Indeed, Equity has reported that between April 1989 and May 1990, of the close to 100 shows produced under Equity's standard production contract, thirty-three (representing 504 roles) included no ethnic minority actors.³⁴ An additional twelve productions included only one or two ethnic actors.³⁵

Yet, despite the apparent disparate impact created by casting requirements, it is questionable whether a successful discrimination claim could be made by a class of minority actors against a production company under the Act. As the Supreme Court stated in *Griggs*, if minority applicants are not able to meet the requirements of a position due to deficiencies in their own experience and education, then they are indeed unqualified, even if these deficiencies are the result of past discrimination or discrimination in other venues.³⁶

In *Wards Cove Packing v. Atonio*,³⁷ the Supreme Court further clari-

31. *Id.* at 431.

32. *Id.* (emphasis added).

33. *Id.* at 432.

34. Press Release, *supra* note 11, at 2-3.

35. *Id.*

36. *Griggs*, 401 U.S. at 435.

37. 490 U.S. 642 (1989).

fied the standards used to establish a claim of discrimination under Title VII set forth in *Griggs*. The *Wards Cove* Court held that to establish a prima facie case, a plaintiff class must show that there is a statistical disparity between "the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market."³⁸ Once this disparity has been established, the plaintiff class must demonstrate that it is the application of a specific hiring practice that has created the racial imbalance in the defendant's work force.³⁹ "If the absence of minorities holding [these] positions is due to a dearth of qualified nonwhite applicants (for reasons that are not [the defendant's] fault), [the defendant's] selection methods . . . cannot be said to have had a 'disparate impact' on nonwhites."⁴⁰

A plaintiff class of minority actors would, therefore, have to produce statistical data to show that they were disproportionately underrepresented in the roles cast by the defendant production company, as compared to the racial mix of all actors "qualified" for those parts. Of course, one problematic aspect of this requirement is determining what constitutes the "qualified population" of actors to be used in the comparison. For example, Vincent Liff, the casting director for *Miss Saigon*, stated that in considering prospective cast members for the role of the Engineer, the producers of *Miss Saigon* sought a "classical stage background" in addition to "international stature and reputation."⁴¹ Thus, while talent and the ability to handle the demands of a given role are highly subjective qualities, it is clear that an actor's lack of experience, perhaps the unfortunate result of discrimination in other venues, hinders his or her chances of being chosen for a starring role.

Liff pointed out that over the past thirty years, until *M. Butterfly* in 1988, there were almost no significant opportunities for Asian actors on the Broadway stage.⁴² Mackintosh also highlighted the fact that "of Equity's membership of 40,000 actors, only approximately 400 are of Asian background."⁴³ It may be, therefore, that there is not a disproportionate number of "qualified" minority actors who are being denied employment in the theater industry at this point in time.

38. *Id.* at 650 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)).

39. *Id.* at 656-57.

40. *Id.* at 651-52.

41. Alex Witchel, *Union Weighs 'Miss Saigon' Casting*, N.Y. TIMES, July 25, 1990, at C12.

42. *Id.*

43. Rothstein, *supra* note 1.

If a statistical disparity could nonetheless be demonstrated, a potential plaintiff class would next need to challenge the assertion that the specific requirements of a successful audition and past stage experience and training bear a "demonstrable relationship to successful performance" of the roles being cast. It is unlikely that such a challenge would succeed, because the use of auditions and an examination of an actor's background are indeed job-related requirements. They provide a good indication of an actor's talent and ability to handle the demands of a given role. As a result, these hiring practices might indeed pass a "reasoned review of the employer's justification for [their] use,"⁴⁴ and be found to be a "business necessity."

The conclusion that general casting practices are clearly related to job performance, and thus not legally discriminatory, is appropriate where an open casting call has been held for a role that is not race-specific (e.g., a role such as a judge, narrator or a symbolic character like God), and in situations where a role may be race-specific but where the production team decided that someone other than a member of that race could successfully play the role (e.g., the Eurasian Engineer in *Miss Saigon*). Of course, casting calls for such roles must be truly open — so that a lack of qualified minority applicants is not artificially created by the production company. In addition, those minority actors who respond to the call must be auditioned under conditions identical to those under which non-minority actors audition (e.g., same amount of time, same location, etc.).

IV. RACIALLY SPECIFIC CASTING AND TITLE VII OF THE CIVIL RIGHTS ACT: INTENTIONAL DISCRIMINATION OR BUSINESS NECESSITY?

Of course, not all theatrical roles are race-neutral. Many roles are in fact racially-defined, such as characters in a period play, historic figures, members of a nuclear family, and characters whom a playwright has specified to be of a certain race. When casting such roles, it would not be unusual for a production company intentionally to exclude actors of a different race from consideration. Legal protection of these casting practices, such as the defense of a "bona fide occupational qualification" or "business necessity," would insulate producers from liability for their artistic choices.⁴⁵

44. *Wards Cove*, 490 U.S. at 659.

45. The actors who protested the casting of Pryce in the role of the Engineer in *Miss Saigon* presented an argument that would support the creation of a defense for a director's intentional exclusion of certain races in casting racially-defined roles. In fact, their argument

While Title VII of the Civil Rights Act expressly prohibits employment discrimination, it does contain one exception:

(1) it shall not be an unlawful employment practice for an employer to hire and employ [an employee] . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide qualification reasonably necessary to the normal operation of that particular business or enterprise.⁴⁶

The bona fide occupational qualification ("BFOQ") exception has been widely interpreted as permitting a limited form of overt employment discrimination where the "essence of the business operation" or its "primary function" would otherwise be "undermined."⁴⁷ This exception may be relied upon when the employer has reasonable cause to believe that the discriminatory requirement is necessary for the effective operation of his or her business.⁴⁸

The "primary function" of a play is generally to convey a message or tell a story to the audience. Since the characters of a play are used to communicate that message, both verbally through their interaction with one another and the audience, and non-verbally through their appearance, it seems reasonable to assume that where the characters are race-specific, race is a job requirement, and hence, should be a BFOQ exception. Race, however, is specifically excluded from the Title VII BFOQ exception.

In the context of the theater, however, the omission of a race exception is somewhat curious. When the Equal Employment Opportunity Commission (the "EEOC") set up guidelines with respect to sex as a BFOQ, it stated that sex could not be used as a requirement for employment "because of the preferences of . . . the employer, clients or customers *except* . . . where it is necessary for the purpose of authenticity or genuineness, . . . e.g., an actor or actress."⁴⁹ This example of a situation where gender discrimination may be permissible

went beyond the protection that might be afforded by such a defense — and apparently called for mandating the use of race as a casting criterion for racially-defined roles. Ironically, their position would have the result of limiting opportunities for minority actors to be cast in roles not traditionally given to minority actors.

46. 42 U.S.C. § 2000e-2(e)(1) (1988).

47. See, e.g., *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), cert. denied, 446 U.S. 966 (1980); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Manhart v. Los Angeles Dep't of Water & Power*, 553 F.2d 581, 587 (9th Cir. 1976), vacated on other grounds, 435 U.S. 702 (1978); *Hodgsen v. Greyhound Lines*, 499 F.2d 859, 862 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

48. *Diaz*, 442 F.2d at 388.

49. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(iii), (2) (1990) (emphasis added).

is analogous to a situation where an actor of a specific race is cast to play a racially-defined character. Such casting serves the purpose of presenting an authentic portrayal of the character to the audience. In fact, Joseph Clark and Clifford Case, the proponents of Title VII in the Senate, wrote: "A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible."⁵⁰

While a limited race BFOQ exception for the theater industry makes sense in this context,⁵¹ another possible alternative might be to regard the consideration of race in casting for race-specific roles as a "business necessity." Lower courts have generally assumed that the "business necessity" exception created by the Supreme Court in *Griggs* and *Wards Cove* only applies to unintentional discrimination through the use of hiring practices which are "fair in form, but discriminatory in operation."⁵² Virtually nothing has been said concerning whether intentional discrimination can fall within the parameters of business necessity.⁵³ The Fifth Circuit, however, discussed the possibility in *Miller v. Texas State Board of Barber Examiners*.⁵⁴

In *Miller*, the Texas State Board of Barber Examiners (the "Board"), the agency responsible for licensing and inspecting barber shops and barber colleges in Texas, employed Miller, a black man, to work as an undercover investigator in both white and black barber shops in 1965. Four years later, the Board promoted him to the position of inspector and assigned him exclusively to black barber shops, after the Board's white inspectors refused to inspect those shops, fearing for their personal safety. Miller worked in this new capacity until he was discharged in 1973. He then brought suit for discrimination.

At the district court level, the Board asserted that Miller's assignment was justified by business necessity, and the court found in its favor. The Fifth Circuit affirmed the judgment on different grounds and held that "the district judge *may* have erroneously applied the business necessity doctrine,"⁵⁵ because it is questionable whether the doctrine was meant to apply to situations involving overt racial dis-

50. 110 CONG. REC. 7217 (1964).

51. For a discussion of the premise that the exclusion of race from the BFOQ exception should be viewed as purposeful legislative action which should not be altered, see ARTHUR LARSON & LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 72.10 (1984); see also *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981).

52. *Griggs*, 401 U.S. at 431.

53. LARSON & LARSON, *supra* note 51.

54. 615 F.2d 650 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980).

55. *Id.* at 655 (emphasis added).

crimination. The court stated, however, that the "[l]imitation of the business necessity doctrine to covert discrimination is questionable on logical and perhaps legal grounds."⁵⁶

The court observed that *Griggs* "has no language which absolutely requires that the doctrine be so limited."⁵⁷ The court also posited two situations in which it felt that the business necessity exception would be warranted where there was intentional racial discrimination. The first was "the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice."⁵⁸ The second was "the selection of actors to play certain roles . . . [I]t is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately play Martin Luther King, Jr."⁵⁹ The court suggested that the business necessity doctrine should be expanded to cover such situations.

The *Griggs* test of business necessity — whether a given hiring practice is "job-related" and "bears a demonstrable relationship to successful [job] performance"⁶⁰ — clearly applies to the use of race as a criterion in the casting of racially-defined roles. Nevertheless, direct application of the business necessity exception to the intentional use of race as a criterion in casting racially-defined roles may not, in fact, be completely desirable. The test for business necessity, which is generally applied in cases involving unintentional discrimination, is less stringent than that used to determine if there is a BFOQ that would eliminate liability for certain intentional discrimination based on religion, sex or national origin. It is easier to demonstrate that a hiring criterion is job related and bears a demonstrable relationship to successful job performance than it is to prove that a hiring criterion is reasonably necessary to the normal operation of a particular business or enterprise.⁶¹

It would be inconsistent to treat intentional discrimination based on race in the theater industry differently from other forms of intentional discrimination by requiring directors and producers to meet a less stringent standard. Therefore, the expansion of the business necessity doctrine suggested by the *Miller* court should be specifically limited. The exception should take the form of a separate necessity

56. *Id.* at 653.

57. *Id.*

58. *Id.*

59. *Id.* at 654.

60. 401 U.S. at 431.

61. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.29 (1988).

defense which would operate as the functional equivalent of a BFOQ for race. In fact, the *Miller* court's examples of casting the racially-defined roles of George Wallace and Martin Luther King, Jr. fall squarely within such a conceptual framework. The "essence" of the job of an actor is to give an accurate portrayal of the character he or she is playing, and thus to communicate a message to the audience. If a character is race-specific, it is reasonable to conclude that casting an actor of that race will result in a more authentic portrayal⁶² and a more "effective" performance.

Although it has been suggested by one commentator that "the deliberate omission of 'race' from the BFOQ clause [of the Act is] . . . a potent argument for the proposition that overt racial discrimination can never be justified,"⁶³ another commentator offers a more persuasive argument:

Notwithstanding the implications of this omission, on some rare occasions the race or color of the employee may be absolutely necessary for satisfactory performance. To disallow totally any defense for race or color distinctions would be unrealistic

. . . .
 . . . [In a case such as] the hiring of a black actor to play the role of Dr. Martin Luther King, Jr. . . . race would be absolutely necessary for . . . efficient job performance.⁶⁴

To date, no state or federal court has directly considered the issue of whether an actor's race may function as either a business necessity or BFOQ, so it is not entirely clear what the outcome of a legal action would be. However, the creation of a business necessity defense that would operate as the functional equivalent of a BFOQ for race in the context of casting a racially-defined theatrical role would seem logical.

V. FIRST AMENDMENT PROTECTION FOR THEATRICAL CASTING

A director whose casting decisions were challenged under Title VII of the Civil Rights Act would not be limited to the business necessity or BFOQ defenses discussed above. He or she could also invoke the protection of the First Amendment.⁶⁵ The First Amendment is implicated because the production of a play is a medium of

62. See *supra* note 49, and accompanying text.

63. LARSON & LARSON, *supra* note 51.

64. PLAYER, *supra* note 61, at 284-85.

65. U.S. CONST. amend. I. A complete discussion of First Amendment implications is beyond the scope of this article.

expression for its director. Once a director commits to a particular play, he or she decides how it should be presented to the audience. This personal vision includes interpretation of the script, the play's characters, costumes and scenery. In a sense, the performance of the play is a statement, and the actors are the "words" chosen by the director to express that statement. It seems that all of the components of the production of the play, including its casting, should therefore be afforded the same First Amendment protection enjoyed by the oral and written word, and by expressive conduct, such as the burning of the American flag.⁶⁶

First Amendment protection for freedom of casting in the performing arts was addressed in dicta by the First Circuit in *Redgrave v. Boston Symphony Orchestra*.⁶⁷ In that case, the actress Vanessa Redgrave had been hired by the Boston Symphony Orchestra (the "BSO") to narrate Stravinsky's *Oedipus Rex* in a series of concerts. After announcing the engagement, the BSO received calls protesting the performances because of Redgrave's open support for the Palestine Liberation Organization. The BSO subsequently canceled both its contract with Redgrave and the performances. Redgrave sued the BSO for breach of contract and for interference with her right of free speech by "threats, intimidation and coercion."⁶⁸

In response to the latter claim, the BSO asserted that it had not canceled the performances in order to repress Redgrave's future speech but because it had concerns regarding potential disruptions of the performances by protesters. The BSO feared that protests might jeopardize the safety of the audience and the players and detract from the artistic qualities of the performance. Seiji Ozawa, the BSO's Music Director, explained that "his conception of 'Oedipus Rex' required an 'atmosphere of hearing' in which both performers and audience could concentrate, rather than an atmosphere influenced by shouting, booing, and the presence of uniformed police."⁶⁹

The court found for the BSO on the basis of state law, choosing to avoid the "unnecessary" question of whether the BSO's actions were protected under the First Amendment. However, the court's discussion of the tension between the First Amendment and civil rights law is relevant to situations involving race-specific casting. The court stated it "[did] not think . . . that liability should attach if a perform-

66. See *Texas v. Johnson*, 491 U.S. 397 (1989).

67. 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989).

68. The Massachusetts Civil Rights Act, MASS. GEN. L. ch. 12, § 11H-1 (1988 & Supp. 1991), offers protection against interference with free speech by private persons.

69. *Redgrave*, 855 F.2d at 901.

ing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interest."⁷⁰ The court then noted that "the Supreme Court recently has reaffirmed the principle that discrimination might in certain circumstances be justified in order to preserve expressive integrity" under the First Amendment.⁷¹

In the case referred to by the First Circuit, *New York State Club Association v. City of New York*,⁷² the Supreme Court stated:

It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example⁷³

Similarly, in *Roberts v. United States Jaycees*,⁷⁴ the Supreme Court observed that "insofar as the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women . . . will change the message communicated by the group's speech."⁷⁵ In her concurrence, Justice O'Connor stated that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.⁷⁶

Those involved with the production of a play are, in a sense, an association "organized for expressive purposes," and the members of its cast define its voice. If a director is forced to change his or her casting criteria because the criteria are found to violate the Civil Rights Act, the director's message will be altered. Therefore, it would seem that casting decisions should enjoy the same protection under the First Amendment accorded to other forms of speech. The fact that some people might find the message conveyed by those decisions to be distasteful, or unsuited to their preferences, does not bar that protection. "It is firmly settled that under our Constitution, the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."⁷⁷

Even David Henry Hwang, the playwright who first complained to

70. *Id.* at 904 n.17.

71. *Id.*

72. 487 U.S. 1 (1988).

73. *Id.* at 13.

74. 468 U.S. 609 (1984).

75. *Id.* at 627.

76. *Id.* at 633-40 (O'Connor, J., concurring).

77. *Street v. New York*, 394 U.S. 576, 592 (1969); see also *Cox v. Louisiana*, 379 U.S. 536 (1965); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Equity about the casting of Pryce in the role of the Engineer, later retreated somewhat from his earlier stance:

I guess ultimately the legislation that actors can't do yellowface is probably wrong. I use the analogy of Andrew Dice Clay. I find him offensive, but I'd fight for the right of his free speech. And within that, I think Mackintosh does have the right to cast whoever he wants in the role⁷⁸

VI. CONCLUSION

In light of the questionable viability of a discrimination claim challenging theatrical casting criteria under the Civil Rights Act, and the strong imperatives of protecting casting decisions under the First Amendment, it seems that non-legal avenues for creating employment opportunities for minority actors need to be pursued. Actors' Equity has already taken steps to promote non-traditional casting, namely, "the casting of ethnic, female or disabled actors in roles where race, ethnicity, gender or physical capability are not necessary to the characters' or play's development."⁷⁹ A clause has been added to the standard production contract, which states that "the parties recognize the principle of non-traditional casting."⁸⁰

In addition, since 1986, Equity has joined with other major theater organizations such as the Dramatists Guild, the Society of Stage Directors and Choreographers, and the League of American Theaters and Producers in the formation of the Non-Traditional Casting Project (the "NTCP"), an independent, not-for-profit organization, to advocate non-traditional casting.⁸¹ The NTCP's activities include conducting seminars and forums, distributing educational materials, publishing a periodic newsletter and an Ethnic Playwrights Listing, as well as maintaining files that contain the pictures and resumes of 4,000 ethnic, female and disabled actors, directors, playwrights, designers, choreographers, stage managers and administrators.⁸²

Non-traditional casting has gained wider acceptance of late, both in highly publicized performances, including Morgan Freeman in *Taming of the Shrew*, Denzel Washington in *Richard III*, Robert Guillaume

78. Kevin Kelly, *M. Butterfly, Miss Saigon and Mr. Hwang*, BOSTON GLOBE, Sept. 9, 1990, at B89.

79. BEYOND TRADITION, preface (Clinton Turner Davis & Harry Newman eds., 1988).

80. Agreement and Rules, *supra* note 14, Rule 44A.

81. Harry Newman, *Casting a Doubt: The Legal Issues of Nontraditional Casting*, 19 J. ARTS MGMT. & L. 55, 56 (1989).

82. Non-Traditional Casting Project Fact Sheet (on file with the Non-Traditional Casting Project, New York, N.Y.).

in *Phantom of the Opera*, and Josette Simon in *After the Fall*, as well as in regional performances at theaters such as the Milwaukee Rep and the Detroit Rep. These productions are important because they provide valuable training and experience for minority actors, while they introduce the audience to the possibility and desirability of non-traditional casting. Hopefully, the efforts of organizations such as the NTCP will continue and succeed. In this way, employment opportunities for minority actors may be increased, while artistic freedom is preserved.

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Liliane de Pierredon-Fawcett is the holder of a doctorate in law from the University of Paris. She presently resides in London where she is the director of a gallery of decorative arts.

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William M. Borchard, Esq. is a partner in Cowan, Liebowitz & Latman, P.C., NYC, specializing in trademark, copyright and unfair competition law. He has been Chairman of both the Trademark and Copyright Divisions of the American Bar Association's Patent, Trademark and Copyright Law Section. He has also been a director of, and legal counsel to, the United States Trademark Association (USTA), and is a former Editor-in-Chief of The Trademark Reporter.

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