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Miss Saigon: Casting for Equality on an Unequal Stage

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Miss Saigon: Casting for Equality on an Unequal Stage

by

MABEL NG*

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Introduction

A 1986 Actors' Equity Association (Equity) study of all plays produced professionally throughout the nation showed that over ninety percent featured all white casts. The majority of these plays were staged in cities where the ethnic populations exceeded fifty percent. A recent survey revealed that of one hundred shows produced between April 1989 and May 1990, one-third of them, representing 504 roles, did not include any ethnic minority actors. An additional twelve productions included only one or two ethnic actors.

Once upon a time in America, it was common practice for caucasian actors to don make-up to darken their skins in order to play people of color. As recent news reports indicate, this practice still persists, while ethnic actors are barred from playing race-specific and other roles solely because of the color of their skin. This note explores whether legal remedies are available to actors of color who traditionally have been denied opportunities to star in American commercial theatrical productions. The issues concern the tension that arises between a director's artistic right to cast whomever she wishes in a play and society's interest in ensuring that minority actors are given access to employment opportuni-

1. The bargaining representative for stage actors and actresses in the United States.
4. Equity's Approval of "Miss Saigon" Application, Actors' Equity Association Press Release, Aug. 16, 1990, at 2-3 (contact Dick Moore (212) 719-9570) [hereinafter Equity's Approval]. According to representatives of actors' unions, minorities are underrepresented in the entertainment world in comparison with their percentages in the national population. While nonwhite ethnic groups made up about 22.5% of the American population in 1989, the Screen Actors Guild indicated that only 15-16% of film and television jobs went to minority actors, slightly up from 14.3% in 1987. 1987 figures indicate that roles in commercials for minority actors amounted to 12% of all guild commercial jobs. Stephanie Gutman & Phil West, Casting Call Still a Whisper; Hiring: The "Miss Saigon" Controversy Has Bared the Bitterness Among Actors and Actresses of Color Over the Inequities They See in Film, Theater and Television Casting, L.A. TIMES, Aug. 16, 1990, at F1.
6. Gutman & West, supra note 4, at F1; Siao, supra note 5, at 32; Smith, supra note 5, at B1.
ties. This note addresses the question of whether the law can play a role in relaxing this tension.

Unfortunately, there appears to be little that the law can do to ensure access by minority actors, principally because of overriding freedom of expression rights of the producer/director and because the law as currently interpreted by the Supreme Court places burdensome obstacles in the path of actors seeking to prove disparate impact claims. Nonetheless, some opportunities for minority actors are opening up, albeit very slowly, inspired not by legal requirements but by catalysts such as non-traditional casting, political action, and funding from both private sources and the National Endowment for the Arts.

I

The Casting Issue in Miss Saigon

The genesis for this note was the controversy surrounding the U.S. production of Miss Saigon, a hit musical from London which premiered on Broadway on April 11, 1991. In July 1990, Equity notified the producer, Cameron Mackintosh, that it could not condone the casting of Jonathan Pryce in the role of the Engineer, a chief character and narrator of the play, because such casting was “especially insensitive and an affront to the Asian community.” The Engineer is described by the producer as a Eurasian pimp and nightclub owner, although the libretto of the play refers only to the character’s Asian heritage. Pryce, a Welshman, originated the role of the Engineer on the London stage, where he received the Olivier Award for his performance.

A. Asian-Americans Protest Casting of Lead Character

Equity’s action was prompted in part by a letter sent in June 1990 by David Henry Hwang, the Asian-American Pulitzer Prize-winning playwright of M. Butterfly, who, in protesting the casting of a caucasian in the key role of the Eurasian Engineer, wrote, “Mr. Pryce is an excellent actor, but I would be equally upset were he cast as Boy Willie in The

7. The play opened at a record cost of $10 million, a top ticket price of $100, and an advance ticket sale approximating $37 million. Jack Kroll, Good Evening, “Miss Saigon,” NEWSWEEK, April 22, 1991, at 60, 60.
11. Id. The Olivier Award is London’s equivalent of the Tony Award. Pryce had also won a Tony Award for best actor in the Broadway production of Comedians. Id.
Similarly, B.D. Wong, the winner of a Tony award for his role as best supporting actor in *M. Butterfly*, wrote:

There is no doubt in my mind of the irreparable damage to my rights as an actor that would be wrought if . . . Asian actors are kept from bringing their unique dignity to the specifically Asian roles in *Miss Saigon*, and therefore to all racially specific roles in every future production which will look to the precedent *Miss Saigon* is about to set as a concrete model.

Generally, nonresident aliens are not allowed to work in the United States unless they receive permission to do so. In evaluating whether a work permit (H-1 visa) should be granted to a nonresident alien to work in an American theatrical production, the Immigration and Naturalization Service consults Equity to ascertain whether the alien has star status or can provide unique services. Once “star” or “unique services” status is ascertained, Equity’s contract with the League of American Theatres and Producers provides that Equity will support a producer’s INS application on behalf of the alien.

On August 7, 1990, Equity formally rejected Mackintosh’s application for Pryce to appear as the Engineer in the play. Equity’s release stated:

The casting of a Caucasian actor made up to appear Asian is an affront to the Asian community. This casting choice is especially disturbing when the casting of an Asian actor, in this role, would be an important and significant opportunity to break the usual pattern of casting Asians in minor roles.

Equity pointed out that its production contract with the League of American Theaters and Producers provides that all parties agree to continue their joint efforts toward, and reaffirm their commitment to the policy of nondiscrimination, and to an ongoing policy of furthering the principles of equal employment opportunity. It is the desire of the parties that employment opportunities for Equity’s multi-racial membership be improved, and that the stage reflect a multi-racial society.

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12. *Id.* *The Piano Lesson* is an all-black drama by August Wilson.
13. *Id.*
18. *Id.* at 2.
19. *Id.* at 3. The release also states, “The casting of Mr. Pryce would not be so objectionable if Mr. Mackintosh was . . . willing to . . . cast visibly ethnic actors in the numerous productions of *Les Miserables* which have created nearly 400 jobs for Equity actors.” *Id.*
Equity also stated that it made its decision "in full awareness that many jobs may be lost to actors of Asian background if the production is canceled."20 A New York production of Miss Saigon was said to provide roles for fifty actors, thirty-four of which were designated for members of minority groups.21 Hundreds of other acting jobs from possible touring companies, plus additional union production stagehand jobs, could also have been affected.

B. Producer Cancels Broadway Show

Mackintosh responded to Equity's rejection by canceling the production, despite record advance ticket sales of $25 million. He also charged Equity with violating its own collective bargaining agreement with the League of American Theatres and Producers and its agreement with British Equity. Claiming there was no legal basis for Equity's objection to Pryce's admission to perform in Miss Saigon, he stated that the "only issue which Equity has the right to consider in making its decision is whether or not Jonathan Pryce is a 'star.' Equity has previously certified Mr. Pryce as a 'star,' when it endorsed his appearance on Broadway in 1984 under an H-1 visa."22

Equity countered that the union had "never taken issue with Mr. Pryce's status as a star," but that it could not "condone or be a part of a casting decision that it strongly views to be an affront to the Asian community and insensitive to efforts being made by the entire theatrical community to accurately reflect the multi-racial society in which we live."23 Instead, it claimed to be making a "moral decision" aimed at creating equal casting opportunities for its minority members.24

Mackintosh could have gone to arbitration, where Equity conceded he might have won.25 Refusing to take the matter to arbitration "simply to prove a legal point," however, Mackintosh said, "The debate is no

20. Id. at 2.
21. Gutman & West, supra note 4, at F1; Rothstein, supra note 8, at C16. One Asian-American actor claimed that such roles are those of prostitutes and Viet Cong soldiers "who serve as window dressing and extras." Gutman & West, supra note 4, at F8.
22. Press Release, Statement by Cameron Mackintosh, Aug. 8, 1990, at 1 (contact Cameron Mackintosh Inc. (212) 921-9290) [hereinafter Mackintosh Statement]. However, according to Equity's statement of August 8, 1990, formal approval by Equity is required for each employment request under the production contract between Actors' Equity and the League of American Theatres and Producers. Equity's Response to Cameron Mackintosh's Statement, Actors' Equity Association Press Release, Aug. 8, 1990, at 3 (contact Dick Moore (212) 719-9570) [hereinafter Equity's Response].
25. Rothstein, supra note 8, at C16.
longer about the casting of Miss Saigon, but about the art of acting itself. . . . Equity has rejected our application solely on the grounds that Mr. Pryce is caucasian.”

Reaction to Mackintosh’s cancellation was intense. On August 16, 1990, in response to immense pressure from its own membership and the public, Equity rescinded its decision. The union acknowledged that because Pryce qualified as a “star” under its agreement with the League of American Theatres and Producers, his casting was not subject to Equity approval. In reversing its position, Equity took into consideration Mackintosh’s willingness to respond to three issues about the show: (1) his written commitment to seek qualified Asian actors as replacements or understudies on Broadway and to originate the role in future companies; (2) his assistance in the vocal training of Asian actors who may be considered for such roles; and (3) Pryce’s removal of prosthetics on his eyes “immediately upon his becoming aware that their intended use offended members of the American-Asian community.”

Despite Equity’s reversal, Mackintosh refused to reinstate the production until “Equity made further concessions to cement his artistic control.” Finally, on September 17, after long and difficult negotiations, he and Equity issued a statement that Miss Saigon would go on after all. In the statement, Equity “acknowledge[d] the artistic integrity of the creative team of Miss Saigon,” while Mackintosh acknowledged and indicated his support of “Equity’s efforts to improve equal employment opportunities for its ethnic members.”

27. Even New York Mayor David Dinkins lobbied Equity to change its position, writing in a letter dated August 16, 1990:

I . . . understand the need to foster a thriving, diverse theater community committed to artistic freedom of expression. I recognize that the theater industry is an integral part of the city's economy. It is an industry that is labor-intensive, providing jobs not only for actors, but for musicians, carpenters, painters, ushers, guards, seamstresses and other skilled and less skilled workers. . . . For all these reasons, as you and the members of the Council reconsider your position on Miss Saigon, let us acknowledge the importance of bringing to New York a production that will provide a continuing source of fair employment for minority actors both in the initial company as well as in successive and road companies.

28. Equity’s Approval, supra note 4, at 2.
30. Id. The joint statement followed an accord reached on September 17, where both sides affirmed the need “to improve employment opportunities for all Actors of color in the commercial legitimate theatre in the United States . . . [while, at the same time, ensuring] that the creative rights of the authors and the creative team are protected in accordance with the
C. The Tension Between Artistic Rights and Equal Employment Opportunities

This note focuses on the broad legal implications of casting a white man to play a Eurasian. The questions raised are whether the disproportionately low participation of ethnic actors in the American theater constitutes disparate impact, whether the rare hiring of an ethnic actor equals discrimination, and whether ethnicity can ever be a job-related requirement in the performing arts arena. This note will first examine the standard production contract governing productions such as Miss Saigon and address the argument put forth by Asian-American actors that Equity should have pushed Mackintosh to arbitration over the issue of casting the Engineer. Second, this note will examine the concept of non-traditional casting. Third, it will examine the current state of affirmative action in light of City of Richmond v. J.A. Croson Co. and Wards Cove Packing Co. v. Atonio. Finally, this note will explore other non-legal means of providing employment opportunities for minority actors.

II

The Standard Production Contract

Under the standard production contract between a producer and Equity, nonresident actors may not be employed in the United States unless Equity approves. As Equity did not originally approve of the casting of Jonathan Pryce as the Engineer in the American production of Miss Saigon, Asian-Americans and others have argued that the union should have continued denying Mackintosh’s request, thereby forcing the producer to arbitrate the matter. In other words, the union should not have capitulated to Mackintosh’s demands or to pressure from both its membership and the general public to allow Pryce to be cast as the Engineer.

A. Star Status or Unique Services of Foreign Actors

There are two major flaws in this argument. In the first place, the contract states that 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.\textsuperscript{35} If a nonresident meets any of these criteria, then "Equity will support the Producer's application to the Immigration and Nationalization Service for the temporary admission and employment of said alien(s)."\textsuperscript{36}

Thus, once it is determined that a nonresident actor is a "star" performer, Equity's approval is a mere formality; it could not oppose any such application. Pryce had won the Olivier Award, an internationally recognized prize, for his performance in London. It would not have been difficult for Mackintosh to provide other documentation attesting to Pryce's widespread acclaim and international recognition. Playbills with star billing and records of earnings commensurate with the claimed level of ability would establish Pryce's stardom as outlined under the contract.\textsuperscript{37} Because Pryce had star status, Equity could no longer legally block production of the play based upon the casting of the role of the Engineer alone.\textsuperscript{38}

B. Artistic Discretion

Secondly, with regard to equal employment opportunities for ethnic minorities, the production contract states: "there can be no interference with the contractual rights or artistic discretion of the Playwright, Director, or Choreographer, [in the producer's] endeavor to engage ethnic minority Actors in all productions."\textsuperscript{39} The "no interference" clause specifically gives a director the upper hand in casting whomever she wishes in a commercial Equity play. Thus, Mackintosh would have prevailed had the matter gone to arbitration, a point Equity conceded in press reports.\textsuperscript{40}

\textsuperscript{35} Production Contract, supra note 16, \textsection 3(B).
\textsuperscript{36} Id. \textsection 3(C).
\textsuperscript{37} See id. \textsection 3(B)(1).

\textsuperscript{38} The role of the Engineer was not the only disputed casting issue. Mackintosh also wanted Equity to allow him to bring in Lea Salonga, a Filipino actress who played the title role in the London production. On January 7, 1991, a union-management arbitrator ruled that Salonga could come to Broadway to recreate the role, on the basis that she was an actress who could provide "unique services" that could not be provided by any current member of Equity and that no other actress in the United States was capable of performing the role. Equity had originally rejected her bid to come to Broadway on December 11, 1990, but Mackintosh sought a reversal of the ruling through arbitration. See Filipino Actress OK'd for "Miss Saigon," S.F. EXAM., Jan. 8, 1991, at C3; see also Keiko Ohnuma, Ruling: No Asians Qualified for "Miss Saigon" Role, ASIAN WEEK, Jan. 11, 1991, at 1, 4.

\textsuperscript{39} Production Contract, supra note 16, \textsection 23(E).

III

Non-Traditional Casting

A. Concept Defined

Non-traditional casting, conceived of by Equity as a way to increase employment for minority actors, is the "casting of ethnic minority and female Actors in roles in which race, ethnicity, or sex is not germane." Also known as "color blind" casting, it uses women, ethnic actors, and actors with disabilities in roles where race, ethnicity, gender or physical ability do not bear upon the character or development of the play. Examples include all-black productions of Hello, Dolly and The Three Sisters; the casting of black actors in traditionally white roles such as Denzel Washington as Richard III and Morgan Freeman as Petruchio in The Taming of the Shrew; the casting of a woman as King Lear; and the casting of an interracial family in The King and I.

The Non-Traditional Casting Project (NTCP), an independent not-for-profit organization arising from the collaborative efforts of Equity, the Dramatists Guild, the Society of Stage Directors and Choreographers, the League of American Theatres and Producers, the League of Resident Theatres, and other major theater organizations, promotes the principles of nondiscriminatory casting. In the last few years, the NTCP has sponsored symposia in various parts of the nation, distributed a videotape and a book, and assembled a casting file of 3,000 actors representing ethnic minorities and the disabled.

Non-traditional casting, however, is far from commonplace. Moreover, it is questionable whether such casting goes far enough to remedy the lack of ethnic participation in American theater. While the Miss Saigon controversy was being aired, the NTCP took the position that there was "no reasonable basis to protest . . . the casting of Jonathan Pryce as the Engineer." Joanna Merlin, co-chair of the Project, said, "[h]owever strongly Equity feels they must condemn the casting of Jonathan Pryce . . . I believe their vote seriously threatens freedom of artistic choice. How can anyone legitimately dictate who will or will not be cast in a show except the creative team?"

41. Miss Saigon Statement, supra note 17, at 2.
42. Production Contract, supra note 16, § 44A.
43. Hartigan, supra note 2, at B25.
44. Newman, supra note 2, at 56.
46. Rothstein, supra note 8, at C16.
47. Rothstein, supra note 24, at C17.
Indeed, while the concept of non-traditional casting is incorporated into the production contract governing employment, it is done so under the proviso that "there can be no interference with the contractual rights or artistic discretion of the playwright, director, or choreographer. Subject to these limitations, the Producer will attempt to achieve non-traditional casting." Thus, non-traditional casting is "[i]n no way . . . intended to violate the playwright's intention or vision."

B. Race-or Culture-Specific Roles

Because non-traditional casting does not address race- or culture-specific roles, many in the Asian-American theater community believe that the concept falls short of remedying the effects of ethnic exclusion, and may instead be used by proponents of artistic integrity to exclude minorities even further. Equity's initial stand to bar Pryce was seen "as a victory for affirmative action in the theater world . . . [because of] the history of exclusion of Asian-American actors from playing significant race-neutral roles, even though the buzzword in recent years has been 'non-traditional casting.'" Theoretically, non-traditional casting means enhanced opportunities to audition for roles historically not available. In practice, however, Asian-American actors are still generally called upon to play only specifically Asian roles, most of which are either minor or perpetuate certain stereotypes.

Arguably, non-traditional casting should be a one-way street for racial-minority actors in order to compensate for past discrimination. It should enable the dramatic arts to correct historic inequities, not promote the use of white actors in racial-minority roles. Because racial-minority actors still have a tough time getting work, they should at least be able to play parts fashioned after their racial-ethnic type.

48. Production Contract, supra note 16, § 44A.
49. Newman, supra note 2, at 57.
50. Wong, supra note 40, at 9.
Equity's initial position in the Miss Saigon controversy reflects agreement with this argument.

Non-traditional casting was never intended to be used to diminish opportunities for ethnic actors to play ethnic roles... To allow Miss Saigon to appear as cast without a strong expression of Equity's displeasure would be a betrayal of those producers and directors and casting directors who have made every effort to encourage and enlarge the Asian talent pool by casting Asian parts Asian as well as casting other roles non-traditionally with Asian actors.53

Equity reiterated this position in its statement of August 8, 1990: “the point Equity maintains is that the problem of insufficient job opportunities available to ethnic actors is only further aggravated by offering a role, where ethnicity is germane to the character, to a Caucasian actor.”54

Unfortunately, the hue and cry that broke forth characterized Equity's action as “smack[ing] of a kind of absolutist urge to control art—kin to the urges seen in the furor over artists Robert Mapplethorpe and Karen Finley.”55 Non-traditional casting was distorted to mean that “Jews can only play Jews, or Italians can only play Italians, or any similar casting that is drawn along racial or ethnic lines.”56 Non-traditional casting critics ignored the fact, however, that “Jews have always been able to play Italians, Italians have always been able to play Jews, and both have been able to play Asians. Asian actors, however, almost never have the opportunity to play either Jews or Italians and continue to struggle even to play themselves.”57

C. No Interference Clauses in the Production Contract

Under the production contract, quarterly meetings are to be held between Equity and the League of American Theatres and Producers to assure that the non-traditional casting policy is being implemented, and disputes arising under the policy are to be submitted to grievance and arbitration.58 Sections of the contract dealing with equal employment opportunities and non-traditional casting, however, are conditioned by “no interference” clauses, safeguarding the playwright's, director's or choreographer's intent. These clauses prevent Equity from enforcing its decision to bar the casting of Pryce. Similarly, they permit “the producers of other shows [to] insist all too often that the text of a play does not

53. Miss Saigon Statement, supra note 17, at 24.
54. Equity's Response, supra note 22, at 1.
55. Hartigan, supra note 2, at B25.
56. Equity's Approval, supra note 4, at 4.
57. Id. at 4-5.
58. Production Contract, supra note 16, § 44A.
allow the casting of ethnic actors and [thereby] consistently refuse . . . to consider the talent of minority actors for employment."

Equity's agreement with the League of Resident Theatres (LORT) does not contain a "no interference" proviso regarding non-traditional casting. Instead, the agreement states that "LORT will encourage its members to actively solicit the participation of ethnic minorities in the casting process." It is unclear whether this difference in language creates different employment results in resident and commercial theater. Nevertheless, testimony presented before the House Subcommittee of Government Activities and Transportation by Roche Schulfer, Managing Director of the Goodman Theatre, indicates that the employment of ethnic actors at the resident, non-profit Goodman Theatre over the past decade has averaged 20%, higher than the 6.9% of ethnic minority membership of Equity in 1982 when the last such survey was taken, and presumably higher than the percentage of ethnic actors actually employed in commercial theater.

D. The Lack of Auditions for Asians

A major source of strife in the Miss Saigon controversy concerned the lack of auditions for the role of the Engineer. Despite an alleged world-wide search to find qualified actors for all roles, Vincent G. Liff of Johnson, Liff & Zereman, the casting director for Miss Saigon, claimed in a letter that he had been unable to find an Asian actor suitable for the role, one of more or less the right age who could both act and sing.

I can say with the greatest assurance that if there were an Asian actor of 45 to 50 years, with classical stage background and an international stature and reputation, we would surely have sniffed him out by now. Furthermore, if we hadn't found him, he certainly would have found us.

Such an incredulous statement implies that there simply exists no single Asian actor in the U.S.—or worldwide—who could play the role of the Engineer. It has been asserted, however, that if there are such qualified and willing Asian actors, "the issue is reoriented from one of racial or

59. Miss Saigon Statement, supra note 17, at 3.
other qualification to one of institutional resistance disguised as artistic taste."

Regardless of whether the lack of auditions for Miss Saigon reflects racism, subsequent revelations indicate that there was never an intent or desire to audition or employ an Asian to portray the Engineer, either in London or New York. No actor other than Jonathan Pryce was seriously considered for the role. It is perhaps on these facts that the casting process was most disturbing. A claim that no Asian actors have the requisite experience or ability to carry the weight of a Broadway play without allowing them to audition becomes a self-fulfilling prophecy.

The production contract specifies that in order to achieve cast integration and "promote the employment of Equity’s multi-racial membership in pursuance of equal opportunity for all Actors," a producer must submit to Equity a complete cast breakdown with a definitive description of each character in the production prior to the holding of auditions. At the same time, the producer must also submit a script of the play to an Equity advisory committee who "shall submit recommendations of those roles in which members of ethnic minorities might be cast." The resulting recommendations, however, are advisory only, thereby retaining for the producer or director the ultimate authority in casting decisions.

The compromise agreement between Equity and Mackintosh called for open auditions for Asian actors and joint efforts by both parties to actively solicit cooperation with the Asian community, ensuring that the word is spread about the open auditions. The agreement may have been a hollow victory for Asian-Americans because (1) auditions to cast for the Broadway production would have had to occur anyway, (2) the open auditions were for minor roles, and finally, (3) Mackintosh was allowed to cast both Pryce as the Engineer and Salonga as Kim.


64. A Statement of Mutual Understanding, supra note 30, at 1. Documentary evidence provided by Mackintosh to Equity indicated that the search initially concentrated on finding Asian actors to play the role of Kim; later this search was expanded to casting other female and male Asian roles for the Broadway production. The casting search, however, was never intended to find candidates to create the role of the Engineer, although it was intended to find understudies for the original Broadway company. Id.


66. Id.

67. Id.

68. A Statement of Mutual Understanding, supra note 30, at 1-2. "In addition to publication in the customary trade papers, advertisements will be placed in leading Asian newspapers announcing these auditions. The producer will contact performing arts schools and universities to notify them of such auditions." Id.
IV

Affirmative Action

The Miss Saigon controversy parallels the concerns surrounding the use of affirmative action to remedy the effects of discrimination. Although non-traditional casting falls short in rectifying the non-inclusion of Asian-Americans in the theater due to its failure to consider race for casting race-specific roles, the law actively prevents the special consideration necessary for remedying the situation.

A. Discriminatory Preferences and the BFOQ Exemption

Under Title VII of the Civil Rights Act of 1964, the principal federal statute protecting private-sector employment opportunities for ethnic minorities and women, it is illegal for an employer “to fail or refuse to hire any individual . . . because of such individual’s race, color, religion, sex, or national origin.”69 The Act “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. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”70

Discrimination legally permitted under the Civil Rights Act of 1964 is defined by the bona fide occupational qualification (BFOQ) exception. Section 703(e) of Title VII provides that an employer may hire on the basis of religion, sex, or national origin “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”71 The BFOQ exception, however, has been construed to apply only to a very narrow area of artistic endeavor, “where sexual identification is essential to the integrity of the production. In all other areas, the sole inquiries are whether the individual can perform the job and whether those functions which cannot be performed are essential to the job.”72 Thus, while the BFOQ exception may apply where a theatrical role is gender specific, case law makes it clear that it cannot apply where the role is race specific, because race is specifically excluded from the list of bona fide occupational qualifications.73

Nonetheless, race may be taken into account, both constitutionally and under Title VII, for the purpose of remedying past racial discrimina-

72. BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 341 (2d ed. 1983).
Supreme Court decisions in the October 1988 term, however, make discrimination claims significantly more difficult to win and equal employment opportunities more difficult to secure.75

B. The 1991 Civil Rights Act

It is too early to tell whether the Civil Rights Act of 1991, signed into law by President Bush on November 21, 1991,76 will ameliorate this situation. The new law was designed to clarify provisions regarding disparate impact claims, strengthen and improve federal civil rights laws, and provide for compensatory and punitive damages in certain intentional employment discrimination claims.77

C. Wards Cove Packing Co. v. Atonio

Perhaps the most egregious of the 1989 Supreme Court decisions that bear upon equal employment opportunities for ethnic actors in the theater is Wards Cove Packing Company v. Atonio.78 This decision reduced the burden on employers defending employment practices having a disparate and adverse impact upon women and minorities. Employers previously required to prove a practice’s “business necessity” may now simply produce evidence that the “challenged practice serves, in a significant way, the legitimate employment goals of the employer.”79

Prior to Wards Cove, the Court had declared that Title VII prohibited not only overt discrimination, but also practices that are fair in form but discriminatory in operation.80 In other words, discrimination can be implied when a facially-neutral employment test or practice has a disproportionately negative impact on the hiring or promotion of minorities and cannot be justified by the employer. Wards Cove involved salmon canneries in Alaska where unskilled canny positions were filled predominantly by Japanese, Chinese, Filipino, Samoan, and Native Alaskan workers who were systematically tracked into the lowest paying manual labor jobs. Higher-paying, skilled, noncannery jobs were filled

74. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (race may be given some consideration in a university’s admissions process to create a diverse student body); United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 (1979) (Title VII could not be construed to bar “all private, voluntary, race-conscious” efforts to abolish “traditional patterns of racial discrimination.”).


77. Id.

78. 490 U.S. 642.

79. Id. at 659.

almost completely by whites. The predominantly white noncannery workers and the predominantly nonwhite cannery workers lived in racially-segregated bunkhouses and ate in racially-segregated mess halls. These conditions bore "an unsettling resemblance to aspects of a plantation economy."81

1. Racial Stratification in the Workforce

A class of nonwhite cannery workers filed suit under Title VII alleging, inter alia, that several of the canneries’ hiring and promotion practices were responsible for the racial stratification of the workforce. The suit also alleged that the company’s employment practices had denied them the opportunity for non-cannery work on the basis of race.82 The Supreme Court reversed an en banc court of appeals ruling that the petitioners had made out a prima facie case of disparate impact. In so doing, the Court held that a “comparison between the percentage of nonwhite cannery workers and nonwhite non-cannery workers is an improper basis for making out a claim of disparate impact.”83 Rather, the proper comparison is “between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs.”84 Thus, “[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not [employer’s] fault), [employer’s] selection methods or employment practices cannot be said to have had a ‘disparate impact’ on nonwhites.”85 To hold otherwise would mean that any employer who had a segment of his work force that was somehow racially imbalanced “could be haled into court and forced to engage in the expensive and time-consuming task of defending the ‘business necessity’ of the methods used to select the other members of his work force.”86 The Court went on to say that the “only practicable option for many employers would be to adopt racial quotas, insuring that no portion of his work force deviated in racial composition from the other portions thereof.”87

81. 490 U.S. at 664 n.4 (Stevens, J., dissenting).
82. Id. at 648.
83. Id. at 654.
84. Id. at 650.
85. Id. at 651-52.
86. Id. at 652.
87. Id. This argument, which proponents of civil rights legislation say is a red herring, was a principal reason offered by President Bush for vetoing the 1990 civil rights bill. Propo-
nents of the legislation said

There [was] nothing in the Civil Rights Act pertaining to quotas. In fact, the bill contain[ed] a disclaimer denying any effort to institute quotas. In the 18 years that the standards restored by the act were in effect, there [was] no evidence that quotas
2. **Specific Causation Requirement**

The Court also adopted a "specific causation" requirement that disparate impact claimants must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking... specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."88

If plaintiffs can show both disparate impact under the new comparative statistical analysis, and specific causation, then "the case will shift to any business justification" that employers can offer for the use of such disparate impact practices.89 "There is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."90

3. **Retreat on an Employer's Burden**

The *Wards Cove* decision is a retreat from prior cases where the court held that an employer's burden in a disparate impact case is proof of an affirmative defense that the practice "is necessary to the operation of business."91 These changes tip the balance in favor of employers in

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89. 490 U.S. at 657.
90. *Id.* at 658.
91. *Id.* at 659.

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The question... is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense... Our opinions always have emphasized that in a disparate-impact case the employer's burden is weighty... [The majority's] casual—almost summary—rejection of [the business necessity defense] that developed in the wake of *Griggs* is most disturbing.
disparate impact claims, because now plaintiffs must essentially prove "intent" on the part of the employer to discriminate, 92 "a nearly impossible task given the fact that management does not usually document discriminatory intent." 93

4. "Business Necessity"

In enacting the 1991 Civil Rights Act, Congress found that "the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio has weakened the scope and effectiveness of Federal civil rights protections." 94 The Act "codifies] the concepts of ‘business necessity’ and ‘job related’ enunciated by the Court in Griggs v. Duke Power." 95 Nonetheless, the Act does not precisely define what the phrase "job-related for the position in question and consistent with business necessity” means. 96 This ambiguity has led some congressional supporters of the Act to say that it overrules Wards Cove, while others say that it is "an affirmation of existing law, including Wards Cove." 97

A White House statement accompanying the signing of the bill directs all federal agencies to enforce the new law on the basis that the Court’s ruling in Wards Cove remains intact. 98 Although what this means remains unclear, civil rights advocates have indicated they will seek legal remedies if the Administration attempts to defy congressional intent, "either in the regulatory process or in the courts." 99

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Id. at 670-72.

92. Igasaki, supra note 87, at 2.


95. Id. § (3)(2). The new law amends section 703 of the Civil Rights Act of 1964 by adding a new subsection which provides in part:

An unlawful employment practice based on disparate impact is established... if...

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race... and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.

105 Stat. at 1074.

96. Id.

97. Robert Pear, With Rights Act Comes Fight to Clarify Congress' Intent, N.Y. TIMES, Nov. 18, 1991, at A1, A12. Indeed, a shadow was cast upon the meaning of the new Act the very day before President Bush was to sign the bill when White House counsel C. Boyden Gray circulated a draft position statement that called for the abolition of all governmental affirmative action programs and regulations. The White House disavowed the statement, stating that Gray had issued it without the President's permission. Id. See also Andrew Rosenthal, President Tries to Quell Furor on Interpreting Scope of New Law, N.Y. TIMES, Nov. 22, 1991, at A1, A11.


99. Id.
The new Act specifically does not apply "to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." This means that the Act specifically exempts Wards Cove, the only case fitting the above description. The Wards Cove plaintiffs, therefore, are "the only American workers deprived of having their merits of their claim considered under the Griggs standard."

D. City of Richmond v. J.A. Croson Co.

A second decision that affects employment opportunities for ethnic actors is City of Richmond v. J.A. Croson Co., a case limiting the power of government to favor women and minorities in public contracts. Although commercial theater does not involve governmental funding, the implications of the decision on hiring practices in theater as a whole, including resident theaters that receive National Endowment for the Arts grants, are important.

In Croson, the city of Richmond, Virginia adopted a plan requiring prime contractors to set aside at least 30% of the dollar amount awarded in city construction contracts to minority subcontractors. The plan was devised in response to a study which showed that although Richmond's population was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in recent years.

The Court held that Richmond's set-aside program was illegal because "the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race." It said, "A generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." It added that "[r]eliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is . . . misplaced." The Court also advised that, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." It stated that it

100. 105 Stat. 1071, 1099.
103. Id. at 477.
104. Id. at 505.
105. Id. at 498.
106. Id. at 501.
107. Id. at 501-502.
Miss SAIGON is "completely unrealistic" to assume "that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 108

E. Casting Calls for Minority Actors

Given that the pool of Asian-American actors is small, Asian-Americans would be hard pressed to prove illegal discrimination after the decisions of Wards Cove and Croson. One of the thorny problems of hiring ethnic actors is the claim that it is difficult to cast minorities because they don't show up for casting calls. Ethnic actors, in response, argue that "they don't audition because they don't expect to be cast," given the history of the theater. 109 Many ethnic actors do not attend auditions, believing that any possibility of landing a major role is ludicrous, or all for show. In Miss Saigon, for example, Asian organizations and theaters were not contacted for names, Asians were not actively sought for auditions, 110 and Asians were not even considered for the lead role of the Engineer.

Even though the producer, Mackintosh, refused to consider Asian-Americans for the role of the Engineer, it is not clear that his refusal constitutes remediable racial discrimination, particularly in light of the fact that hiring decisions in the theater are based on such subjective criteria as talent and imagination. The casting of Lea Salonga as Kim allegedly involved the audition of 1200 Asian actresses, yet none of them was found to possess the unique abilities that Mackintosh claimed to be seeking. 111 Under Wards Cove, Mackintosh could justify his decision to hire anyone on grounds that such hiring serves his business goal; under the production contract, he could likewise justify any hiring purely on nebulous artistic qualification grounds. In addition, ethnic actors claiming racial discrimination will not prevail against producers such as Mackintosh unless they demonstrate that the specific practices of the producer directly caused the disparate impact. 112 Because of this, producers will not be forced to address the history of discrimination currently preventing Asian-American actors from entering into and advancing within the

108. Id. at 507.
109. Hartigan, supra note 2, at 825.
110. Clarence Page, Actors' Equity Gets "A" for Intentions in "Miss Saigon" Furo, CHI. TRIB., Oct. 3, 1990, at C19. "It was even more grating that another production, the musical version of Shogun, which rivals Miss Saigon in scope, cost and special effects, seemed to have no difficulty at all in finding enough Asian actors to fill its many Asian roles for its fall Broadway opening." Id.
111. An Asian-American actress, Kam Cheng, was selected to share the role of Kim with Salonga, but only "at certain performances." Mervyn Rothstein, American To Share Lead in "Miss Saigon," N.Y. TIMES, Jan. 29, 1991, at B3.
V
Conclusion

After the acrimonious debates and moral rhetoric that consumed *Miss Saigon* settled, artistic freedom appeared to win out over notions of equal opportunity. Perhaps this is as it should be, because somehow it is unsettling to have a union or any organization tell a theater or playwright or producer how to do a show. Theater exists to mesmerize and enchant us through creative voices that momentarily take us from the harshness of real life. Without freedom and protection of artistic expression and integrity, ours would become a world of sameness and even of mediocrity.

Yet it was valuable that the battle of *Miss Saigon* was waged, for it brought to the surface underlying issues of racism and sexism that had simmered for years in American theater, which centers on a white-European male tradition. Although Mackintosh won the skirmish, he has not yet won the war. Audience members live in an increasingly interracial society, and it is not illogical to assume that they will want their world reflected on the stage. *Miss Saigon* showed that Asian-Americans and ethnic actors will no longer idly tolerate exclusionary processes that perpetuate a closed theater and allow for insensitive portrayals of minorities.

A. Need to Reflect Society’s Growing Diversity

The *Miss Saigon* controversy highlighted the need for theater to reflect more of society’s growing diversity. Additionally, it showed that the increased number of jobs for minority actors has been slight and often-time results only in roles pandering to stereotypes. As illustrated by testimony before a congressional hearing by Roche Schulfer, managing director of the Goodman Theatre in Chicago, other methods are required to increase the participation of ethnic minorities in the theater.

B. Suggestions to Increase Ethnic Participation

Schulfer’s suggestions include 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 the professional theater, establishing contact with special sources for ethnic
minority employees, and retaining ethnic consultants for artistic and audience development programs. Schulfer also emphasized the use of non-traditional casting and the selection of specific theme plays such as those featuring minority actors.

C. Other Efforts

There are indications that some serious efforts are being made to open up the theater. In particular, the director of the theater program of the National Endowment for the Arts has set as her goal that fifty percent of the organization’s grant-making panel be composed of people of color. NEA has also awarded a $1,000,000 grant to Arena Stage, a resident theater in Washington, D.C., to train minority actors, directors, designers and administrators, and to produce plays from nonwhite cultures. Additionally, a spokesperson for the Ford Foundation has indicated that the “extent of cultural diversity on the staff and the board of a theater company ha[s] increasingly become a criterion for foundation grants.” The Non-Traditional Casting Project is in the process of establishing both a theater workshop to introduce directors to ethnic and disabled actors, and a national research program to document critical and public response to non-traditional casting.

Perhaps Equity’s statement summarized the issues raised by Miss Saigon best:

While the justification for the original action taken on [Mackintosh’s application to employ Pryce in the Broadway production] may have been controversial, the issues influencing that decision go far beyond Miss Saigon and the question of whether or not Mr. Pryce is a star. What must be addressed by the entire theatrical community are the frustrations felt over past and present discrimination and the lack of employment opportunities available to ethnic minority actors.