

## Articles

# Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?

By MICHAEL J. FRANK\*

SUPPOSE YOU ARE a movie producer seeking to hire an actor to play the part of Dr. Martin Luther King, Jr. In selecting the appropriate thespian, you would want someone with a strong, clear voice who could make the inspiring words and actions of Dr. King come alive and embody his charisma. There are many fine actors and actresses who could do justice to the part, but for seemingly obvious reasons you desire to cast a *black man* in the role, thereby excluding all women, whites, Asians, and Hispanics. Suppose also that a qualified *white* actress initiated a Title VII<sup>1</sup> disparate treatment claim against you based on your admitted refusal to hire her because of her sex and race.<sup>2</sup> As to the sex discrimination claim, Title VII provides you with a defense that sex is a bona fide occupational qualification<sup>3</sup> (“BFOQ”), and if you can establish this defense, you would prevail on that claim. However, as to the race claim, you would lose because Title VII does

---

\* J.D., St. Louis University School of Law (1997). The author is an attorney specializing in labor and employment law. He wishes to thank Mr. Day Krolik of NBC for his helpful comments and suggestions.

1. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

2. She might also have a disparate impact claim, as a plaintiff may proceed under both a disparate impact and disparate treatment theory. *See Lynch v. Freeman*, 817 F.2d 380, 382 (6th Cir. 1987). “Disparate impact claims, recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) . . . , do not require proof of intent to discriminate. Instead, they focus on facially neutral employment practices that create such statistical disparities disadvantaging members of a protected group that they are ‘functionally equivalent to intentional discrimination.’” *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)). This Article, however, only addresses intentional discrimination or disparate treatment claims.

3. *See* 42 U.S.C. § 2000e-2(e) (1994).

not provide a BFOQ defense for race or color discrimination.<sup>4</sup> To some people, this seems absurd, particularly in light of the general belief that there is nothing morally wrong with discriminating in an effort to depict historical persons authentically.<sup>5</sup> Yet others recognize that in some instances the justification for discriminating against minority actors is much less compelling, such as when the race or color of the actors is peripheral to a fictional story or to the ideas the director hopes to convey, or where the skin color of dancers makes no appreciable difference to the production.<sup>6</sup>

However, the hypothetical posed above continues to exist only in the realm of theory as no one has ever initiated such a lawsuit. Therefore, it is uncertain how courts would address such a case. If presented with such a lawsuit, would a court extend Title VII's sex, religion, and national origin BFOQ to reach race or color? Or would the court see this type of discrimination as no different than other invidious acts that Title VII was clearly designed to prohibit? Further, assuming that the court would judicially create a race BFOQ, would this be an instance of improper judicial activism contrary to the clear intent of Title VII? Or would it be a court simply filling in the interstices of a vague statute? Or should Congress just head-off this entire conundrum by amending the Title VII BFOQ provision to permit race and color discrimination in certain situations?

This Article attempts to answer these and other questions in an effort to determine whether there is a need for a race or color BFOQ to protect purportedly benign discriminatory practices in the news and entertainment industries. Part I summarizes the BFOQ defense as the federal courts have refined it. Part II discusses the reasons why Congress did not include race or color in the BFOQ provision. Part III analyzes the various justifications for BFOQs, particularly those that might be applicable to race or color discrimination in the news and entertainment industries. Part IV examines whether the judicial creation of a race or color BFOQ is legally feasible or desirable. Finally,

---

4. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989). Race as a BFOQ is also not a defense to an equal protection claim under 42 U.S.C. section 1981. See *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 474 (11th Cir. 1999). However, the Seventh Circuit has essentially recognized a race BFOQ defense to a 42 U.S.C. section 1983 action for a violation of the Equal Protection Clause. See *Wittmer v. Peters*, 87 F.3d 916, 920-21 (7th Cir. 1996).

5. See K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47 (2000).

6. See Gregory J. Peterson, *The Rockettes: 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, 358-63 (1985).

Part V determines whether legislative action is warranted. This Article concludes that the rules of statutory construction and judicial restraint prevent the judiciary from crafting a race or color BFOQ. Furthermore, legislative action is not presently warranted because no cases have been brought where an employer could assert a race BFOQ. Moreover, there is a danger that a generally applicable race or color BFOQ would protect genuine invidious discrimination. Should circumstances change, however, legislative action might become necessary, especially to protect instances of benign discrimination in the news and entertainment industries.

## I. The Contours of the BFOQ Defense

### A. Congressional Establishment of the BFOQ Defense

In Title VII of the Civil Rights Act of 1964,<sup>7</sup> Congress recognized that many employers were discriminating against employees or potential employees based on characteristics such as race and sex.<sup>8</sup> Such practices were harmful not just to the affected individuals, but also to the nation's economy.<sup>9</sup> Therefore, Congress prohibited discrimination on the basis of an employee's race, color, religion, sex, or national origin in hiring, terminating, and promoting employees, and with respect to determining terms and conditions of employment.<sup>10</sup>

---

7. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

8. See S. REP. NO. 88-872 (1964), 1964 WL 4755 ("The purpose of [the Act] is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.").

9. Of course, the individual most harmed by the discriminatory practices is often the discriminator himself.

[P]eople who decide that they do not want to trade with or hire certain people because of race, sex, or age are making a decision that has more than just external costs. They bear a large part of the costs themselves, for their decision will surely limit their own opportunities for advancement and success, even as it leaves others free to pursue alternate opportunities. The greater the class of persons who are regarded as off-limits, and the more irrational the preferences, the more the decision will hurt the people who make it . . . .

RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 41-42 (1992).

10. See 42 U.S.C. § 2000e-2(a)(1)(i) (1994) (prohibiting intentional or disparate treatment discrimination). Title VII also prohibits so-called "disparate impact" discrimination. See 42 U.S.C. § 2000e-2(a)(2) (1994). Title VII has multiple purposes. The foremost is to eliminate discrimination in the workplace. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995). It is also designed to remedy the effect of discrimination and the segregation of employees in the workplace, including stereotypical job assignments. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557 (3d Cir. 1996) (en banc). Congress hoped that Title VII would force employers to evaluate their employment practices in an effort to

However, Congress also recognized that sometimes discrimination on these bases was not only morally acceptable, but also made sound economic sense. Through the bona fide occupational qualification ("BFOQ") affirmative defense provision of Title VII,<sup>11</sup> Congress deemed it legally permissible to discriminate intentionally on some of these bases in narrowly defined instances.<sup>12</sup> Later, Congress extended this same protection to employers covered by the Age Discrimination in Employment Act<sup>13</sup> ("ADEA").<sup>14</sup> It did this so that employers would not have to change the essential nature of their businesses in order to comply with Title VII and the ADEA.<sup>15</sup> The relevant portion of Title VII's BFOQ provision states:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his 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 . . . .<sup>16</sup>

Notably, the only three grounds for a BFOQ defense are sex, religion, and national origin, not race or color. Sex is the most commonly asserted BFOQ, along with age in the ADEA context. National

---

eliminate discrimination, would deter future discrimination, and would help to compensate plaintiffs for the injuries caused by discriminatory practices. See *McKennon*, 513 U.S. at 358.

11. 42 U.S.C. § 2000e-2(e) (1994). See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1511 n.3 (9th Cir. 1989) ("The bona fide occupational qualification defense is essentially an affirmative defense."). The BFOQ defense applies only to cases of intentional discrimination, not to cases of disparate impact. See *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 n.14 (3d Cir. 1988). However, the BFOQ defense has a counterpart applicable to disparate impact cases—the defense of business necessity. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1460–61 (11th Cir. 1990). The business necessity defense is not applicable to cases of intentional discrimination. See 42 U.S.C. § 2000e-2(k)(2) (1994).

12. Under Title VII, an employer may lawfully discriminate if the discrimination is in accordance with legitimate affirmative actions programs, national security interests, seniority systems, or done in a foreign nation in compliance with foreign law. See 42 U.S.C. § 2000e-1(b) (1994); 42 U.S.C. § 2000e-2(g), (h) (1994).

13. 29 U.S.C. § 621–634 (1994 & Supp. IV 1998).

14. See 29 U.S.C. § 623(f)(1) (1994). The standards for applying the ADEA BFOQ are substantially similar to those for Title VII. See 1 MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 2.37, at 327 (2d ed. 1999). Therefore, many of the decisions cited or discussed in this Article are ADEA cases.

15. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Fragante v. City & County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989).

16. 42 U.S.C. § 2000e-2(e) (1994). The ADEA also allows employers to discriminate based on age in certain instances under that statute's BFOQ provision. See 29 U.S.C. § 623(f)(1) (1994).

origin is almost never proffered as a BFOQ,<sup>17</sup> and because other broader exceptions protect religious discrimination, religion is rarely advanced as a BFOQ.<sup>18</sup> Congress drafted the BFOQ exception narrowly and the courts have construed it as such.<sup>19</sup> The BFOQ defense applies only to the hiring, firing, and promoting of employees and to job assignment decisions.<sup>20</sup> It is not a defense to harassment or discriminatory pay scales or benefits.<sup>21</sup> The employer bears the burden of establishing the defense,<sup>22</sup> which usually involves a case-by-case, "fact-intensive inquiry."<sup>23</sup> For these reasons, summary judgment frequently is inappropriate when an employer asserts a BFOQ defense.<sup>24</sup>

## B. The Elements of the BFOQ Defense

To prove a BFOQ defense, the defendant must show that for some reason the sex, religion, or national origin of the rejected plain-

---

17. See George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 140 (1995).

18. *But see* *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 354 (7th Cir. 1986) (affirming summary judgment based on religion BFOQ). Even in *Pime*, however, it is probable that the plaintiff did not establish a prima facie case of discrimination, and thus the religion BFOQ was likely unnecessary. See *id.* at 355 (Posner, J., concurring).

19. As the Supreme Court stated, "The BFOQ defense is written narrowly, and this Court has read it narrowly." *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) [hereinafter *Johnson Controls II*]; *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). As Judge Posner noted, "A broad reading would gut the statute. For it is unlikely that most employment discrimination in the private sector is irrational. Few private employers discriminate without having some reason for doing so . . . ." *Int'l Union v. Johnson Controls, Inc.*, 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting), *rev'd*, 499 U.S. 187 (1991) [hereinafter *Johnson Controls I*].

20. See *Cianciolo v. City of Knoxville*, 376 F. Supp. 719, 721 (E.D. Tenn. 1974). As noted by the court in *Cianciolo*:

Although this section speaks only to hiring and firing, its operation also impliedly applies to employment opportunities. Thus, if an employer restricted the activities of an employee because the same was "necessary to the normal operation of that particular business or enterprise," then the employer would be relieved of his statutory obligations under the Act.

*Id.*

21. See *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366-67 (9th Cir. 1986).

22. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Fallon v. Illinois*, 882 F.2d 1206, 1216 (7th Cir. 1989).

23. See *Criswell*, 472 U.S. at 417-23; *Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993).

24. See *Johnson Controls I*, 886 F.2d at 906 (Posner, J., dissenting); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1216 (9th Cir. 1988) ("The validity of a BFOQ turns upon factual findings, preferably ones by a jury."); *Childers v. Morgan County Bd. of Educ.*, 817 F.2d 1556, 1559 (11th Cir. 1987) (*per curiam*) ("Cases which rely heavily on expert testimony, as is the case here, do not easily lend themselves to summary judgment. Indeed most of the public safety age discrimination cases seem to have been resolved at trial.").

tiff substantially interferes with his or her ability to perform the job.<sup>25</sup> In cases of sex discrimination, the employer must show that “given the reasonable objectives of the employer, the very womanhood or very manhood of the employee undermines his or her capacity to perform a job satisfactorily.”<sup>26</sup> The defense has two parts: the importance of the end the employment restriction serves; and the closeness of the relationship between the discriminatory means and the end purportedly served. Like the means/end analysis of sex-based, equal protection cases, courts apply heightened scrutiny with a BFOQ defense, although not the strictest scrutiny.<sup>27</sup>

### 1. Importance of the Purpose Being Served

First, the employer must show that the purpose the employment restriction serves is related to the “essence” or “central mission” of its business.<sup>28</sup> As the quoted language indicates, mere convenience to an employer will never justify a BFOQ.<sup>29</sup> Rather, the employer must show that age, religion, sex, or national origin is essential to the applicant’s ability to perform “the job from which the applicant is excluded.”<sup>30</sup> If an essential function is not at stake, an employer cannot justify dis-

---

25. See *Johnson Controls II*, 499 U.S. 187, 204 (1991) (discussing sex discrimination). The BFOQ defense is not available for claims of race, color, or ethnicity discrimination. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989).

26. *Torres v. Wis. Dep’t of Health & Soc. Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988) (en banc).

27. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 64 (2000) (“Although it is true that the existence of the [BFOQ] defense makes the ADEA’s prohibition of age discrimination less than absolute, the Act’s substantive requirements nevertheless remain at a level akin to the Court’s heightened scrutiny cases under the Equal Protection Clause.”); *Johnson Controls I*, 886 F.2d 871, 899 (7th Cir. 1989) (en banc) (comparing the BFOQ analysis to compelling interest test used in First Amendment jurisprudence), *rev’d*, 499 U.S. 187 (1991). Under some forms of strict scrutiny, a law must be narrowly drawn to serve a compelling state interest. See *Boos v. Berry*, 485 U.S. 312, 321 (1988). Under medium level scrutiny, a law need only promote a substantial government interest that would be achieved less effectively absent the regulation. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982) (holding that under intermediate scrutiny the government must show a substantial relationship between the means chosen and the important interest served).

28. See *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985) (citing *Uesry v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (citing *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

29. See *EEOC v. Mississippi*, 837 F.2d 1398, 1399 (5th Cir. 1988) (stating that “age qualifications must be more than merely convenient to the employer”).

30. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (discussing an ADEA claim).

crimination in favor of or against the trait.<sup>31</sup> Although this test sounds rather stringent, some courts apply it strictly, while others give employers broad discretion in defining the essential features of a job, similar to the deference shown in Americans with Disabilities Act<sup>32</sup> (“ADA”) cases.<sup>33</sup> For example, in *Pime v. Loyola University of Chicago*,<sup>34</sup> the Seventh Circuit determined that being a Jesuit priest was an essential component of a philosophy professorship at a Jesuit university.<sup>35</sup> The court justified this requirement even though most of the philosophy professors at the university were not Jesuits<sup>36</sup> (suggesting that being a Jesuit was not essential), and the core function of the job (teaching philosophy) did not require ordination to the priesthood.<sup>37</sup> Contrast this case with *Frank v. United Airlines, Inc.*,<sup>38</sup> where the Ninth Circuit rejected an employer’s argument that slenderness is a BFOQ for female, but not for male, flight attendants.<sup>39</sup> The key to this decision was the fact that the employer could not show that slenderness was essential to the job, nor did it even suggest that slenderness aided flight attendants in performing their assigned tasks.<sup>40</sup> Generally, an employer cannot show the reasonable necessity of a trait where the employer does not require all employees to possess the trait.<sup>41</sup>

An employer’s good faith or subjective belief that a certain attribute is essential to its business will not satisfy its burden of proving a BFOQ.<sup>42</sup> Further, the fact that state law, or a testator,<sup>43</sup> requires dis-

---

31. See, e.g., *id.* at 122–23.

32. 42 U.S.C. § 12101–12213 (1994 & Supp. IV 1998).

33. See 42 U.S.C. § 12111(8) (1994).

For the purposes of [the ADA], consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

*Id.*

34. 803 F.2d 351 (7th Cir. 1986).

35. See *id.* at 353–54.

36. See *id.* at 352.

37. See *id.* at 353.

38. 216 F.3d 845 (9th Cir. 2000).

39. See *id.* at 855.

40. See *id.*

41. See *EEOC v. Pennsylvania*, 829 F.2d 392, 396 (3d Cir. 1987).

42. See *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987).

43. See *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 466–47 (9th Cir. 1993) (holding that compliance with the discriminatory Protestant-only provision of a last will and testament does not create a BFOQ).

crimination does not make the relevant characteristic a BFOQ.<sup>44</sup> “The mere fact that a state enacts a discriminatory regulation does not create a BFOQ defense for one who follows such a regulation.”<sup>45</sup> But a glance at some of the BFOQ cases in which a state or municipality is a defendant shows that oftentimes courts will give deference to state legislative findings as to the necessity of an asserted BFOQ.<sup>46</sup> When private employers are involved, however, the courts typically verify the necessity of the BFOQ under a stricter objective standard.

Title VII’s use of the term “bona fide” indicates that the qualification in question must be intimately connected with sex, religion, or national origin, and the employer must actually use the qualification in hiring decisions.<sup>47</sup> The modifier “occupational” indicates that the asserted BFOQ “must concern job-related skills and aptitudes.”<sup>48</sup> Mere peripheral qualifications that make an individual a more desirable employee generally do not concern the essence of an employer’s business and thus are not “occupational,”<sup>49</sup> even though the qualifications

---

44. See *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225–26 (9th Cir. 1971) (holding that compliance with discriminatory state law does not create BFOQ). But see *Reed v. County of Casey*, 184 F.3d 597, 599 (6th Cir. 1999) (holding that sex was a BFOQ where a female deputy was reassigned to the undesirable night shift in an effort to comply with a Kentucky regulation that a female deputy always be on duty when female prisoners were held in the jail). Actions performed to comply with federal law may get a little more deference from the courts, especially where Congress or a federal agency has made findings that are equivalent to those necessary for a BFOQ defense. In *Coupe v. Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), the Sixth Circuit held that in asserting a BFOQ defense for age discrimination, the employer may rely on the factual findings of the Federal Aviation Administration (“FAA”) that age is a suitable proxy for safety, which the agency made in promulgating its rule against employers using pilots over the age of sixty. See *id.* at 1026. “Were it otherwise, Federal Express would be required to second-guess the very agency established by Congress to regulate it.” *Id.*

45. *Garrett v. Okaloosa County*, 734 F.2d 621, 624 (11th Cir. 1984).

46. See, e.g., *EEOC v. Mo. State Highway Patrol*, 748 F.2d 447, 450 (8th Cir. 1984) (“[I]n applying the BFOQ exemption, we should be guided by sound principles of federalism and should accord some deference to the state legislative declaration.”); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1167 (8th Cir. 1982) (giving no presumption of correctness to discriminatory employment policies because such a presumption of correctness “would effectively give the employee the burden of showing that the BFOQ exception does not apply”).

47. See *Kopec v. City of Elmhurst*, 193 F.3d 894, 901 (7th Cir. 1999).

48. *Johnson Controls II*, 499 U.S. 187, 201 (1991). See also *Mahoney v. Trabucco*, 738 F.2d 35, 39 (1st Cir. 1984).

49. Thus, as in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), the mere belief that women might find a job more strenuous or difficult than men would not make sex a BFOQ. See *id.* at 234.



might make the business more competitive.<sup>50</sup> Nor will the added expense to the employer of eliminating discrimination give rise to a BFOQ defense.<sup>51</sup> However, this is a slight over-generalization. In the ADEA setting, some federal circuit courts allow employers to justify discrimination based on factors that do not predict whether the employees can perform the required tasks, such as the costs involved in training new employees and in continued employment of older employees.<sup>52</sup> For these circuits, the financial burden of eliminating discrimination is one factor that courts can consider in the BFOQ necessity analysis. Other circuits, however, reject this approach, considering an employer's expense to be an irrelevant factor that greatly expands the BFOQ defense.<sup>53</sup> Thus, for example, the Seventh Circuit once held that an employer could not justify an age BFOQ where the reason for mandatory retirement was "the need to have a definite and financially feasible age upon which a retirement benefit formula could be based."<sup>54</sup> Most courts reason that economic or similar considerations cannot be the basis for a BFOQ because such considerations are among the harms the ADEA and Title VII target.<sup>55</sup>

## 2. Relationship Between the Means and the End

Secondly, the means chosen (i.e., the decision not to hire members of a particular class) must be *closely related* to the essence of the business. This prong is concerned with the overbreadth of some employment restrictions. To satisfy this requirement, the employer must show that all, or substantially all, of the individuals excluded would have been unable to perform the job safely and effectively, or that it would have been impracticable to weed out ineffective employees on

---

50. See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (noting that Southwest Airlines believed that hiring only female flight attendants would make it more competitive).

51. See Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 14 (1991).

52. See *Johnson v. Am. Airlines*, 745 F.2d 988, 991-93 (5th Cir. 1984) (holding that in determining whether age is a BFOQ the employer may look solely to whether age prevents the employee from performing the job, but may also consider the length of training required and the ability to recoup its investment); *Murnane v. Am. Airlines*, 667 F.2d 98, 100-01 (D.C. Cir. 1981).

53. See *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042 (9th Cir. 1983) (holding that the court cannot consider economic factors as a justification for discrimination); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 755 (7th Cir. 1983) (same).

54. *Orzel*, 697 F.2d at 755.

55. See *id.*; see also *County of Los Angeles*, 706 F.2d at 1042 (citing *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981)).

an individual basis.<sup>56</sup> In other words, the employer must show that possession of the required attribute—whether it is youth, femininity, masculinity, or French-ness, for example—is either necessary for, or highly predictive of, successful performance of the job at issue and that no other non-discriminatory attribute is similarly predictive of success. Thus, the employment restriction must be more than just reasonable;<sup>57</sup> it must be “reasonably necessary” to serve the essence of the business.<sup>58</sup> However, at the other extreme, the need to discriminate does not have to be absolutely necessary.<sup>59</sup>

An employer does not have to demonstrate necessity by objective, empirical evidence where common sense and expert testimony support a finding of necessity.<sup>60</sup> In showing the necessity of the discrimination, courts will allow defendants to make reasonable projections as to the effects of a failure to discriminate.<sup>61</sup> Employers are free to use expert testimony to demonstrate that there are no reasonable alternatives, even though the employer did not consult an expert when it crafted its discriminatory employment policies.<sup>62</sup> Furthermore, defen-

---

56. See *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (citing *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)). This test is usually used in age discrimination cases, where the difficulty of determining whether elderly employees remain strong and healthy could be costly. It may also be applicable in pregnancy discrimination cases, where it might be difficult to determine which pregnant women could still perform difficult tasks. See *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 367, 373 (4th Cir. 1980) (Sprouse, J., concurring) (holding that an employer established business necessity defense to disparate impact claim where it showed that it could not easily identify which pregnant flight attendants would experience abnormal health incidents).

57. If the employer merely had to show that its restrictions on hiring or retention were reasonable, their burden would be like that of defendants facing rational basis scrutiny in Equal Protection Clause cases. See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963–64 (2001) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)) (“Under rational-basis review . . . a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”).

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.

*Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

58. See *Criswell*, 472 U.S. at 419 (“The BFOQ standard adopted in the statute is one of ‘reasonable necessity,’ not reasonableness.”).

59. See *Johnson Controls I*, 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting) (stating that the relevant qualification must be “more than just reasonable but less than absolutely necessary”), *rev’d*, 499 U.S. 187 (1991).

60. See *Healey v. Southwoods Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996).

61. See *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999).

62. See *Williams v. Hughes Helicopter, Inc.*, 806 F.2d 1387, 1390 (9th Cir. 1986).

dant-employers do not need to conduct formal studies as to the necessity of hiring only members of a particular class,<sup>63</sup> although such studies certainly strengthen their BFOQ defense.

Some courts preclude an employer from invoking the BFOQ defense if the employer does not apply the qualification consistently.<sup>64</sup> For example, if a French restaurant refuses to hire a Chinese chef because of his national origin, the restaurant cannot hire a Mexican cook instead. "For an occupational qualification to be 'bona fide,' it must be just as valid and necessary one day as it is the next,"<sup>65</sup> and it must be considered a vital trait from one employee to the next.

Although the employer's discriminatory practice does not have to be the least restrictive means available to serve essential business interests,<sup>66</sup> substantial overbreadth, or over-inclusiveness, will jeopardize a finding that the discrimination was "reasonably necessary." Courts look to see if reasonable alternatives to discrimination might equally serve the relevant business purposes.<sup>67</sup> In particular, in *Western Air Lines, Inc. v. Criswell*,<sup>68</sup> the United States Supreme Court made clear the fact that other employers in the industry do not use the BFOQ strongly suggests that the restriction is not reasonably necessary.<sup>69</sup> Except as noted above,<sup>70</sup> substantial financial loss associated with failing to discriminate does not make the relevant trait a BFOQ unless the

---

63. See *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376, 385 (S.D.N.Y. 1992).

64. See *EEOC v. Miss. State Tax Comm'n*, 873 F.2d 97, 99 (5th Cir. 1989) (en banc) (discussing employer's failure to apply standards consistently among current employees as precluding employer's invocation of a BFOQ based on those standards). For example, if an employer who does precision work excluded workers over the age of fifty because such employees usually suffer from farsightedness, but retains many younger employees who also suffer from the condition, it suggests that perfect vision may not be essential to the job.

65. *Garrett v. Okaloosa County*, 734 F.2d 621, 624 (11th Cir. 1984).

66. See *Reed v. County of Casey*, 184 F.3d 597, 599 (6th Cir. 1999) (noting that an alternative existed to the employer's decision to transfer a female deputy to the undesirable night shift in order to comply with a state law that a female deputy always be present while female prisoners are in custody at the jail, but that the alternative was expensive and undesirable); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that to satisfy intermediate scrutiny in the free speech context, the government need not show that it used the least restrictive means available).

67. See, e.g., *Johnson Controls I*, 886 F.2d 871, 901 (7th Cir. 1989) (noting that there "has been no convincing exposition in the record of any suitable alternative or of scientific, medical or technical evidence supporting the efficacy of such an alternative"), *rev'd*, 499 U.S. 187 (1991).

68. 472 U.S. 400 (1985).

69. See *id.* at 423.

70. See *supra* notes 50-52 and accompanying text.

financial loss would cripple the employer.<sup>71</sup> Thus, in *Wilson v. Southwest Airlines Co.*,<sup>72</sup> even though Southwest Airlines predicted that hiring male flight attendants would substantially decrease its bottom-line, a district court in Texas found that this economic loss was not a sufficient justification for recognizing sex as a BFOQ.<sup>73</sup>

### C. The Justifications Behind BFOQs

Courts have recognized four types of BFOQs based on their asserted justifications: (1) those related to the safety of customers and employees; (2) those related to the performance of necessary tasks; (3) those affecting the authenticity of the product or service; and (4) those related to the privacy of patrons.<sup>74</sup>

#### 1. Safety

"Safety concerns may be factored into the BFOQ calculus if safety goes 'to the core of the employee's job performance'—that is, when the safeguarding of human lives is an inherent part of the job."<sup>75</sup> For example, in *Dothard v. Rawlinson*,<sup>76</sup> the United States Supreme Court found that a maximum-security prison could exclude women from jobs requiring contact with the prisoners because of the close tie between sex and the prison guards' ability to maintain a safe and secure

---

71. See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981). The Fifth Circuit takes an approach that is slightly more deferential to employers:

Title VII does not purport to shield protected workers from all adverse consequences of non-invidious employment decisions. When an employer has established that a standard is justified as a BFOQ or by business necessity, it would be unreasonable to place on it the burden of taking extraordinary measures to cushion the blow for affected employees. A "less discriminatory alternative," therefore, is only that which accords with the employer's customary practices so amenable that the failure to use the alternative indicates that the legitimate concerns supporting the challenged standard are pretextual.

*Levin v. Delta Air Lines*, 730 F.2d 994, 1001 (5th Cir. 1984).

72. 517 F. Supp. 292 (N.D. Tex. 1981).

73. See *id.* at 304.

74. Justice Scalia has also suggested a fifth type of BFOQ. See *Johnson Controls II*, 499 U.S. 187, 223–24 (1991) (Scalia, J., concurring). He opined in his concurrence in *Johnson Controls II* that a great expense associated with employing members of one sex could justify discrimination against that sex based on a BFOQ defense. See *id.* (Scalia, J., concurring). Justice Scalia wrote: "I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive." *Id.* at 224 (Scalia, J., concurring).

75. *Coupe v. Fed. Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997) (quoting *Johnson Controls II*, 499 U.S. at 203).

76. 433 U.S. 321 (1977).

prison, where safety and security were essential to the prison.<sup>77</sup> In other words, without this BFOQ, the safety of prisoners and other guards would be jeopardized.<sup>78</sup>

The “greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in a case of an accident, the more stringent may be the [employer’s] job qualifications” designed to prevent such accidents.<sup>79</sup> In other words, the greater the potential harm that might result from lack of discrimination, the greater the employer’s ability to discriminate to avoid that harm. Still again, the greater the probability and magnitude of a given danger, the greater the employer’s freedom to exercise its discretion in judging the reasonableness of safety-related job qualifications.<sup>80</sup> Not surprisingly, the “presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low.”<sup>81</sup> Therefore, when an employer “establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is ‘reasonably necessary’ to safe operation of the business.”<sup>82</sup>

The safety rationale most often arises in ADEA cases where employers impose mandatory retirement on employees (frequently pilots or police officers) who claim that they are still capable of performing

---

77. *See id.* at 335–36.

78. *See id.* Because of the Constitution’s Supremacy Clause, even state safety regulations that mandate the sex of prison guards would fall prey to Title VII were it not for the BFOQ defense. *See Reidt v. County of Trempealeau*, 975 F.2d 1336, 1339 n.3 (7th Cir. 1992).

79. *EEOC v. Boeing Co.*, 843 F.2d 1213, 1221 (9th Cir. 1988) (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)).

80. *See id.*

81. *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982).

82. *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). *See also EEOC v. County of Santa Barbara*, 666 F.2d 373, 377 (9th Cir. 1982) (“[E]mployers whose businesses are safety-related have less difficulty proving that age is a BFOQ.”). At one time, the Seventh Circuit applied only rational basis review to employers whose businesses had an important safety component, such as industries that carry passengers. *See Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974) (“Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers.”). The court has since moved away from this standard to the “reasonably necessary” review mandated by *Criswell* and the text of Title VII. *See Kopec v. City of Elmhurst*, 193 F.3d 894, 902 (7th Cir. 1999); *EEOC v. North Knox Sch. Corp.*, 154 F.3d 744, 751 n.2 (7th Cir. 1998).

their jobs.<sup>83</sup> Usually, the plaintiffs lose these contests. For example, in one ADEA safety case, the Supreme Court held that relative youth (younger than sixty years old) was a BFOQ for flight engineers because age-related disabilities might prevent the engineers from assisting the pilot, thereby endangering the lives of passengers and crew.<sup>84</sup> Furthermore, while undoubtedly some pilots under the age of sixty present safety hazards, and some over the age of sixty do not, the court held that age is a relatively accurate proxy for safety, and there are no appropriate, less restrictive means under the circumstances.<sup>85</sup>

Importantly, however, employers have based the BFOQ defense in these situations on the lack of technology to ascertain which elderly employees pose a safety threat,<sup>86</sup> such as a medical device that would predict with accuracy when an elderly pilot is likely to suffer a heart attack or stroke. This has led courts to recognize that "a once valid BFOQ may lose its justification with advances in medical science. That the age 60 rule may have been a BFOQ in 1978 does not place it beyond challenge now."<sup>87</sup> Advancing technology may also destroy the relevance of other safety BFOQs if implementation of new safety devices or protective measures can prevent the feared mishaps.

Some employers also seek to justify discriminatory hiring policies on the grounds of safety to third parties, sometimes unborn third parties. The Supreme Court confronted one such case in *International Union v. Johnson Controls, Inc.*<sup>88</sup> There, the Court rejected an employer's paternalistic policy of refusing employment to fertile women for certain positions in which they would be exposed to lead, a known cause of birth defects.<sup>89</sup> The Court held that the employer could not assert infertility as an essential qualification of the job to justify its

---

83. See, e.g., *Criswell*, 472 U.S. at 2744-45; *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984).

84. See *Criswell*, 472 U.S. at 419. Contrast *Criswell* with *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), where the Fifth Circuit held that the exclusion of males from flight attendant positions was not necessary to preserve the essence of the employer's business. See *Diaz*, 442 F.2d at 388. While female flight attendants might make customers happier, and thus might increase the probability that a passenger will fly with Pan Am in the future, the sex of the flight attendant made no difference in the performance of the flight attendant's duties. See *id.* at 389.

85. See *Coupé v. Fed. Express Corp.*, 121 F.3d 1022, 1026 (6th Cir. 1997).

86. See *Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984).

87. *Id.*

88. 499 U.S. 187 (1991).

89. See *id.* at 206-07. Although the policy appeared paternalistic, Justice White's concurrence recognized that the employer has a legitimate desire to avoid tort liability for any harm to unborn children and that its practices might be a manifestation of this desire. See *id.* at 212-13 (White, J., concurring).

practice, as the safety of any potential fetus was not "essential" to the employer's business and could not be the basis for a BFOQ.<sup>90</sup> After *Johnson Controls*, it is highly unlikely that an employer can ever justify discriminatory hiring based on paternalistic notions of what is best for the employee's safety, unless the safety of the employee also affects the safety of customers or co-workers, not family.<sup>91</sup> The view endorsed by *Johnson Controls* is that "personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination."<sup>92</sup> *Johnson Controls*, therefore, calls into question the reasoning of *Kern v. Dynallectron Corp.*,<sup>93</sup> where the Northern District Court of Texas held that being a Moslem was a BFOQ for certain pilot positions in Saudi Arabia.<sup>94</sup> Under Saudi law, any non-Moslem found in Mecca would be executed.<sup>95</sup> Assuming that the employee's refusal to comply with the Saudi exclusionary law would harm only the employee—he would be decapitated—the *Kern* holding prevents such employees from deciding for themselves whether to bear the risk of their conduct.<sup>96</sup> In so holding, the court apparently reasoned that employers could discriminate when necessary to protect potential employees from serious harm,<sup>97</sup> reasoning which the Supreme Court rejected in *Johnson Controls*.

---

90. See *id.* at 206.

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job.

*Id.*

91. See *Mantolete v. Bolger*, 767 F.2d 1416, 1425 n.1 (9th Cir. 1985) (Rafeedie, J., concurring) ("[R]isk to the plaintiff is not sufficient to establish either a bona fide occupational qualification or the business necessity defense.").

92. *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980) (Sprouse, J., concurring).

93. 577 F. Supp. 1196 (N.D. Tex. 1983).

94. See *id.* at 1201.

95. See *id.* at 1198. Today, because of the amendments to Title VII of the Civil Rights Act of 1991, the employer's discriminatory hiring policies would probably have passed muster under the "compliance with foreign law" exception. See 42 U.S.C. § 2000e-1(b) (1994) (allowing discrimination in a foreign country if done to comply with foreign law).

96. Of course, it is possible that the court was considering the fact that a decapitated employee would leave passengers stranded in Mecca, thereby seriously harming the employer's business.

97. See *Kern*, 577 F. Supp. at 1200.

## 2. Privacy and the Rehabilitation of Prisoners

Although the Supreme Court has not encountered a BFOQ defense based on privacy, the lower federal courts "have consistently recognized that privacy interests may justify sex-based requirements for certain jobs."<sup>98</sup> In recognition of the fact that many people are more comfortable if members of the same sex see them unclothed,<sup>99</sup> courts have accepted a privacy rationale for discrimination based on sex, after an analysis of whether less intrusive measures were feasible.<sup>100</sup> To show that the employment practice is narrowly tailored, some courts require defendants to demonstrate that a simple rearrangement of job responsibilities would be insufficient to protect the privacy interests of patrons.<sup>101</sup>

One court that accepted sex as a BFOQ permitted a hospital to discriminate against male nurses who wanted to serve in the obstetrics and gynecology unit.<sup>102</sup> Several courts have held that psychiatric hospitals may discriminate on the basis of sex through requirements that one staff member of each sex be available to patients in order to protect the patients' privacy.<sup>103</sup> However, at least one court has questioned the privacy rationale, asking: "Is it significant that preferences for privacy from members of the opposite sex may be entirely culturally created, and that by recognizing such preferences the courts may

---

98. *Johnson Controls II*, 499 U.S. 187, 219 n.8 (White, J., concurring).

99. Of course, it is arguable that this feeling of discomfort is a product of a culture that is entitled to no greater protection than the discomfort that members of one race or ethnic group might feel around members of another race or ethnic group.

100. See *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1415-16 (N.D. Ill. 1984) ("When privacy considerations of clients or guests serve as a reason for hiring only members of one sex . . . the defendant must also prove that no reasonable alternatives exist to its gender-based hiring policy.").

101. See, e.g., *United States v. Gregory*, 818 F.2d 1114, 1118 (4th Cir. 1987) ("The burden of proof is on the employer-defendant to establish a BFOQ, and it appears that the defendant below offered no evidence demonstrating why it could not accommodate, through the reasonable modification of the facility and job functions, female corrections officers.").

102. See *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982). The legislative history of Title VII indicates that members of Congress felt that the desire of elderly women to be treated only by women nurses was a legitimate one, regardless of privacy concerns, and that the BFOQ provision would help ensure that the fulfillment of this desire would not result in liability under Title VII. See 110 CONG. REC. 2718 (1964) (statement of Rep. Goodell).

103. See *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996); *Jennings v. N.Y. State Office of Mental Health*, 977 F.2d 731, 732 (2d Cir. 1992) (per curiam).



encourage sex differences at the expense of equality in employment?"<sup>104</sup> For most courts, the answer seems to be "no."

As another court has stated, "[I]t is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race."<sup>105</sup> Yet, courts have recognized a privacy-based sex BFOQ based on customer preference when female customers object to men touching them or seeing them naked.<sup>106</sup> In *Fesel v. Masonic Home of Delaware, Inc.*,<sup>107</sup> a federal district court ruled that in a senior citizen home, being a woman is a BFOQ for an orderly because the resident women would not consent to male workers bathing them or being subject to other intimate personal contact with male workers.<sup>108</sup> This practice, so the court thought, required the employer to hire only women for such positions, despite the fact that men could perform the essential functions of the job as well as women.<sup>109</sup> Similarly, using the rationale of privacy-based customer preference, courts allow employers to hire only male janitors in male bathhouses,<sup>110</sup> female

---

104. *Torres v. Wis. Dep't of Health & Soc. Servs.*, 838 F.2d 944, 950 (7th Cir. 1988), *vacated upon rehearing en banc*, 859 F.2d 1523 (7th Cir. 1988). The Fifth Circuit has suggested that "Congress intended that customer preference might be considered when applying the BFOQ exception." *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 298 (N.D. Tex. 1981).

105. *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982).

106. *See Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979). *Cf.* Jill Gaudio, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 693 (1998) ("[E]mployers pleading a BFOQ defense may not rely on customer or client preferences."). Obviously, a woman's interest in privacy is greater than a man's interest in being served by only female flight attendants. The point here is simply to note that while one is permitted and the other is not, both interests are based on customer preference, and not on the ability of men or women to perform the actual tasks of the jobs.

107. 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

108. *See id.* at 1354. Perhaps because of the lower expectation of privacy in prisons, neither male nor female prisoners have fared as well as female nursing home residents when they complained about guards of the opposite sex viewing them in revealing sleepwear or various states of undress. *See Canedy v. Boardman*, 16 F.3d 183, 187 (7th Cir. 1994) ("The cases therefore hold that sex is not a bona fide occupational qualification preventing women from working in all-male prisons and that pat-down searches and occasional or inadvertent sighting by female prison employees of inmates in their cells or open showers do not violate the inmates' right to privacy."); *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980). *But see Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1994) (stating that in the BFOQ analysis courts have not used "a more deferential standard than the normal Title VII analysis merely because the employer was a prison").

109. *See Fesel*, 447 F. Supp. at 1351.

110. *See Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1416-17 (N.D. Ill. 1984) (holding that sex is a BFOQ for washroom attendants); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1133 (S.D. W. Va. 1982).

nurses,<sup>111</sup> male treatment assistants,<sup>112</sup> male hospital orderlies,<sup>113</sup> and female prison guards,<sup>114</sup> even though members of the excluded sex are just as capable of performing the essential duties of the particular jobs. The courts that have permitted the privacy-based sex BFOQ believe that the very sex of the excluded individuals prevents them from giving customers adequate privacy. Accordingly, the test for the privacy-based sex BFOQ is whether the excluded applicants can satisfactorily respect the privacy of customers in the performance of the job.<sup>115</sup>

Although all BFOQs can be characterized as a capitulation to customer preference,<sup>116</sup> these privacy-based BFOQs present the prime example of this form of discrimination. The privacy rationale is even more remarkable, considering that in most instances courts design it to protect the sensibilities and preferences only of women.<sup>117</sup> Yet, courts frequently reject customer preference rationales for employers who hire only male executives,<sup>118</sup> waiters,<sup>119</sup> or bus drivers,<sup>120</sup> or only females as flight attendants<sup>121</sup>—especially slender female flight attendants<sup>122</sup>—or as health club instructors.<sup>123</sup> These courts reason that allowing a BFOQ because of customer preference in these cases

---

111. See *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1194 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100, 1102-03 (8th Cir. 1982).

112. See *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376 (S.D.N.Y. 1992) (per curiam). Interestingly, *Jennings* added another requirement to the defendant's burden of proving the applicability of a privacy-based sex BFOQ: the patients' privacy interest is entitled to protection under the law. See *id.* at 383-84. This element might be implicit in the other elements of the sex BFOQ in other privacy decisions, as protecting a weak privacy interest hardly seems essential to a defendant's business.

113. See *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933, 936-37 (S.D. Miss. 1987).

114. See *Robino v. Iranon*, 145 F.3d 1109, 1110-11 (9th Cir. 1998).

115. See *Jennings*, 786 F. Supp. at 385.

116. See *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980) (noting that Congress "has indicated that customer preference may be considered under the limited 'bona fide occupational qualification' exception in the areas of religion, sex, and national origin"), *rev'd on other grounds*, 456 U.S. 273 (1982).

117. See, e.g., *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

118. See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981).

119. See *Levandos v. Stern Entm't, Inc.*, 723 F. Supp. 1104, 1107 (W.D. Pa. 1989), *rev'd on other grounds*, 909 F.2d 747 (3d Cir. 1990).

120. See *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1453, 1472 (S.D.N.Y. 1987).

121. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

122. See *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 608 (9th Cir. 1982).

123. See *EEOC v. Sedita*, 755 F. Supp. 808, 810-11 (N.D. Ill. 1991); see also *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (rejecting the possibility that race could be a BFOQ in equal protection cases where prisoners demand guards of their own race).

“would only serve to perpetuate the very prejudice that Title VII was meant to overcome.”<sup>124</sup> Apparently, the courts believe that no such prejudice is operating in the privacy cases. Furthermore, within the privacy cases, the courts deem the interests of ordinary customers in their privacy to be less than those of patients in nursing and health care facilities.<sup>125</sup>

Where the privacy of female inmates is considered necessary for their rehabilitation—particularly where they have been sexually or physically abused by men—courts will hold that being a woman is a bona fide qualification for certain prison guard positions.<sup>126</sup> Similarly, in *Healey v. Southwood Psychiatric Hospital*,<sup>127</sup> the employer-hospital based its discrimination against women in making job assignments in part on privacy concerns and in part on a therapeutic element.<sup>128</sup> The hospital claimed it had designed the discrimination to ensure that there were a sufficient number of men on the staff in order to provide “role models” for the male patients.<sup>129</sup> This case shows how defendants generally may couple other concerns with the privacy justification to obtain protection under the BFOQ provision. However, courts have also limited the use of the BFOQ defense in these situations, lest the exception swallow the rule; they look to see whether alternatives to complete discrimination—such as limiting job assignments—could sufficiently protect the privacy of the inmates.<sup>130</sup> Thus, female institutions cannot completely prohibit men from serving as guards, or vice-versa. However, as in the nursing home setting, employees may be restricted from assignments that entail observing undressed inmates or being alone with an inmate of the opposite sex.<sup>131</sup>

A few cases go beyond *Healey* and hold that prisons can discriminate against a particular sex even if it is necessary *solely* for the inmates’ rehabilitation, regardless of privacy concerns.<sup>132</sup> In *Torres v. Wisconsin Department of Health & Social Services*,<sup>133</sup> the employer justi-

---

124. Befort, *supra* note 51, at 14.

125. Others have tried to reconcile this seeming contradiction by suggesting that customer preference may “constitute a BFOQ if it is so extreme as to result in complete impossibility of performance.” *Id.* at 15.

126. See *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998).

127. 78 F.3d 128 (3d Cir. 1996).

128. See *id.* at 133.

129. See *id.*

130. See *Hardin v. Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir. 1982).

131. See *Robino*, 145 F.3d at 1111.

132. See *Torres v. Wis. Dep’t of Health & Soc. Servs.*, 859 F.2d 1523, 1532 (7th Cir. 1988) (en banc).

133. 859 F.2d 1523 (7th Cir. 1988) (en banc).

fied the exclusion of male guards from a prison for women because of a perceived need to limit contact between female prisoners and male authority.<sup>134</sup> The employer based the exclusion of men on a belief that it would aid prisoners in their rehabilitation.<sup>135</sup> The court had no trouble with the prison's assertion that rehabilitation is a goal within the essence of a prison's function.<sup>136</sup> The real problem came with the tailoring of the means employed to serve this end, as the prison presented no evidence that excluding males from guard positions would actually benefit the inmates.<sup>137</sup> However, the court did not appear overly concerned with this omission, since at the time no studies on the subject existed, making it more difficult for the defendant to prove its case.<sup>138</sup> Because the policy was a good attempt at rehabilitation, the court believed that prison officials were entitled to experiment with this penological technique.<sup>139</sup>

[T]heir judgments . . . are entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience. The fact that the program is considered a reasonable approach by other professional penologists also is a factor to be given significant consideration. In an area where the questions are so many and the answers so few, the range of reasonable options must necessarily be more extensive. Certainly, the court ought not require unanimity of opinion and ought not to substitute completely its own judgment for that of the administration.<sup>140</sup>

However, this deference should not fool other employers into believing that they too will receive this type of light review. Courts only grant prison officials this broad discretion, and three of the eleven judges of the *en banc* court believed too much deference was shown.<sup>141</sup>

### 3. Performance of Actual Occupational Tasks

Employers can also justify discrimination when the ability to physically perform the essential tasks of the job is tied to sex, religion, or national origin. For example, although discrimination against pregnant women is a form of sex discrimination under the Pregnancy Discrimination Act, sex is sometimes found to be a BFOQ when pregnant employees cannot perform all of the essential functions of a given

---

134. *See id.* at 1530.

135. *See id.*

136. *See id.*

137. *See id.* at 1531.

138. *See id.* at 1532.

139. *See id.*

140. *Id.*

141. *See id.* at 1534 (Cudahy, Cummings & Easterbrook, JJ., dissenting).

job.<sup>142</sup> Thus, one employer claimed that sex (or “non-pregnancy”) was a BFOQ because employees had to be able to lift seventy-five pounds, and most pregnant women were not up to the task.<sup>143</sup> However, in that particular case, the employer nevertheless failed to establish the BFOQ defense because the lifting requirement was not a truly necessary part of the plaintiff’s job, as evidenced by the employer’s failure to enforce the lifting requirement on all employees.<sup>144</sup>

In another type of performance case, the Seventh Circuit held that the ability to speak English was a BFOQ for employees in a tertiary care hospital.<sup>145</sup> Therefore, discrimination against Latinos who could not speak English was not a violation of Title VII.<sup>146</sup> The Ninth Circuit has recognized that employers may justify a fluency requirement in the entertainment industry, as the audience must be able to understand the entertainers on some level.<sup>147</sup> The court opined:

[A] disc jockey may be required to speak English as a condition of employment and . . . may be required to broadcast exclusively in that language if the station owner so desires. The ability to speak the language in which the program is to be broadcast is obviously a bona fide occupational qualification for any broadcaster.<sup>148</sup>

Despite these two instances, use of the performance justification is rare because sex, religion, and national origin seldom, standing alone, prevent a person from performing the essential tasks of most occupations.

#### 4. Authenticity

Courts have also recognized that the authenticity of a product or service sometimes requires that employees be members of a particular sex, nationality, or religion. For example, French or Chinese restau-

---

142. 42 U.S.C. § 2000e(k) (1994).

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . .

*Id.*

143. See *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998).

144. See *id.* at 437.

145. See *Garcia v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 660 F.2d 1217, 1222 (7th Cir. 1981). “A ‘tertiary care hospital’ is a highly specialized medical facility (which provides) . . . sophisticated diagnostic services and treatment which normally can(not) be provided by secondary and primary care facilities.” *Id.* at 1221.

146. See *id.*

147. See *Gutierrez v. Mun. Court*, 838 F.2d 1031, 1041 n.13 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

148. *Id.*

rants may need to hire only chefs from France or China in an effort to retain authenticity in the cooking.<sup>149</sup> Similarly, the Equal Employment Opportunity Commission ("EEOC") guidelines relating to BFOQs recognize that employers may lawfully discriminate against men in hiring actresses to play the part of female characters in theatrical productions.<sup>150</sup> Religion can also be a BFOQ based on the need for authentic religious ceremonies.<sup>151</sup> Thus, where a particular church discriminates against non-adherents in hiring ministers to perform religious rites, religion can be a BFOQ.<sup>152</sup> Similarly, in churches like the Roman Catholic Church, where ecclesiastical law decrees that only men may be ordained priests, the sex BFOQ is applicable to protect the authenticity of the church's ministry.

At the other end of the spectrum, a mere clause in a school system's charter that mandates the hiring of teachers belonging to a certain religion will not make religion a BFOQ, presumably based on fears that this would make it too easy to get around Title VII. Thus, the Ninth Circuit held that the Kamehameha Schools of Hawaii illegally discriminated against a prospective teacher by refusing to consider her because she was not a Protestant, even though the schools had adopted a mandate requiring them to hire only members of Protestant religions.<sup>153</sup> Adherence to a Protestant religion was not a BFOQ because the teaching of religious tenets or values was not an essential part of the schools' mission, and in fact, the schools did not vigorously enforce the Protestant-only requirement.<sup>154</sup> Contrast that case to *Pime*, discussed above,<sup>155</sup> where a divided panel of the Seventh Circuit held that being a Jesuit priest was a BFOQ for a teaching position at a nominally Catholic university.<sup>156</sup> It is hard to reconcile these two cases,

---

149. See *Util. Workers v. S. Cal. Edison*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970); 110 CONG. REC. 7213 (1964) (prepared statement of Sen. Clark & Sen. Case).

150. See 29 C.F.R. § 1604.2(a)(2) (2000) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.").

151. See 42 U.S.C. § 2000e-2(e) (1994).

152. Religious institutions are also protected by another provision, see 42 U.S.C. § 2000e-1(a) (1994), which states that Title VII does not apply to religious corporations, associations, or educational institutions "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by" such institutions. *Id.* Because of the broader protection provided by this exemption, defendants seldom have to resort to the religion BFOQ to defend a religious discrimination claim.

153. See *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 465 (9th Cir. 1993).

154. See *id.* at 462.

155. See discussion *supra* notes 34-37 and accompanying text.

156. See *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 353-54 (7th Cir. 1986).

particularly because in *Pime*, the university conceded that non-Jesuits could teach philosophy just as effectively as Jesuit priests.<sup>157</sup>

In any event, defendants rarely use the authenticity justification in litigation, partly because sex, religion, and national origin are not usually impediments to performing actual tasks of employment. Nevertheless, as discussed below,<sup>158</sup> an authenticity justification may be the best justification for directors seeking to discriminate in casting actors of a particular race, particularly in plays and movies based on history or which take place in a particular time period and/or location.

## II. Congress' Failure to Enact a Race or Color BFOQ

The instances of controlled discrimination discussed above generally seem innocuous and are largely uncontroversial. Likewise, it seems that employers could justify race and color discrimination for the same reasons, such as authenticity, especially in the world of arts and entertainment. Discriminating against whites in hiring black actors to play the parts of black characters would presumably be acceptable to most reasonable people.<sup>159</sup> Indeed, the EEOC has recognized that the entertainment industry is one place where discrimination might be necessary.<sup>160</sup> Similarly, seeking only black applicants to work as investigative reporters in the African-American community might be necessary in some instances and unobjectionable to most people. The catch, however, is that race is not an explicitly authorized basis for discrimination under Title VII, and it is important to understand why.

---

157. See *id.* at 356 (Posner, J., concurring). Judge Posner, concurring in *Pime*, may have had the better of the argument:

*Pime* was turned down for a tenure-track position in Loyola's philosophy department not because he is a Jew, not because he is not a Catholic, but because he is not a member of the Jesuit order. I therefore do not think he has been deprived of an employment opportunity because of his religion.

*Id.* (Posner, J., concurring).

158. See discussion *infra* Parts III, V.A.2.

159. The United Kingdom, for example, recognizes race as a genuine occupational qualification where the authenticity of a business requires racial discrimination in hiring. See Bryan D. Glass, Comment, *The British Resistance to Age Discrimination Legislation: Is It Time to Follow the U.S. Example?*, 16 COMP. LAB. L.J. 491, 505 (1995).

160. See 29 C.F.R. § 1604.2(a)(2) (2000) (stating that a sex BFOQ exists in hiring actors where it is necessary for authenticity).

## A. The Gravity of Race Discrimination

Numerous courts have opined that Congress intentionally elected not to include race or color as a basis for a BFOQ defense.<sup>161</sup> “Congress, in its determination to eliminate this form of discrimination, did not provide for exceptions to race and color discrimination, not even narrow ones.”<sup>162</sup> Courts base this opinion primarily on the legislative history of Title VII, which indicates that Congress explicitly considered and rejected a race BFOQ.<sup>163</sup> In particular, the House of Representatives considered an amendment to the BFOQ provision that would have included race and color.<sup>164</sup> In support of the amendment, Congressmen repeatedly mentioned the need to protect movie producers who needed to discriminate based on race and skin color.<sup>165</sup>

I commend the gentleman from Mississippi for offering this amendment. I have in mind a situation where a theatrical group wants to put on Shakespeare's great tragedy “Othello.” They need a particular type of individual to play the part of Othello. How could that be accomplished unless the gentleman's amendment is adopted? How could they possibly get the type of individual to play that part unless we incorporate the words “race or color” in this section.<sup>166</sup>

Nevertheless, Congress rejected the amendment.

Congress' decision not to include race or color in the BFOQ provision is partially due to its belief that race discrimination was more prevalent and harmful than discrimination on the basis of religion, sex, or national origin.<sup>167</sup> “[A]ntidiscrimination law seeks to exercise a

---

161. See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (stating the omission of race or color from Title VII's BFOQ provision was “certainly not by an oversight”); *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982).

162. Robert J. Aalberts & Lorne H. Seidman, *Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of Childress v. City of Richmond*, 26 PEPP. L. REV. 261, 281 (1999).

163. See 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

164. See 110 CONG. REC. 2550 (1964) (amendment offered by Rep. Williams).

165. See *id.* (statement of Rep. Huddleston & Rep. Williams).

166. *Id.* (statement of Rep. Huddleston).

167. See, e.g., *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991).

The Supreme Court does not consider discrimination against women to be as invidious—as harmful and as difficult to justify—as discrimination against blacks or other racial minorities; nor, to come to the point, does it consider discrimination against men to be as invidious as racial discrimination. In treating sex discrimination less severely than racial discrimination, the Court is following a distinction in Title VII of the Civil Rights Act of 1964, which establishes a defense



far more sweeping transformation of race than of gender, as is evident in the fact that Title VII does not even contain a BFOQ exception for race."<sup>168</sup> "Title VII, by its own terms, appears to find something particularly heinous about race discrimination."<sup>169</sup> "Title VII is a blanket prohibition of racial discrimination, rational and irrational alike, even more so than of other forms of discrimination attacked by Title VII."<sup>170</sup> The Congressmen speaking in opposition to amending the BFOQ provision to include race or color stated quite plainly that they feared any such exception would single-handedly negate the anti-discrimination provision of Title VII, stating:

A grave difficulty arises when we contemplate the substitute amendment. You must remember that the basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color. Now the substitute amendment, I fear would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole that could well gut this title.<sup>171</sup>

The trouble with the amendment offered by the gentleman from Mississippi is that it opens it up a good deal more than the case of a casting director looking for actors to play certain roles in a dramatic production. If it was limited to that, it would be a lot more acceptable than it is. But it opens up other possibilities that I do not think any of us would want to open.<sup>172</sup>

## **B. The Belief That Title VII Does Not Cover Benign Race Discrimination**

Another reason that race was not included in the BFOQ provision was the mistaken belief on the part of some Congressmen that it was unnecessary.<sup>173</sup> In particular, some Congressmen thought that Ti-

---

of bona fide occupational qualification for sex discrimination but denies it for racial discrimination.

*Id.* (citations omitted).

168. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 37 (2000).

169. Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 603 (1998). Schneyer continues, "This is important because it gives the appearance of reducing the importance of sex discrimination: if Congress would allow BFOQs for sex but not for race, sex discrimination must not be as bad as race discrimination." *Id.* But this reasoning fails to take into account the possibility that Congress thought that there were more instances, and probably more important instances (such as the privacy cases), in which sex discrimination could be justified as opposed to the few instances where race discrimination is "necessary."

170. *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982).

171. 110 CONG. REC. 2556 (1964) (statement of Rep. Celler).

172. *Id.* (statement of Rep. O'Hara).

173. See Peterson, *supra* note 6, at 354.

the VII did not prohibit certain forms of benign race discrimination.<sup>174</sup> This assumption appears to be the case especially with respect to the entertainment industry. For example, members of the Senate questioned the floor managers as to whether the Harlem Globe Trotters or movie directors could discriminate based on race.<sup>175</sup> They responded that both groups would be exempt from Title VII in the first instance.<sup>176</sup> The Globe Trotters would be exempt because they presumably would have too few employees to be covered by Title VII.<sup>177</sup> The movie directors would be able to discriminate based on "physical appearance," as opposed to discriminating based on race, under Title VII.<sup>178</sup> Members of the House held similar beliefs.<sup>179</sup> As Congressman O'Hara stated: "In the example used, which involved a dramatic performance, some particular role may require a person whose skin is of a particular hue. I do not think that when you seek such person for that role, you come within the meaning of the unfair practices described in this bill."<sup>180</sup> Based on these beliefs, Congress exercised its discretion and excluded a race or color BFOQ from Title VII and has not found it necessary to subsequently amend the statute to protect this form of discrimination.

### III. The Reasonableness and Utility of a Race or Color BFOQ

Despite Congress' omission of race<sup>181</sup> from the BFOQ provision, people accept the reasonableness and morality of recognizing a BFOQ for race, at least in some instances involving the entertainment industry.<sup>182</sup> Indeed, to demonstrate the necessity of a race BFOQ, some scholars use as their prime example the need to employ black actors to portray black characters.<sup>183</sup> As one academician has written: "[W]e ought to admit the possibility of a BFOQ in the case of race, as the federal law does not, because there seems nothing harmful, in a realist production, in requiring that we have actors who look—and

---

174. See 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

175. See *id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See *id.*

180. *Id.* at 2556 (statement of Rep. O'Hara).

181. Some Congressmen had a strange notion as to what constitutes "race." "The five races of man are white, black, brown, yellow, and red. I think it is clear that the American Indian is a matter of race, not national origin." *Id.* at 2562 (statement of Rep. Huddleston).

182. See Appiah, *supra* note 5, at 46-47.

183. See *id.*

sound—like people of whatever racial identity they are representing.”<sup>184</sup> Moreover, even the EEOC—which frequently finds invidious discrimination wherever it looks—recognizes the need for realistic actors, at least with respect to sex.<sup>185</sup> It has stated that “[w]here it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.”<sup>186</sup> Similarly, Justice Stevens—hardly a shrinking violet on racial issues—argued that race must be taken into account in making some hiring and placement decisions, at least for governments:

[I]n our present society, race is not always irrelevant to sound governmental decisionmaking: To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.<sup>187</sup>

It can also be argued that race is essential to some positions in which the employees act as role models for children.<sup>188</sup> Since it might be easier for children to identify with someone of their own race and sex, it might be necessary to hire individuals on these bases in order to provide children with adequate models after whom they can emulate and pattern their own behavior.<sup>189</sup> This argument may have particular

---

184. *Id.*

185. See 29 C.F.R. § 1604.2(a)(2) (2000).

186. *Id.*

187. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) (footnote omitted). See also *Garcia v. City of Houston*, 201 F.3d 672, 676 n.3 (5th Cir. 2000) (discussing how defendant originally attempted to establish a race BFOQ for hiring blacks based on the need to infiltrate black neighborhoods in undercover operations).

188. See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (holding that discrimination against an unmarried pregnant woman was protected by the BFOQ provision because staff members were required to be good role models for the children with whom they worked); see also Judy Laurinatis, *Charter Schools Seen as Budget Drain*, *PITT. POST-GAZETTE*, Dec. 13, 2000, LEXIS, Pittsburgh Post-Gazette File (“We have African-American role models and teachers. We have African-American men as teachers and counselors’ . . . . The value of children having someone with their cultural background teaching them can’t be overstated . . . .”); *Wanted: Minority Teachers*, *THE HERALD* (Rock Hill, S.C.), Sept. 18, 2000, LEXIS, The Herald (Rock City, S.C.) File (“Black teachers bring new cultural dimensions to the classroom and provide adult role models for students.”).

189. See Mike Berry, *Personality Is Key in School Election*, *ORLANDO SENTINEL*, Oct. 29, 2000, LEXIS, Orlando Sentinel File (“[T]he school district needs to attract more black

force in support of hiring black, male teachers to teach black, male children,<sup>190</sup> as these children frequently do not have adequate male role models in their homes.<sup>191</sup> This reasoning obviously extends beyond workers who directly deal with children; news and entertainment personnel can also serve as role models for children and in fact have access to a larger group of children than does the average teacher, due the breadth of the entertainment media. In discrete instances, employers in these industries might perceive a need to discriminate based on race or color.<sup>192</sup> Consequently, scholars and students of the

---

male teachers to serve as role models.”); Cheryl M. Harris, *Schools Seek Black Teachers as Role Models*, DAYTON DAILY NEWS, Feb. 12, 2001, LEXIS, Dayton Daily News File (“Students should not go through 12 years of school seeing only one kind of teacher and role model . . .”); Clark Kauffman, *Transracial Adoptions Encounter Opposition*, DES MOINES REG., Nov. 13, 2000, LEXIS, Des Moines Register File (“The kids need black teachers, black role models . . .”). As the Court in *Wygant* noted, “Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*.” *Wygant*, 476 U.S. at 276 (citation omitted).

190. Even if there were a race BFOQ for Title VII, however, public school teachers would have to contend with the plurality holding in *Wygant* that the need for same-race role models is not a compelling interest where there has been no showing of a history of overt discrimination. See *Wygant*, 476 U.S. at 276 (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness.”). Regardless, even slightly imaginative administrators can (and probably do) get around *Wygant* in hiring minority teachers. See Lois K. Solomon, *Teachers Study New Building Staff Hiring Almost Finished*, SUN-SENTINEL (Ft. Lauderdale), June 15, 2000, LEXIS, Sun-Sentinel (Fort Lauderdale) File (discussing a school principal’s statement that she is “desperately seeking black teachers for her remaining three openings because one of the school’s major concerns is having role models for its children”). Furthermore, *Wygant* does not necessarily preclude discriminatory work assignments, particularly because comparable assignments do not carry the detriment to other employees that a lay off does. *Wygant* also does not extend to private actors, and so if there were a race BFOQ, private schools could legally discriminate in hiring, a practice that may already occur despite Title VII. See Suzanne Pardington, *School Teaches Lesson in Pride, Discipline. Black Students Get One-on-One Attention*, SEATTLE TIMES, Sept. 17, 2000, LEXIS, Seattle Times File (discussing how at Malcolm X, a private school, administrators try “to combat the statistics by giving each student individual attention” and “hiring black male teachers as role models”).

191. See Tamara Henry, *Call Them Mister S.C. Program Aims to Boost Number of Black Male Teachers at Elementary Level*, USA TODAY, Jan. 30, 2001, at 9D (“Black youngsters, especially boys, are in desperate need of role models and teachers they can relate to, who can show them that success and a productive life are possible . . .”). Some educators have suggested that black male children simply need *male* role models. See Frank Cerabino, *Educator Sees Few Role Models for Black Teens*, PALM BEACH POST, June 4, 2000, LEXIS, Palm Beach Post File (stating that positive male role models are “missing in the lives of too many black boys” and that these boys “not only have no males at home; they virtually have no males at school”). Accordingly, because Title VII contains a sex BFOQ, the contours of this role model justification will probably be fleshed out through sex discrimination in the hiring of male teachers, regardless of their race.

192. It could be argued, however, that the guidance of children is not essential to these industries, and thus is insufficient under the BFOQ standard to warrant discriminatory

law have suggested that either the legislature or judiciary create a race or color BFOQ to reach these cases.<sup>193</sup> As is demonstrated below, however, each of these proposals has its pitfalls.<sup>194</sup>

#### IV. Judicial Creation of a Race or Color BFOQ

One way around Congress' failure to enact a BFOQ for race is for the judiciary to create such a defense. There are some good arguments for doing so. Among the best is the argument that recognition of a race BFOQ would be in accordance with one of the purposes of Title VII: remedying the under-representation of minorities in the workplaces of America caused by discrimination.<sup>195</sup> Since courts are to construe statutes to effect their purposes, recognizing a race BFOQ would protect those employers who discriminate in favor of minorities, perhaps resulting in more minorities on the stage and in film. Some argue that judicially crafting such a rule is a proper course of action.<sup>196</sup> Indeed, some scholars suggest that the very necessity of racial discrimination in the selection of cast members led the Seventh Circuit to recognize a race BFOQ in *Wittmer v. Peters*,<sup>197</sup> regardless of Congress' failure to specifically create one.<sup>198</sup> However, this is just one side of the story.

##### A. Contrary to Title VII's Purpose

Even assuming that courts can correctly ascertain a statute's purpose,<sup>199</sup> the belief that a common law extension of a statute is in accordance with the statute's purpose or is "necessary" does not make it

---

hiring or assignment. The same might be said with respect to discrimination against teaching applicants or employees.

193. See Peterson, *supra* note 6, at 355.

194. See discussion *infra* Part IV.

195. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557 (3d Cir. 1996) (en banc) (stating that Title VII was designed "to remedy the segregation and under-representation of minorities that discrimination has caused in our Nation's work force").

196. See Gaulding, *supra* note 106, at 692 n.277.

197. 87 F.3d 916 (7th Cir. 1996).

198. See Gaulding, *supra* note 106, at 692 n.277 ("A very narrow judge-made exception does allow employers to select employees based on race in those few instances where it is truly necessary (e.g., for an acting job).").

199. See LON FULLER, *THE MORALITY OF LAW* 87 (Yale Univ. Press, rev. ed. 1964) ("A statute, it may be said, does not serve a purpose as simple and as easily defined as, for example, that of a vacuum cleaner. The social mischief it seeks to remedy is often subtle and complex, its very existence being perceptible only to those holding certain value judgments.").

a legitimate exercise of judicial power.<sup>200</sup> As one court states, "Congress had lofty goals [in enacting Title VII] but provided limited means for reaching those goals."<sup>201</sup> Courts that reach beyond the means provided by Congress risk rewriting Title VII's BFOQ provision.<sup>202</sup> Furthermore, most courts agree that the failure to include a race BFOQ provision was an intentional act,<sup>203</sup> and any judicial action to manufacture one would clearly be contrary to the will of Congress.<sup>204</sup> Courts cannot overlook statutory limitations on the chosen means simply because they serve important purposes, especially where this would be contrary to the clear intent of Congress. The judicial creation of a BFOQ defense based on race or color seems to be just such an act.

### B. Misplaced Reliance on *Wittmer v. Peters*

Despite these concerns, proponents of a race or color BFOQ could point to *Wittmer* as an example of a court creating a race BFOQ.<sup>205</sup> *Wittmer* involved an employer who passed over white prison guards for a promotion to lieutenant in favor of a black guard who

---

200. And in this instance, the chosen means is contrary to another purpose of Title VII: "barring considerations of race from the workplace." *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1558 (3d Cir. 1996) (en banc).

201. *Hudson v. Soft Sheen Prods., Inc.*, 873 F. Supp. 132, 136 (N.D. Ill. 1995) (rejecting individual liability under Title VII).

202. As one court has noted, "There are a host of . . . examples of judge-made statutory exceptions so weakly rooted in the statute as to be fairly described as judicial amendments." *Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481, 484 (7th Cir. 1997).

203. See *Ray v. Univ. of Ark.*, 868 F. Supp. 1104, 1126 (E.D. Ark. 1994).

204. Judicial amendment of a statute is justified only in limited circumstances, such as when Congress provided no rule on a subject before the court, where it is necessary to save the statute from being struck down as unconstitutional, where Congress essentially authorized courts to legislate on an issue, or where the statute would otherwise create an absurdity. As the Seventh Circuit stated:

[C]ourts do not create exceptions to statutes every time it seems that the legislature overlooked something. The legislative role of the courts is more confined than that of the legislature. The judges will create a statutory exception only when, as in the union-shop cases, it is necessary to save the statute from being held unconstitutional, or when they have great confidence that the legislature could not have meant what it seemed to say. . . . The first criterion is really included in the second; the legislature presumably would not have wanted the statute struck down in its entirety.

*Crawford*, 115 F.3d at 484–85 (citations omitted). When the text of a statute "is unyielding and beyond rehabilitation, . . . courts are left with no choice but to construct a rule that makes the best sense, while adhering as closely as possible to what we can discern Congress would have wanted." *Rizzo v. Children's World Learning Ctrs.*, 213 F.3d 209, 220–21 (5th Cir. 2000) (Jones & Smith, JJ., dissenting), cert. denied, 121 S. Ct. 382 (2000).

205. See *Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996).

scored well below the white guards in an occupational test.<sup>206</sup> The defendants argued that the discriminatory promotion was necessary for the success of the new “boot camp” type of prison because “black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.”<sup>207</sup> The defendants backed up their claim of penological necessity with un rebutted expert evidence.<sup>208</sup> Despite the fact that this was essentially a capitulation to the racial prejudices of inmates,<sup>209</sup> this evidence led Judge Posner and his colleagues essentially to hold that race can be a BFOQ in equal protection cases concerning the promotion of prison personnel.<sup>210</sup>

### 1. Equal Protection Clause Versus Title VII

However, employers who look to *Wittmer* as support for a judicially created BFOQ for race should remember that *Wittmer* is an equal protection case, not a Title VII decision. Courts have recognized that race discrimination that satisfies equal protection standards will not necessarily withstand scrutiny under Title VII.<sup>211</sup> Judge Posner was writing on a clean slate in *Wittmer*. No such *tabula rasa* exists for Title VII, as the legislative history clearly indicates that Congress rejected a race BFOQ.

### 2. Rules of Statutory Construction

Beyond any resort to legislative history and its usual perils,<sup>212</sup> a court could simply apply the maxim of statutory construction “*expressio unius exclusio alterius*” (the inclusion of one implies the exclusion of

---

206. *See id.*

207. *Id.* at 920.

208. *See id.* at 917.

209. The Seventh Circuit apparently did not see its holding as an abandonment of the principle that customer preference is not a basis for discrimination, as it promptly repeated that very rule. *See id.* at 920 (“Nor do we hold or believe that prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race.”).

210. *See id.* at 921.

211. *See Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1560 (3d Cir. 1996) (en banc).

212. As Justice Robert Jackson wrote:

[I]t is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

another).<sup>213</sup> The fact that Title VII specifically provides for BFOQs based on sex, religion, and national origin, but not race or color, gives rise to the presumption that this defense does not extend to discrimination based on race or color. It is true that courts have disparaged the maxim as of late,<sup>214</sup> but there is little reason to believe that the failure to include race or color in the BFOQ provision was anything other than intentional. Furthermore, another rule of statutory construction states that courts must construe exemptions from remedial statutes narrowly.<sup>215</sup> Because the BFOQ provision is an exception to a remedial statute (Title VII), the Supreme Court has made clear that courts must interpret the BFOQ provision narrowly, lest the exception swallow the rule.<sup>216</sup> Expanding the defense to race or color is hardly in keeping with a narrow construction of Title VII's BFOQ provision.

### 3. Judicial Deference to State Employers

*Wittmer* provides even less support for a Title VII race BFOQ when one considers that *Wittmer* is a special kind of discrimination case. *Wittmer* was a decision involving a state employer and prison personnel, not the average employer or employment setting.<sup>217</sup> In recognition of federalist concerns,<sup>218</sup> courts will often allow state employers some discretion in their employment decisions when invidious discrimination is not readily apparent,<sup>219</sup> which may partially explain the *Wittmer* decision. In recognition of the difficulty of governing prisons, courts consistently give the states greater freedom in making employ-

---

213. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) ("If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other.").

214. See *Custis v. United States*, 511 U.S. 485, 501-02 (1994) (Souter, J., dissenting).

While often a valuable servant, the maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius*, etc.) is a dangerous master to follow in the construction of statutes. It rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false.

*Id.* (Souter, J., dissenting) (citation and internal quotations omitted). See also *Cheney R.R. Co. v. Interstate Commerce Comm'n*, 902 F.2d 66, 68 (D.C. Cir. 1990) ("Scholars have long savaged the *expressio* canon.").

215. See *EEOC v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980).

216. See *Johnson Controls II*, 499 U.S. 187, 201 (1991); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985).

217. See *Wittmer v. Peters*, 87 F.3d 916, 917 (7th Cir. 1996).

218. See *EEOC v. Mo. State Highway Patrol*, 748 F.2d 447, 450 (8th Cir. 1984).

219. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (holding that a mandatory retirement age for police officers does not violate the Equal Protection Clause).



ment decisions related to novel prison techniques.<sup>220</sup> *Wittmer* may be another manifestation of the deference shown by the Seventh Circuit in *Torres*, discussed above,<sup>221</sup> where the court accepted Illinois's assertion that being female was a BFOQ because limiting prisoner contact with males was necessary for their rehabilitation.<sup>222</sup> Since these same principles and concerns are not usually present in most other employment settings, there is little basis to believe that courts will show the same deference to non-governmental employers who assert race as a BFOQ. With this in mind, it would be ill-advised to look to the courts to create a race BFOQ for the entertainment or any other industry.

### C. Rejection of the Judicially Created Race BFOQ

At least one district court has rejected the possibility of a judicially created race BFOQ. In *Ray v. University of Arkansas*,<sup>223</sup> many of the black students and university administrators complained about a white police officer, Ray, at a predominantly black university.<sup>224</sup> Ray's superiors claimed that his race diminished his effectiveness as an officer and supported this assertion with evidence that some African-American students shot at the plaintiff while others hurled racial epithets and vulgarities at him.<sup>225</sup> The black chief of police viewed the plaintiff's race negatively and believed that any "white officer would be perceived negatively by a portion of his constituent community which, in turn, could lead to racial responses and confrontations."<sup>226</sup> The university, therefore, discharged Ray and justified his termination with the assertion that being an African-American was a BFOQ for his position.<sup>227</sup> The court admitted that in some instances a race BFOQ might be rational.<sup>228</sup> However, the court also recognized that Congress had tied its hands as to allowing this exception; Congress had clearly declined to extend the BFOQ provision to race.<sup>229</sup> It is probably safe to assume that most other courts will follow *Ray* and reject a race BFOQ for Title VII, thus leaving Congress as the last resort for

---

220. See *supra* Part I.C.2 (discussing *Torres v. Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523 (7th Cir. 1988) (en banc)).

221. See *supra* Part I.C.2.

222. See *Torres*, 859 F.2d at 1532.

223. 868 F. Supp. 1104 (E.D. Ark. 1994).

224. See *id.* at 1106.

225. See *id.* at 1107, 1109.

226. *Id.* at 1126.

227. See *id.* at 1126-27. The case does not specifically state that the university argued for a race BFOQ, but the court addressed the argument. See *id.*

228. See *id.* at 1126.

229. See *id.*

providing protection from Title VII for benign (and sometimes not so benign) race and color discrimination.

## V. Congressional Enactment of a Race or Color BFOQ

Some commentators have recognized the problems with a judicially created race BFOQ and have called instead for Congress to amend Title VII's BFOQ provision to include race or color.<sup>230</sup> However, due to the dearth of cases dealing with the issue and little anecdotal evidence that there is a pressing need for such a BFOQ, one must first ask whether such legislative action is truly necessary.

### A. Is Legislative Action Warranted?

Because necessity is frequently the mother of legislation, one must ask whether amending Title VII's BFOQ provision to include race or color is necessary for the entertainment industry, or for that matter, any industry. As mentioned above, it is uncontroverted that in casting actors for particular parts, directors sometimes intentionally discriminate based on race.<sup>231</sup> Discriminatory practices may also exist in the television news industry, where it sometimes may be necessary to use reporters of a particular race to do undercover work, such as an exposé on the Ku Klux Klan, or where an Asian-American reporter might have better success getting other Asians to volunteer information during an interview.<sup>232</sup> These are but two obvious examples of a form of discrimination that is probably quite common; so common that many people might not even think of these practices as "discrimination." These employers, therefore, continue on without questioning their practices, perhaps believing that Title VII does not speak to their actions. The initial question is whether these employers are right: Is this conduct permissible under Title VII?

#### 1. Implicit Exemption to Title VII

Senators Clark and Case, the floor managers of the Civil Rights Act of 1964, took the position that Title VII permits some of these

---

230. See Appiah, *supra* note 5, at 47; see also Peterson, *supra* note 6, at 355; Jennifer L. Sheppard, *Theatrical Casting—Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267, 276-79 (1991).

231. See Bonnie Chen, Note, *Mixing Law and Art: The Role of Anti-Discrimination Law and Color-Blind Casting in Broadway Theater*, 16 HOFSTRA LAB. & EMP. L.J. 515, 523-24 (1999).

232. See *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 653 (5th Cir. 1980) (discussing the need for discriminatory hiring where infiltration of a criminal enterprise of a particular race is required); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (same).

discriminatory practices.<sup>233</sup> Surprisingly, they opined that selecting cast members because they “look” black, as opposed to selecting them because they are black, is in accordance with the spirit and text of the law.<sup>234</sup> In answering a question about whether a “movie company making an extravaganza on Africa [that] may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible” would violate Title VII,<sup>235</sup> the Senators responded that such discrimination based on racial appearance was permissible:

Although there is no exemption in title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be a non-Negro. Therefore, the act would not limit the director’s freedom of choice.<sup>236</sup>

Of course, “[i]solated statements of individual legislators represent neither the intent of the legislature as a whole nor definitive interpretations of the language enacted by Congress.”<sup>237</sup> The Senators’ statement is far from definitive, as the EEOC takes a position that is directly contrary to the one expressed in this excerpt.<sup>238</sup> In short, the rationale expressed in the excerpt is inconsistent with the contemporary interpretation of Title VII. The EEOC has enacted a regulation stating that the sex BFOQ provision protects the discriminatory hiring of actors based on their sex,<sup>239</sup> but it has not promulgated a similar rule as to skin color or racial appearance, despite the Senators’ assertion.

If as the Senators assert, under Title VII a director is already free to discriminate on the basis of whether an actor *looks* like a woman or a man (or a *black* man), then there would be no need for the sex BFOQ in such an instance. In other words, if Title VII already permits appearance discrimination without the BFOQ provision, there is no need for an EEOC regulation interpreting the BFOQ provision to permit discrimination based on sexual appearance. Additionally, contrary to the import of the Senators’ remarks, the Supreme Court made

---

233. See 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

234. See *id.*

235. *Id.*

236. *Id.*

237. *In re Davis*, 170 F.3d 475, 480 (5th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 822 (1999).

238. See 29 C.F.R. § 1604.2(a)(2) (2000).

239. See *id.*

clear in *Price Waterhouse v. Hopkins*<sup>240</sup> that discrimination against a woman because she acts masculine, or does not look or act in a stereotypically feminine fashion, is a basis for liability under Title VII.<sup>241</sup> Along this line of reasoning, discriminating against an Asian American because he does not sufficiently look or act white, black, or Asian would also violate Title VII, as the discrimination allows an employer to ascribe certain looks and behaviors to particular groups and award employment according to these prejudicial notions. Moreover, Title VII also prohibits discrimination based on "color."<sup>242</sup> Even if a director's plea that he was only discriminating based on the color of the actor's skin frees him from penalties for race discrimination, he has just admitted to discriminating based on color.

As it is, however, courts agree that Congress made an intentional decision not to include race or color in the BFOQ provision.<sup>243</sup> Indeed, the use of race as a job qualification is just the sort of practice that the Title VII of Civil Rights Act of 1964 was intended to prevent.<sup>244</sup> The legislative record demonstrates that Congress specifically desired to eliminate the possibility that employers would use race as a job qualification, although the legislative history also shows that Congress might not have appreciated the full extent to which it was outlawing the practice.<sup>245</sup> However, "[i]f Congress intended [to allow employers to consider] race . . . for such purposes as promoting diversity, providing role models, or assuring racial representation on police forces, Congress could have created a 'bona fide occupational qualification' exception for race, such as was done for sex."<sup>246</sup> In fact, Representative Williams proposed one.<sup>247</sup> The amendment would have allowed "limited discrimination and classification based on race or color where such distinctions are genuinely job related."<sup>248</sup> "By omitting race from the enumerated 'bona fide occupational qualifica-

---

240. 490 U.S. 228 (1989).

241. *See id.* at 235, 244-45.

242. *See* 42 U.S.C. § 2000e-2 (1994).

243. *See* *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981); *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982).

244. *See* 110 CONG. REC. 2556 (1964) (statement of Rep. Celler) ("[T]he basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color.").

245. *See id.* (statement of Rep. O'Hara) ("I do not think that when you seek [people with a particular skin color] for that role, you come within the meaning of the unfair practices described in this bill.").

246. Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 192-93 (1997).

247. *See* 110 CONG. REC. 2550 (1964) (amendment offered by Rep. Williams).

248. Alt, *supra* note 246, at 193.

tions,' Congress made it clear that" there was to be no exception for race or color, unlike gender, religion, and national origin.<sup>249</sup>

Furthermore, even if, as Senators Case and Clark suggest,<sup>250</sup> Title VII was not designed to reach bona fide "racial phenotype discrimination,"<sup>251</sup> in most situations it would be nearly impossible to differentiate between race discrimination and racial phenotype discrimination without clear evidence of the employer's intent. Judges and juries are not particularly adept at mind reading, and discriminators are sufficiently cognizant of the penalties for discrimination that they do not usually leave direct evidence of their discriminatory intent.<sup>252</sup> In assessing an employer's intent, courts are usually left with indirect evidence of motivation. With this in mind, imagine a court confronted with a defendant who claimed, "I did not discriminate against the plaintiff because he *is* black; I discriminated because he *looks* black." It would be difficult for the court to determine whether the employer's statement was true, or whether race discrimination was masquerading as racial phenotype discrimination. One's racial phenotype is so closely related to his or her race that, for most purposes, the two are indistinguishable.

Because an individual's race and racial phenotype are products of his or her genetics, discriminating on the basis of whether someone "looks black" is not much different than discriminating because the individual is black. Therefore, it is unlikely that most juries would perceive any meaningful distinction between the two. Furthermore, it is important to remember that the plaintiff does not have the burden of proving that race was the sole cause of the discrimination.<sup>253</sup> Rather,

---

249. *Id.*

250. See 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

251. "Phenotype" is an individual's observable physical attributes, such as height, eye, hair, and skin color, facial features, and hair texture; or, as defined by a medical dictionary, "phenotype" is "the entire physical, biochemical, and physiological makeup of an individual as determined both genetically and environmentally, as opposed to genotype." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1277 (28th ed. 1994).

252. See *Radue v. Kimberly Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (citations omitted) ("Direct evidence essentially requires an admission by the decision-maker that his actions were based on the prohibited animus. . . . [M]ost employers are careful not to openly discriminate and certainly not to publicly admit it."). The Supreme Court has aptly described direct evidence of discrimination as "eyewitness testimony as to the employer's mental processes." *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2105 (2000) (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

253. See 42 U.S.C. § 2000e-2(m) (1994); *Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, 115 F.3d 116, 120 (2d Cir. 1997) (holding that "a Title VII plaintiff can prevail by proving that an impermissible factor was a 'motivating factor'").

plaintiffs need only show that race was a motivating factor.<sup>254</sup> That is, plaintiffs need only demonstrate that race was one substantial factor in the employment decision.<sup>255</sup> Even if the defendant claims that an employer based its employment decision on preferences for a racial phenotype, a jury could still find that race or color was a motivating factor.<sup>256</sup> In any event, at least one federal circuit has stated that it will not be fooled by a defendant's claims of phenotypic preference.<sup>257</sup> In addressing a suggestion on how a movie producer could assert a business necessity defense to a disparate impact claim similar to the one suggested by Senators Clark and Case above, the Fifth Circuit stated: "It is unlikely that we would either require or be deceived by such convoluted semantical gymnastics . . . ."<sup>258</sup> Based on this language, defendants are well-advised to ignore the Senators' proposed defense.

## 2. Return to the Judicially Created BFOQ

However, the mere fact that Title VII reaches discriminatory hiring that is "necessary" for accurate depiction of historical events does not mean that the legislature necessarily needs to enact a BFOQ. As in other areas of law, Congress oftentimes leaves it to the courts to fill in the interstices of legislative enactments, and Title VII has been no exception. For example, the courts have created the "mixed-motive" and after-acquired evidence defenses in Title VII cases.<sup>259</sup> At first blush, it is not outlandish to think they could also create a race BFOQ defense.

---

254. See 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

255. See *id.*; *Foster v. Arthur Andersen, L.L.P.*, 168 F.3d 1029, 1033-34 (7th Cir. 1998).

To be a motivating factor, . . . the forbidden criterion must be a significant reason for the employer's action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted.

*Id.*

256. Of course, skin color is one element of a person's phenotype. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1277 (28th ed. 1994).

257. See *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980).

258. *Id.*

259. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (holding that after-acquired evidence of the employee's misconduct may limit damages); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (recognizing a mixed-motives defense); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("Mixed-motive analysis applies when the evidence shows that an employer considered both a proscribed factor . . . and one or more legitimate factors . . . in making a challenged employment decision.").

Proponents of such an idea point to *Wittmer*, the case in which the Seventh Circuit recognized a race BFOQ in the “boot camp” prison setting where maximizing prisoners rehabilitative potential “requires” racial discrimination.<sup>260</sup> It is also conceivable that a safety justification might support a race BFOQ where cooperation with authorities during fires, riots, and natural disasters might be more forthcoming depending upon the race of the government official.<sup>261</sup> In the news industry, safety might also justify the assignment of reporters and camera personnel to particular stories. Thus, a television station could justify not assigning a black reporter to cover a Ku Klux Klan rally,<sup>262</sup> or refusing to assign a white reporter to a story on African-American gangs, on safety grounds.<sup>263</sup> The assumption is that black gang members might be reluctant to open up to white reporters and that most Klan members would not readily agree to interviews with black reporters. Beyond a safety rationale, discriminatory job assignments might be functionally necessary for the news media.

In the entertainment industry, a compelling justification for a race BFOQ is authenticity. Authenticity is a legitimate justification for sex, religion, and national origin BFOQs.<sup>264</sup> If an Italian restaurant may discriminate against non-Italian chefs without incurring the wrath of Title VII, it stands to reason that Title VII would exclude a director’s decision to use black actors to portray Frederick Douglass or Malcolm X. The race of actors lends just as much, if not more, authenticity to a visual production as an Italian chef does to Italian food. It is doubtful whether restaurant patrons can tell from the quality of food produced who produced it, while theatergoers can readily ascertain the color and race of actors in most instances. Employers use these authenticity rationales to justify national origin and sex

---

260. See *Wittmer v. Peters*, 87 F.3d 916, 921 (7th Cir. 1996); see also discussion *supra* Part IV.B.

261. See *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (questioning whether race could justify discriminatory hiring of firefighters “who may lack credibility, and be denied cooperation, in minority neighborhoods if the firehouses in those neighborhoods have only white personnel”).

262. However, this is a form of paternalism that Title VII was designed to eradicate. It could be argued that the safety rationale is no different from the “health and safety” rules that prohibited women from working particular jobs or working extended hours. Title VII has been construed to place the right and responsibility for making these safety decisions on the affected employees, not the employers.

263. As noted below, one or two instances of discriminatory assignments would not be sufficiently severe to constitute an adverse employment action. See discussion *infra* note 267.

264. See discussion *supra* Part I.C.4.

BFOQs,<sup>265</sup> rationales that are equally applicable to a race or color BFOQ.

### 3. A Dearth of Evidence of the Necessity for a Race BFOQ

Despite the fact that several rationales would support a race BFOQ, one could argue that a race BFOQ is not truly necessary in the entertainment industry. There is not a single reported case in which an actor has sued a director for race-based casting decisions, even though it is common.<sup>266</sup> Similarly, no reporters have ever brought a race-based assignment action against a television station or a newspaper publisher for refusing to assign them to a certain story, despite the fact that such discriminatory assignments have most certainly occurred with some frequency.<sup>267</sup> There are several possible explanations for this dearth of litigation.<sup>268</sup>

#### a. Lack of Awareness of Title VII

It may be that the victims of discrimination are not aware of their Title VII rights. However, this seems unlikely, as discrimination suits are common even among uneducated workers. Even if they do not know the complete mechanics of a Title VII case, most people have at least some awareness that race discrimination is unlawful and most are

---

265. *See id.*

266. *See* Peterson, *supra* note 6, at 355; Sheppard, *supra* note 230, at 279; Gary Williams, "Don't Try to Adjust Your Television—I'm Black": Ruminations on the Recurrent Controversy over the Whiteness of TV, 4 J. GENDER RACE & JUST. 99, 129 (2000).

267. Of course, it is doubtful that one or two instances of failing to assign a reporter to a story would be sufficiently serious as to constitute an adverse employment action giving rise to liability under Title VII. *See Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). "A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment. To be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Id.* (citations and footnote omitted).

[A] plaintiff . . . does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.

*Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999).

268. The discussion of potential explanations that follows is not meant to be exhaustive. For example, the lack of reported cases on the subject might be due to quick settlement of the matter. Nevertheless, this possibility is not even discussed because it cannot fully explain the absence of litigation addressing "justifiable" discrimination in the news and entertainment industry. Furthermore, many of the proposed explanations are not mutually exclusive, and the dearth of litigation is probably best explained by a combination of reasons.



savvy enough to contact an attorney, particularly in light of the American proclivity for litigation.

### **b. Fear of Retaliation**

A second possible explanation is that actors and reporters are afraid that any complaints about discrimination will adversely affect their careers; that their industries will blackball them for filing a charge of discrimination. This belief might account for some of the reticence to challenge the status quo in discriminatory job assignments, but it is also an unlikely explanation for the lack of cases, particularly because many others in the entertainment industry have not been shy about initiating lawsuits for perceived discrimination.<sup>269</sup> Furthermore, many employees are aware of Title VII's anti-retaliation provisions,<sup>270</sup> which provide some protection to individuals who report or oppose discriminatory practices.<sup>271</sup> Fear of retaliation does not fully explain this phenomenon.

### **c. Lack of Blatant Discrimination**

A third suggested explanation is that many hiring decisions in the entertainment industry are so subjective that potential plaintiffs never know why they were not hired.<sup>272</sup> For all an actor knows, he might not have done well in the interview, or perhaps the hired individual had more experience. Often an applicant lacks this kind of information and is handicapped in attempting to determine the employer's true motivations, which are difficult to ascertain under most circum-

---

269. See, e.g., *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501 (11th Cir. 2000) (discussing a radio station program host who claimed sexual harassment and retaliation); *Tutman v. WBBM-TV*, 209 F.3d 1044 (7th Cir. 2000) (discussing a black cameraman who sued a television station for hostile environment race harassment); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000) (discussing an Americans with Disabilities Act discriminatory discharge claim); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (discussing a radio disc jockey who claimed she was sexually harassed by her supervisor); *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368 (7th Cir. 1992) (discussing ADEA claim by a former employee of television station); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985) (discussing a woman news anchor who initiated a sex discrimination suit against her employer based on its physical appearance standards); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984) (discussing a black disc jockey who was fired for moonlighting and brought a disparate treatment action under Title VII).

270. See 42 U.S.C. § 2000e-3(a) (1994).

271. See *Rojas*, 87 F.3d at 746 (discussing a radio disc jockey who sued for retaliation based on her complaints about sexual harassment).

272. See Sheppard, *supra* note 230, at 274.

stances.<sup>273</sup> Of course, employers usually are not foolish enough to advertise their discriminatory intentions.<sup>274</sup> “No employer of even moderate sophistication will admit or leave a paper record showing that it has refused to hire, or has fired, a worker because of a worker’s race.”<sup>275</sup> Also relevant is the tenuous relationship actors have with potential employers and their desire not to make false accusations that might prevent them from obtaining jobs with this, or other, employers in the future.

#### d. Belief That Title VII Does Not Apply

A fourth possible explanation is that potential plaintiffs mistakenly believe that Title VII does not apply to movie and television workers.<sup>276</sup> Proponents of this theory do not explain how or why such a mistaken belief arose—the theory fails to explain why someone aware of Title VII would just assume that it does not apply to major American industries. The general awareness about the illegality of discrimination suggests that in itself this is not a satisfactory explanation.

#### e. First Amendment Considerations

A fifth explanation, related to the fourth, is that entertainers believe hiring and casting decisions are protected by the First Amendment as forms of expressive conduct.<sup>277</sup> Indeed, the Supreme Court has interpreted the First Amendment to extend to “expressive conduct,” such as burning flags<sup>278</sup> and wearing armbands.<sup>279</sup> In the flag burning case, *Texas v. Johnson*,<sup>280</sup> the Supreme Court stated, “In deciding whether particular conduct possesses sufficient communicative el-

---

273. See *Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990) (“Particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities.”).

274. “There will seldom be ‘eyewitness testimony’ as to the employer’s mental processes.” *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). “[A]n employer who knowingly discriminates . . . may leave no written records revealing the forbidden motive and may communicate it orally to no one.” *LaMontage v. Am. Convenience Prods.*, 750 F.2d 1405, 1410 (7th Cir. 1984). However, note the qualifiers “usually” and “seldom.” Apparently, some employers lack the guile to hide their discriminatory intent. See, e.g., *Davis v. Passman*, 442 U.S. 228 (1979) (discussing an employer who stated in a letter to the plaintiff that he would only employ men in certain positions).

275. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517–18 (1987).

276. See *Williams*, *supra* note 266, at 129.

277. See *id.*

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

279. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

280. 491 U.S. 397 (1989).

ements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"<sup>281</sup> Although a full consideration of the First Amendment as it relates to hiring decisions is beyond the scope of this Article, it is arguable that if the casting of actors of a certain race is necessary to convey a particular message to the audience, then hiring decisions based on this casting objective would receive First Amendment protection as "expressive conduct."

It is not surprising that the First Circuit has recognized the tension between the First Amendment and civil rights laws in the case of race-specific casting.<sup>282</sup> It opined, but did not hold, "that liability should [not] attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests."<sup>283</sup> Were potential plaintiffs or their lawyers aware of this reasoning, regardless of whether it is correct or not, it might explain a reluctance to initiate a Title VII action based on casting decisions. However, it is hard to believe that all the discriminatory hiring in the art and entertainment industries is necessary to convey a distinct message. Even if that were the case, it seems that some hearty soul would at least have attempted to litigate the issue in order to test the parameters of an otherwise all-encompassing defense.

#### f. Justifiable Discrimination

A sixth reason is that perhaps most people do not perceive any problem with this form of discrimination, if they think about it at all. They see casting decisions as a form of legitimate discrimination: a justifiable refusal to assign an actor a role he is incapable of performing because his phenotypic properties prevent him from expressing the ideas of the writer or director. As for reporters, people perceive exclusion of certain races from certain assignments as necessary to obtain a particular story and thus not invidious discrimination. As with the recognized BFOQs, people see race as a necessary element of performing the essence of the particular job. Senators Clark and Case admitted as much when they responded that Title VII would not prevent directors from casting actors according to the race assigned to them in the script.<sup>284</sup> In short, while Congress has not seen fit to enact

---

281. *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

282. *See Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 904 (1st Cir. 1988).

283. *Id.* at 904 n.17.

284. *See* 110 CONG. REC. 7217 (1964) (prepared statement of Sen. Clark & Sen. Case).

a race BFOQ for these limited cases, the American people have demonstrated their common sense in declining to pursue litigation in these instances where they perceive race as a bona fide qualification.<sup>285</sup> Trial attorneys, who sometimes are not constrained by keen moral perception, also have refrained from initiating such suits, again, possibly because they realize they are contrary to common sense. Perhaps it is more accurate to say that even plaintiffs' attorneys are reading a race BFOQ into Title VII where none specifically exists, similar to the way Judge Posner ascribed such a defense to an equal protection claim.<sup>286</sup>

As one scholar has put it:

While it is true that the BFOQ defense does not recognize defensible racial discrimination, the statute undeniably permits some racial discrimination . . . . For example, it seems noncontroversial that an FBI project to send an undercover agent to infiltrate the Ku Klux Klan would specify the selection of a white agent.<sup>287</sup>

While it may be uncontroversial that as a matter of principle such an assignment *should not* be unlawful, it is another thing to say that it definitely *does not* violate Title VII. This view is a minority one, and no court has yet been willing to adopt it. In fact, in dicta, the Fifth Circuit has stated that this position is untenable.<sup>288</sup> In *Miller v. Texas State Board of Barber Examiners*,<sup>289</sup> after white inspectors refused to inspect barber shops that catered to African-Americans, the state board promoted the black plaintiff to an inspector position after agreeing to inspect black shops.<sup>290</sup>

Miller was assigned for years as an undercover investigator of black barber shops because he is black. None of the white investigators were assigned these duties for reasons easily understood; it is diffi-

---

285. This may be another example of what Jonathan Rauch calls the "hidden law"—unwritten moral principles based on common sense, which frequently guide individual conduct, often making legislation in an area unnecessary. See George F. Will, *When Law Replaces Common Sense*, WASH. POST, Dec. 24, 2000, 2000 WL 29923843.

In a dense and diverse society, Rauch says, moral disputes and collisions of clashing sensibilities are incessant. But civilized life depends on informal rules and measures—social winks, so to speak—preventing such mundane conflicts from becoming legal extravaganzas or occasions for moral exhibitionism. Otherwise communities become neurotic, quick to take offense, slow to assuage it.

*Id.*

286. See *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), discussed *supra* Part IV.B.

287. Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 823 n.215 (1987) (citation omitted).

288. See *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980).

289. 615 F.2d 650 (5th Cir. 1980).

290. See *id.* at 651.

cult to imagine a caucasian successfully disguised as a shoeshine boy in or as a patron of an all black barber shop.<sup>291</sup>

Despite the court's admission of the necessity of assigning an African-American man to undercover investigations, the court stated that it would not recognize a race BFOQ because it would be contrary to the plain meaning of the BFOQ provision, in which race "is conspicuously absent."<sup>292</sup>

### **g. Most Discrimination in the News and Entertainment Industries Is Benign**

As long as people continue to act reasonably and refuse to seek judicial relief for this limited form of discrimination, it seems unlikely that any congressional action will be required. Recently some minorities have become highly critical of the television networks and theatrical production companies for the "whiteness" of news and entertainment personnel.<sup>293</sup> These critics might inspire plaintiffs to litigate these intentional discrimination cases, and if this occurs, it is probable that some courts might resort to creating a race BFOQ, despite their questionable authority to do so. On the other hand, if courts correctly perceive themselves as powerless to craft a race BFOQ and white plaintiffs claim that they were discriminated against because directors would not cast them as Malcolm X or Bishop Tutu, then juries may be wholly unsympathetic because of their perceived irrationality of the claim, leaving the plaintiffs without remedy.<sup>294</sup> Because

---

291. *Id.* at 653-54.

292. *Id.* at 652. This statement is dicta, however, as the court found that the plaintiff was not complaining about his discriminatory assignments, but about his discharge. *See id.* While the assignment to only black barber shops was obviously discriminatory, the court held that the discharge was based on the defendant's failure to follow orders rather than his race. *See id.* at 654.

293. *See, e.g., Williams, supra* note 266, at 100; *see also* Robert Millar, Comment, *Racism Is in the Air: The FCC's Mandate to Protect Minorities from Getting Shortchanged by Advertisers*, 8 *COMMLAW CONSPPECTUS* 311, 325 (2000).

294. Undoubtedly this is a form of jury nullification, a practice much criticized by both the political right and left depending on whose ox is being gored at any given time. Despite this criticism, nobody doubts that jury nullification still occurs in the United States. As Senator Underwood once stated:

[A]ny law that you put on the statute books, in the last analysis must come to the jury box for its enforcement. It may be asked, "Will the jury violate its oath; will a jury go against the testimony and acquit a man who has been proven to be guilty?" I do not say a jury should by right or by honesty of purpose do so, but I do say that juries do that, have done it, and will continue to do it when you write laws on the statute books against the approval of the people you seek to govern. You know that when, in old England it was a crime punished by death for a man to steal a chicken, juries refused to convict . . .

congressional action is expensive,<sup>295</sup> it is only warranted if courts are truly powerless to create a race BFOQ. Further, legislative action is only warranted if courts are inundated with discrimination cases that a race BFOQ could resolve fairly. As this scenario is highly unlikely, it seems that calls for a congressional amendment of Title VII to include a race or color BFOQ are much ado about nothing.

#### h. Creative Casting

The fact that actors can sometimes successfully portray characters of other races further supports the lack of a need for a race BFOQ in the entertainment industry.<sup>296</sup> Indeed, a furor recently erupted over the use of a white man to portray a character who was supposed to be Eurasian in the musical *Miss Saigon*.<sup>297</sup> The director strongly defended his casting decision on the grounds of artistic freedom.<sup>298</sup> However, the important point is that if the director could justify this practice in the *Miss Saigon* situation, it seems that discriminatory hiring for purposes of "realistic" casting may not be wholly necessary, especially if skin coloring is used to make actors appear a different color. "Make-up and costumes often disguise actors to appear like people that they are not, including people of another racial identity."<sup>299</sup>

Additionally, many types of shows do not truly need actors of one race or another to convey the intended message,<sup>300</sup> particularly because the show is already asking the audience to use its imagination to appreciate the show. For example, in many fables, the race of the actors portraying fictional characters does not matter. Even though directors might desire racial consistency among family members, it is hard to say that such discrimination is "required."

A serious drama presented in a naturalistic style may be dependent on the ability of the performer to appear realistic, but a comedy, a farce, a fable, a fantasy or a surrealist or absurdist work will generally be less dependent on reality and may, on the contrary, even benefit from incongruity in casting.<sup>301</sup>

Because the entertainment industry frequently suspends the normal rules of reality, it would not be overly burdensome to ask the audience

---

54 CONG. REC. 485-86 (1917) (statement of Sen. Underwood).

295. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 590 (1998).

296. See Peterson, *supra* note 6, at 354.

297. See Sheppard, *supra* note 230, at 267.

298. See *id.* at 269.

299. Chen, *supra* note 231, at 517 n.18.

300. See Peterson, *supra* note 6, at 362 ("[M]any realistic works do not require racial specificity because race is not an issue in the plot.").

301. *Id.* at 359.

to perceive a costumed African-American as King George III, or a white man as Chairman Mao.<sup>302</sup> Imagination is the key to all entertainment, and one could hardly characterize asking an audience to contribute a greater dose of it as a defect.

## **B. Enactment of a Race BFOQ Could Have Detrimental Consequences**

Besides the apparent lack of a need for a race BFOQ, there are several other reasons why a race BFOQ might be ill-advised, at least with respect to the entertainment industry. For starters, some defendants might not be able to meet the stringent BFOQ standards that some courts impose. As discussed above, the concept of what characteristics are reasonably necessary to the essence of the defendant's business is not clear. Although courts consider sex discrimination as appropriate to accommodate a customer preference for privacy, they also consider it unjustified in most other cases of customer preference,<sup>303</sup> especially with respect to race.<sup>304</sup> Were courts to apply a similar type of privacy versus customer preference distinction to a race BFOQ, many movie directors might not fare so well. For example, could a director show that using an entirely white cast for a science fiction film such as *Star Wars* is truly necessary to serve the essential interests of the business? Considering that the characters would all be fictional and that African-Americans can act just as well as whites, there seems to be little basis for claiming that the use of only white actors is reasonably necessary.

### **1. Engendering Racial Discrimination**

Furthermore, why should films depicting historical events be entitled to more protection than fictional movies? Since the audience must use a certain amount of imagination to appreciate a movie anyway, it does not seem reasonably necessary for a white man to play the part of Richard M. Nixon. Presumably, the people would understand and appreciate a production regardless of whether an African-Ameri-

---

302. As to playing Mao, some Congressmen thought that excluding non-Asians from the role would be discrimination based on national origin, and thus exempted by the BFOQ provision, and not discrimination based on race. See 110 CONG. REC. 2559 (1964) (statement of Rep. Williams). Actually, depending on the hiring parameters, it could be both national origin discrimination and race discrimination.

303. See, e.g., *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1453, 1472 (S.D.N.Y. 1987) (“[T]he fact that the Hasidic clientele strongly prefer male [bus] drivers does not make being male a BFOQ.”).

304. See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982).

can was playing the part. Recall from the most recent movie on Nixon that Anthony Hopkins played the part of the fallen President despite the fact that the actor bore no resemblance to the former president. With all due respect to Sir Anthony, a black man could have produced an equally entertaining movie; thus the casting of a white actor was not reasonably necessary and a race BFOQ should not protect the casting decision. Although it could be argued that the industry would be no worse off with the enactment of a race BFOQ provision, as there presently is no protection for this type of discrimination, such an enactment might catalyze a flood of litigation as lawyers attempt to discern the contours of a new provision. Discrimination that remains unchallenged because people presently consider it innocuous could become fodder for litigation over the boundaries of a newly minted race BFOQ.

## 2. Expanding Artistic Freedom

Of course, directors faced with such a dilemma would argue that "artistic freedom" is essential to their work, and it is necessary that they retain the right to select the race of the actors who will portray specific characters.<sup>305</sup> This argument probably has its greatest appeal in the context of historical productions. For instance, while it would have been interesting to see *Gone With the Wind* produced with whites playing the parts of the slaves and blacks as the ruling class, the racial casting in itself is a form of communication, and the message communicated by this casting may not be the message that the director or writer chose to communicate. Undoubtedly, this argument has some merit, and a director may persuade a court that is deferential to artistic freedom. However, a glance at present cases that narrowly construe the "reasonably necessary" test in regard to BFOQs suggests that even productions hoping to remain historically accurate with respect to racial casting might fail the test. Why should a director's desire to send a particular "message" to customers receive greater protection than an airline that seeks to send a different message to its customers by hiring only beautiful women as flight attendants?<sup>306</sup> Perhaps artistic freedom deserves more protection than commercial freedom, but if the recent

---

305. See Sheppard, *supra* note 230, at 269.

306. See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 295 n.7 (N.D. Tex. 1981) (noting Southwest Airlines built its business "by employing attractive female flight attendants"). As noted below, Title VII does not make unattractiveness a protected attribute, so only men, and not unattractive women who were similarly excluded by the hiring policy, could sue under Title VII. See *infra* notes 325-27 and accompanying text.



First Amendment commercial speech cases are any indication of the value society places on commercial speech vis-à-vis other speech, the artists will have a tough time proving their case.<sup>307</sup>

### 3. Sustaining Societal Discrimination

There are still further concerns about creating a race BFOQ. Specifically, it may actually promote the racist attitudes purportedly driving consumers in their selection of entertainment: when given a choice, whites tend to watch movies and television programs containing white actors.<sup>308</sup> Entertainment executives use this consumer choice argument to justify the lack of minorities in the industry.<sup>309</sup> Their reasoning goes like this: since most Americans are white<sup>310</sup> and tend to watch movies and television programs featuring whites,<sup>311</sup> there is a greater probability of producing significant income when directors cast white actors in movies and programs.<sup>312</sup> Because the production companies and networks are businesses and must make money to survive and compete, these businesses seek to provide the majority of consumers with the goods they most want, so that the com-

---

307. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Scalia, J., concurring) (“I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”).

308. See Brian Lowry et al., *Networks Decide Diversity Doesn’t Pay*, L.A. TIMES, July 20, 1999, at A1 (“TV viewers are becoming more racially fragmented—choosing to watch shows with characters that look like they do.”).

309. See *id.* (“[S]ome insiders maintain that the real cause of minorities being marginalized has to do simply with audience tastes.”).

310. See *id.* (“Whites are still projected by the Census Bureau to account for more than 70% of the population between the ages of 18 and 54—the broad demographic coveted by media buyers—in 2000.”).

311. See *id.* (“Just a decade ago, . . . white viewers were much more willing to watch shows that featured predominately African American casts. . . . Not so today.”); see also Eric Deggans, *Hits and Duds Series: 2000: A Year in Culture*, ST. PETERSBURG TIMES, Dec. 31, 2000, LEXIS, St. Petersburg Times File (“Thanks to City of Angels, skittish networks will likely conclude white audiences won’t watch black dramas.”). This rationale breaks down, however, when one considers that whites do in fact pay to see black actors and actresses. Although the stated rationale presumably has some basis in reality (the entertainment industry presumably knows what is in its best financial interests), it is also possible that producers and directors are mistaken as to what consumers really want. It may be that their beliefs are based on white reaction to poor quality productions that just happened to cast many blacks, and not to the black actors themselves.

312. See Lowry et al., *supra* note 308, at A1 (“Networks can’t afford to alienate whites, who make up the vast majority of potential viewers, and remain the ones advertisers privately concede they want most.”).

panies can in turn make more money for their investors.<sup>313</sup> Put another way:

[T]he color of the faces we see on any screen, and the way those faces are portrayed, are simply a matter of economics. For these observers, the whiteness of television is a product of supply and demand, and nothing more. They argue that if the American public wants to see more faces of color on the small screen acting in serious dramas and high-minded comedies, people will watch *City of Angels*, *Cosby*, *The Practice*, and other shows that presently feature actors of color performing in a dignified manner. Once the demand for these shows becomes manifest, critics argue, advertisers and network executives will request, and producers will produce, more of those shows.<sup>314</sup>

These individuals believe that “producers and directors will not spend their talents and resources to create a product which does not have a potentially large audience.”<sup>315</sup> This explanation is a straightforward application of basic economic principles, and nobody seriously doubts that most producers would gladly cast minorities instead of whites if the minorities would prove more profitable.<sup>316</sup> “Advertisers are colorblind, said Paul Schulman, whose Schulman/Advanswers NY Agency is one of the largest buyers of network ad time. ‘If it delivers [viewers age] 18 to 49, count them in; if it doesn’t, count them out’ he said.”<sup>317</sup>

The problem with accepting this consumer preference rationale, however, is that it is similar to the rationale behind the old Jim Crow employment laws in the South, e.g. “we have to have separate dining rooms for blacks because the majority of consumers (whites) will not eat with blacks and that will hurt our bottom-line,” or “we do not employ blacks because our customers would prefer to deal with whites.” The Civil Rights Act of 1964 rejected this justification for discrimination, regardless of whether it accurately reflected the views of consumers. Title VII of the Act specifically rejected the notion that the consumers’ racial prejudice should dictate an employer’s hiring decisions,<sup>318</sup> regardless of cost to employers. Of course, African-Americans are not the only group to have suffered from the entertainment indus-

---

313. See Heekyung Esther Kim, Note, *Race as a Hiring/Casting Criterion: If Laurence Olivier Was Rejected for the Role of Othello in Othello, Would He Have a Valid Title VII Claim?*, 20 HASTINGS COMM. & ENT. L.J. 397, 399 (1998).

314. Williams, *supra* note 266, at 111 (footnotes omitted).

315. *Id.*

316. *But see id.* at 109 (“[T]he creators of television series do not think about including actors of color in new series.”).

317. Lowry et al., *supra* note 308, at A1 (alteration in original).

318. See *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982).

try's pandering to consumer preference. Many other groups complain that actors with their attributes are under-represented in movies and television, including Asian doctors,<sup>319</sup> women,<sup>320</sup> and in particular elderly women,<sup>321</sup> the disabled,<sup>322</sup> Hispanics,<sup>323</sup> and East Indians.<sup>324</sup> Any under-casting is arguably due to the consumers' preferences or prejudices.

These same consumer prejudices and preferences keep networks and theaters from producing many programs featuring unattractive or obese people.<sup>325</sup> Fortunately for the employers in the entertainment industry, these qualities are not statutorily protected attributes,<sup>326</sup> at least not yet on the federal level.<sup>327</sup>

---

319. See Forrest G. Wood, Editorial, *Ethnic Diversity in TV Roles*, L.A. TIMES, July 25, 1999, at M4 ("One out of six medical doctors in the U.S. is of Asian Ancestry; but not one actor with a recurring role in 'L.A. Doctors,' 'Chicago Hope' or 'ER' is Asian.").

320. See Sharon Waxman, *More Film, TV Roles Go to Minorities*, PITT. POST-GAZETTE, Dec. 24, 2000, LEXIS, Pittsburgh Post-Gazette File ("[W]omen—more than half of the U.S. population—were cast in 38 percent of the roles in movies and television.").

321. See *id.* ("Women . . . also suffer more from ageism; women over 40 got only 24 percent of female roles, compared to 36 percent for men of that age group.").

322. See Tom Feran, *Disabled Gained and Lost Ground on TV*, SAN DIEGO UNION-TRIB., Dec. 16, 2000, LEXIS, San Diego Union-Tribune File ("But actors and characters with disabilities have only recently begun making wider inroads on TV, and advocates say the 54 million Americans with disabilities remain television's 'invisible minority' . . .").

323. See Lynn Elber, *Book Tells Forgotten Story*, CHI. SUN-TIMES, Nov. 13, 2000, LEXIS, Chicago Sun-Times File ("Minorities other than blacks tend to be invisible on network television, according to a coalition of civil rights groups.").

324. See Viral Bhanyani & Nona Wallia, *Indian Actors Are Making It Big on American Prime Time*, TIMES OF INDIA, Nov. 12, 2000, 2000 WL 29242110.

325. In fact, there are probably fewer overweight or unattractive actresses on the major networks today than there are racial or ethnic minorities, despite the fact that twenty-five percent of Americans are clinically obese, and more than sixty percent are overweight. See Philip Brasher, *Moderate-Fat Diets Are Best, U.S. Report Says High-Fat, Low-Carb Plan Called Thin on Nutrition*, CHI. TRIB., Jan. 11, 2001, 2001 WL 4028901. Just as with the "thin flight attendant" cases discussed above, see *supra* Part I.B.1, women have a much worse time with beauty or weight discrimination than men. For example, portly actors like Drew Carey, John Goodman, Jason Alexander, and the late John Candy, John Belushi, and Chris Farley were able to succeed on television and the big screen, although it is worth noting that their success only came in the comedy milieu, probably because it is considered acceptable to laugh at fat people. These actors were seldom, if ever, cast as action heroes or the love interests in serious dramas. As for comparably successful and overweight women, only Oprah Winfrey, Roseanne Barr, and Kathy Bates come to mind.

326. Actually, this may be a slight overstatement, as some courts have recognized that obesity is a disease, and if it is a permanent condition, persons suffering from it are protected under the ADA. *Cf. Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (stating that obesity is not usually a "physical impairment" within the meaning of the ADA, except in cases where obesity relates to a physiological disorder).

327. This Article is not advocating that the anti-discrimination laws should be extended to regulate discrimination against the obese or physically unattractive. The point is that, presuming obesity and physical unattractiveness are for many people immutable character-

It seems that major portions of the entertainment industry have had a free ride, or at least purchased their tickets at a discount, since it has not borne the full costs of Title VII that other employers have.<sup>328</sup> Providing the industry with BFOQ protection for discriminatory hiring practices could deprive potential plaintiffs of a cause of action against unjustifiable discrimination. While certain instances discussed above, such as the need to use undercover reporters of a particular race,<sup>329</sup> could warrant a race BFOQ, in the context of non-historical theatrical productions, the racial discrimination could be just another manifestation of the Jim Crow laws. Because any race BFOQ would presumably apply to all industries, there is an increased danger that it would insulate more invidious forms of race discrimination than it would exculpate benign forms. This situation was the concern of the Congressmen who opposed adding race or color to the BFOQ provision.<sup>330</sup> Their concerns are as legitimate today as they were in 1964.

There is also a danger that courts could interpret a race BFOQ to protect a broad range of conduct that Title VII was enacted to avoid. The entertainment industry might use it as a tool to solidify the purported "whiteness" that presently characterizes movies and television. The heightened scrutiny presently used by courts to assess asserted BFOQs would go a long way towards eliminating any unwarranted recourse to a race BFOQ. Thus, courts presumably would recognize that the race of a musician is not "reasonably necessary" to the music he or she produces. However, to the extent that authenticity would be an acceptable justification for a BFOQ, any employer that was intent on excluding African-Americans need only change the name of the band to something denoting that the members are white, European, or Anglo-Saxon. Presumably, then, a race or color BFOQ would afford that employer protection.<sup>331</sup> While many a band would be unwilling to

---

istics like race or sex, the discrimination that these groups face is no less hurtful or invidious than much of the discrimination regulated by Title VII, and the consumers of entertainment goods similarly discriminate on these bases.

328. This is not to suggest that the news and entertainment industries have not been defendants in employment litigation. The assertion is simply that the race discrimination that must be occurring in these industries seems to have been largely ignored.

329. See discussion *supra* Part V.A.2.

330. See 110 CONG. REC. 2556 (1964) (statement of Rep. O'Hara) ("The trouble with the amendment offered by the gentleman from Mississippi is that it opens up a good deal more than the case of a casting director looking for actors to play certain roles in a dramatic production.").

331. It is essentially the same principle that protects French restaurants when they discriminate against non-French chefs, even though national origin sometimes makes no dif-

change its name, it seems likely that those most intent on discriminating would find a name change to be a minor inconvenience if it resulted in a free pass to discriminate. While this situation is probably rare, it must be asked whether the benefits gained from a race or color BFOQ for "legitimate" discrimination outweigh the cost of affording protection to invidious discrimination.

In light of these concerns, Congress must carefully consider any attempt to insulate race or color discrimination. No plaintiff has yet to complain about the present employment practices of the news and entertainment industries. Only a few other employers have sought to defend their discriminatory practices based on a race BFOQ. Thus, enactment of a race BFOQ seems highly premature at this point in time. Law works best when applied to concrete situations, and so it would be better to wait and see whether cases involving race and color discrimination actually arise in the entertainment industry. At that point, Congress could implement a more knowledgeable and reasoned response than is presently possible.

### **Conclusion**

Although courts are willing to recognize an authenticity justification for BFOQs, the fact that Congress intentionally elected not to enact a BFOQ for race or color prevents courts from judicially creating one even to protect the authenticity of theatrical productions. In short, the rules of statutory construction and judicial restraint prevent the judiciary from crafting a race or color BFOQ. Legislative action seems to be the only recourse, but it is unlikely to be forthcoming since there is not a single case demonstrating the need for a race BFOQ to protect the news and entertainment industries, or any other industries, except perhaps prisons. Furthermore, the fear that employers could misuse a generally applicable race BFOQ to shield invidious race discrimination is too great to warrant the enactment of such a provision without a real and credible threat to the benign employment decisions of the news and entertainment industries. Thus, despite some suggestions in the legal literature to the contrary, these industries seem to be doing quite well without a race or color BFOQ.

---

ference in the product produced. The same holds true for the national origin or race of musicians.

