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HOLLYWOOD'S RACE/ETHNICITY AND GENDER-BASED CASTING: PROSPECTS FOR A TITLE VII LAWSUIT

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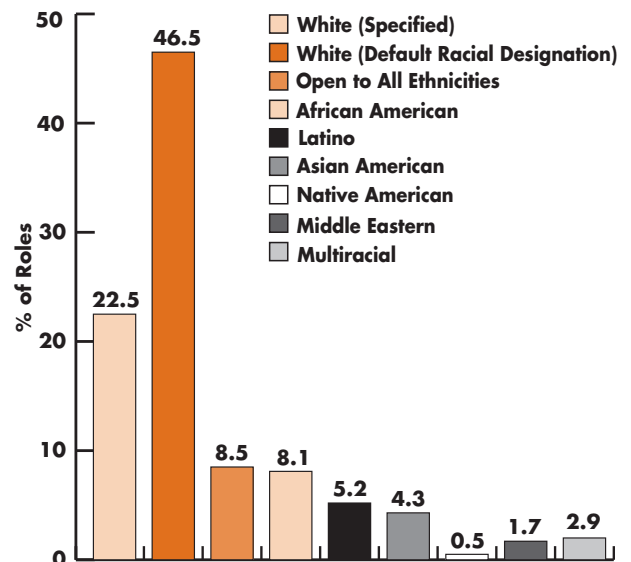
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Hollywood studios often specify a preferred race/ethnicity or gender for particular roles, preferences that are recorded in casting announcements, or “breakdowns.” Breakdowns overwhelmingly favor white male actors for leading roles, leaving only a small proportion of roles open to actors of color or to women. This brief explores the legality of discriminatory breakdowns, looking in particular at the gap between the broad promise of equal employment in Title VII of the Civil Rights Act of 1964 and the reality of continuing exclusionary treatment within the film industry. It examines the potential for lawsuits based on Title VII’s equal employment opportunity provisions and offers recommendations for viable alternatives.

A survey of all breakdowns from June 1, 2006, through August 31, 2006, revealed that 94% of the roles in the breakdown sample contained sex designations. Fifty-nine percent of the roles were designated male roles, and 35% were designated female. In addition, 22.5% of roles were designated for whites, and 22.7% were designated for another racial/ethnic group (fig.1).¹ Although the largest group of listings, 46.5%, comprised roles that did not designate a race/ethnicity, these roles were understood to be for white actors. As noted in the *Los Angeles Times*, “casting directors and agents agree that each

character in the breakdowns is assumed to be white” (Calvo 1999).² Thus, 69% of available roles were reserved for white actors. Actors of color were limited to between 0.5% and 8.1% of roles, depending on their racial/ethnic background, and could compete with white actors for the 8.5% of roles that were open to white and nonwhite actors alike. These rigid set-asides stand in sharp contrast to employment opportunities in virtually every other industry, where the law authorizes that all races/ethnicities be allowed to compete for every available job.

Figure 1. Casting Breakdowns by Race/Ethnicity. (Source: Breakdown Services, June 1, 2006, through August 31, 2006.)



EMPLOYMENT INJURIES

By virtue of their race/ethnicity or gender, actors of color and female actors are presumptively relegated to the margins of the film industry, where they must grapple with a double bind: if they refuse stereotypical roles, they face economic hardship; if they accept stereotypical roles, they increase damage to self- and group identity.

Economic Harms. Casting director Jane Jenkins states that it is “definitely harder for minority actors to get good [agent] representation and to get work.” Female actors also compete for fewer roles, especially women over forty, who are “as much a minority as any ethnic group” (Jenkins 2006). A review of the 171 commercially released films during 2005 that reported a gross of at least \$1 million showed that men were almost three times as likely as women to work in the first-billed lead role (fig. 2) and that whites occupied 82% of these roles (fig. 3).³ Women had better representation in supporting roles, yet they were outnumbered by men in each category. African American women, Latinos, Asians, and Native Americans were all underrepresented.

Identity Harms. Many film roles require actors of color to personify blatant racial/ethnic and gender stereotypes. For example, African American actors must regularly “black up,” and female actors similarly “sex up,” their identities and performances. Actors experience four main types of identity harms: 1) taking on an identity the actor loathes, 2) being employed as the mouthpiece for a writer (often a white male) who is stereotyping the actor’s gender or racial/ethnic group, 3) explaining to family and friends the reason for accepting a stereotypical role, and 4) being typecast or locked into playing stereotypical roles. Women may suffer additional harms: 1) being caught in age-based “role traps,” and 2) taking health risks, such as cosmetic surgery, to conform to ideal and youthful beauty standards.

THE TITLE VII LAWSUIT

Given these harms, how might a Title VII lawsuit proceed? What defenses might

the industry launch? Title VII specifically prohibits an employer, a labor organization, or an employment agency from printing, publishing, or causing to be printed or published “any notice or advertisement relating to employment...indicating any preference, limitation, specification, or discrimination, based on race, color...[or] sex.”⁴ In 2003, the U.S. Supreme Court clarified the general framework for Title VII claims, determining that the plaintiff must establish that gender or race/ethnicity was, as the legislation states, a “motivating factor” for an adverse “employment practice.”⁵ Ultimately, a plaintiff need not prove that he or she would have been offered employment if given the opportunity to compete for it, but only that the opportunity was denied.

BFOQ Defense. According to guidelines established by the Equal Employment Opportunity Commission (EEOC), Title VII’s bona fide occupational qualification (BFOQ) provision purports to authorize gender discrimination insofar as it is “necessary for the purpose of authenticity or genuineness,” and it gives casting as one example.⁶ This exception flies in the face of most Title VII precedent. For instance, precluding individuals from auditioning for a role based on the assumption that most actors would be unable to convincingly play a member of the opposite sex is contrary to Title VII’s requirement that people be considered for employment on the basis of individual qualifications. Claiming that certain traits (other than physical) are more “authentically” male or female is stereotyping on the basis of gender, also prohibited by Title VII.

First Amendment Defense. Supporters of racial/ethnic casting argue that freedoms guaranteed by the First Amendment take priority over those protected by antidiscrimination laws. Opponents claim that because the film industry is a commercial enterprise, the use of racial/ethnic or gender specifications foregrounds issues of fair employment practices. The U.S. Supreme Court has held that generally applicable laws, such as Title VII, may be

Figure 2. Lead Roles by Gender. (Source: IMDB.com.)

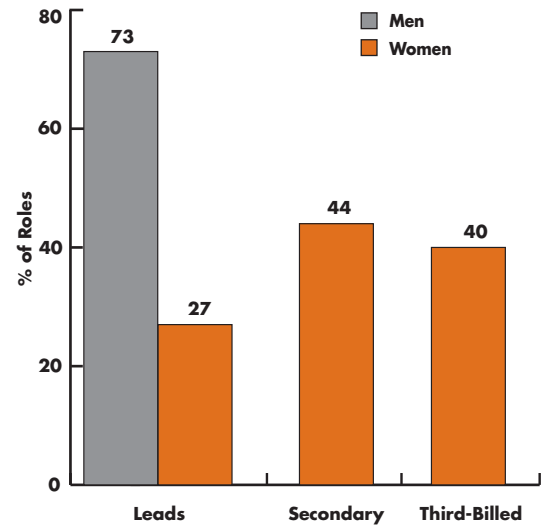
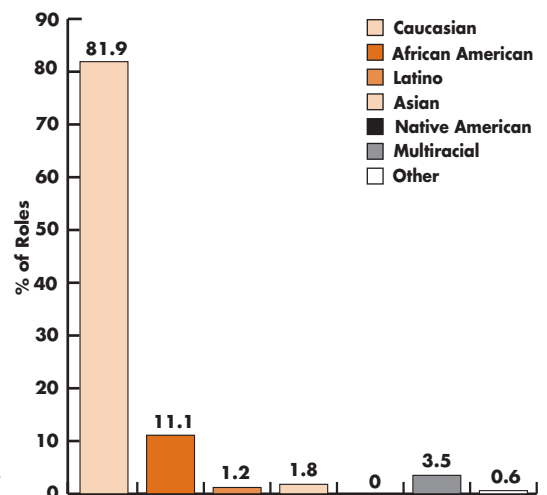


Figure 3. Lead Roles by Race. (Source: IMDB.com.)



applied to expressive organizations, like the press, without triggering heightened free speech protection. Recent Supreme Court rulings have created some uncertainty by recognizing some exceptions to antidiscrimination laws, but because these cases did not involve commercial employers, it is unlikely that a court would apply these rulings to film studios.

Market-Based Defense. Studios would likely assert that casting based on race/ethnicity and gender maximizes box office potential. Empirical evidence is unlikely to help the defense tie the success or failure of a film to race/ethnicity or gender, however, because the reasons for a film’s critical or financial outcome are complex. Furthermore, what appear to be audience preferences

for white, male protagonists are socially constructed choices based in part on the industry's history of discrimination and stereotyping in casting. Preferences shaped by past discrimination should not justify continuing discrimination.

Artistic Defense. Nondiscriminatory casting might create a burden on protected speech by either adding an unintended racial/ethnic or gender element to the storyline or requiring filmmakers to alter the storyline to avoid racial/ethnic or gender implications.⁷ A court would likely assess the burden on the studio by determining whether the narrative would be substantially altered if a character's race/ethnicity or gender were changed. Courts might find that in many cases studios can make slight alterations to the narrative that increase employment opportunity without curtailing First Amendment rights.

RECOMMENDATIONS

Taking race/ethnicity or gender into account when actors are assigned to positions in the industry's hierarchical system violates Title VII's opposition to segregation and subordination. Complying with the equal opportunity provisions of Title VII would not require studios to use quotas, but it would require them to give more consideration to actors of color and women. Ample support in case law encourages the decision to apply Title VII to mitigate the use of racial/ethnic and gender designations in breakdowns.

Practical considerations would limit Title VII's burden on the industry because many roles are cast without auditions or breakdowns, thereby limiting the enforcement of Title VII. Moreover,

prohibiting discriminatory breakdowns would not preclude studios from taking race/ethnicity or gender into account during and after an audition. Race/ethnicity and gender are permissible considerations under the First Amendment when these traits are integral to the storyline. Nonetheless, many breakdowns currently preclude actors of color and women from important roles without any strong narrative justification.

Although the industry is vulnerable to Title VII lawsuits, it could proactively address this problem by implementing the following:

- **Ban the use of racial/ethnic and gender designations in breakdowns except where casting an actor of a specific race/ethnicity or gender is truly integral to the narrative. Require studios to instruct directors and casting directors not to use designations unless they complete a form justifying their use.**
- **Conduct an annual review of the information obtained from these forms. Additionally, compile annual information on the race/ethnicity and gender of the primary actors in all the studio's films. This information can be used to identify areas where certain groups are being excluded and to inspire efforts to increase employment opportunity.**
- **Study the casting practices of films and television shows that achieve diversity.⁸ Draw on these practices to design effective interventions that can be employed throughout the film industry.**

NOTES

1. Compiled from data available at IMDB.com—the Internet Movie Database, widely regarded as a definitive

source of information about casts and box office grosses—and boxoffice Mojo.com.

2. See also Hill 2005 and Cannon 2005; these two casting professionals (one black and one white) state that a listing without a racial/ethnic designation is assumed to be for white actors. Another professional (who is white) says that such a listing would be "open to all ethnicities"; see Jenkins 2006.

3. These findings are consistent with those reported in Lauzen 2003 and Screen Actors Guild 2004.

4. *Civil Rights Act of 1964*, Public Law 88-352, 42 U.S.C. § 2000e-3(b).

5. *Ibid.*, 2000e-2(m). For the Court's decision, see *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003).

6. Equal Employment Opportunity Commission, *Guidelines on Discrimination Based on Sex*, 29 C.F.R. § 1604.2(a)(2). Title VII does not include an exception for race/ethnicity.

7. See *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), where the U.S. Supreme Court asserted that speakers generally have the autonomy to decide not merely what to say but also what *not* to say.

8. For example, the director of *Sideways* cast Sandra Oh, an Asian-American, as a character with a black child and a white mother. This racial/ethnic mixing was not explained but did not harm the film critically or commercially.

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Hollywood "breakdowns" often specify a preferred race/ethnicity or gender for a role—a hiring practice that gives an overwhelming proportion of lead roles to white male actors. This brief examines the potential for Title VII lawsuits as well as viable alternatives.

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