

**THERE'S JUST ONE HITCH, WILL SMITH: EXAMINING
TITLE VII, RACE, AND CASTING DISCRIMINATION ON
THE FORTIETH ANNIVERSARY OF *LOVING V.*
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I. Introduction	319
II. A Mission Impossible?: Breaking Down Racial Hierarchies of Love on Film.....	326
III. Something New?: How Should Society Challenge Casting Discrimination?	335
IV. Conclusion.....	342

When will Hollywood dare release a major movie in which
Denzel Washington and Reese Witherspoon fall passionately in
love?¹

—Nicholas D. Kristof

I. INTRODUCTION

In 2005, the release of the romantic comedy *Hitch*, starring Will Smith, a black actor, and Eva Mendes, a Cuban American actress,²

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1. Nicholas D. Kristof, Editorial, *Retro Hollywood*, PITTSBURGH POST-GAZETTE, Apr. 28, 2005, at B7.

2. See *HITCH* (Sony Pictures 2005).

caused a stir among the American public. Controversy arose over the movie because of the role that race purportedly played in the selection of the movie's final cast.³ Even Smith himself commented on the filmmakers' casting decisions, noting how they avoided casting a black woman as the movie's female lead because they feared the film would be labeled a "black movie," which could make it less profitable, and avoided casting a white woman as the movie's female lead because they feared that such a coupling would offend audiences in the United States.⁴ Smith proclaimed that "[t]here's sort of an accepted myth that if you have two black actors, a male and a female, in the lead of a romantic comedy, that people around the world don't want to see it. . . . We spend \$50-something million making this movie So the idea of a black

3. See, e.g., Greg Morago, *Still Taboo?*, HARTFORD COURANT, Mar. 25, 2005, at D1 ("That Hollywood considers American audiences skittish about seeing whites and blacks romantically linked . . . isn't shocking. What is disturbing is that we make accommodations for that not-so-subtle racism in our most popular forms of entertainment."); Renee Graham, *In Casting Film Couples, Race Is Still a Black-and-White Issue*, BOSTON GLOBE, Mar. 8, 2005, at C1 ("Seems the studio suits declined to pair Smith with an African-American actress, fearing such a coupling would make the film too black for worldwide audiences. . . . Conversely, they also steered clear of hiring a white actress as Smith's love interest out of concerns that an interracial relationship would offend some American moviegoers, and hurt the movie's earning potential.").

4. Graham, *supra* note 3; see also Morago, *supra* note 3. As Professor Russell K. Robinson has explained, the casting process is rather complex. As Robinson details, actors are cast through "breakdowns" given to talent agents, which provide descriptions of open roles in film and television. See Russell K. Robinson, *Casting and Caste-Ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 9 (2007). According to Robinson,

The collaborative nature and multilayered, interdependent structure of casting can obscure the source of discriminatory hiring decisions in the entertainment industry. The decisionmakers in a typical studio-developed and -financed film include the following, ranging from most influential to least: (1) studio executives; (2) producers; (3) director; and (4) casting director. As the above ranking indicates, the term "casting director" misleads because this position confers little ultimate decision-making authority. The casting director, a position with secretarial origins, assembles the pool of actors from which the roles will be cast and coordinates communications among the various decision makers. By contrast, the entity providing the film's financing, typically a studio, ultimately makes the decisions.

Id. at 6. Consistent with Robinson's comments, one casting director made the following claim about how to address casting discrimination: "[A]lthough many [producers] try to be as colorblind as possible, it's sometimes out of their hands. To provoke change on this issue . . . [one] should go straight to the top: the studios." Nicole Kristal, *UCLA Study: Minority Actors Can Sue*, BACKSTAGE.COM, Jan. 9, 2007, http://www.backstage.com/bs/search/article_display.jsp?vnu_content_id=1003529253.

actor and a white actress comes up—that'll work around the world, but it's a problem in the U.S.”⁵

This decision in *Hitch* is just one in a long line of casting decisions for which perceived consumer racial preferences influenced the outcome. For example, in 1989, ABC reportedly dropped Peter Bergman from the soap opera *All My Children* after the program had “gotten bad mail” concerning his on-screen relationship with black actress Debbi Morgan.⁶ Two years later, NBC's hit show *A Different World* reportedly ended the relationship of Kim, a black college student played by Charnelle Brown, with Matthew, a white college student played by Andrew Lowery, because audience members and even some actors on set opposed the relationship.⁷

5. Morago, *supra* note 3. Ironically, in Smith's recent film, *Pursuit of Happyness*—which is not a romantic comedy—the lead actress was Thandie Newton, a biracial actress of Zimbabwean and English descent. See Chris Sullivan, *Why Newton Favours Gravity Over Fluff*, DAILY TELEGRAPH (London), Aug. 5, 2005, at 23, available at <http://www.telegraph.co.uk/arts/main.jhtml?xml=/arts/2005/08/05/bfthandie05.xml>.

6. Peter Castro, *Color Lines*, PEOPLE, Nov. 27, 1989, at 160. Since then, several black-white interracial couples have appeared on daytime soaps. For example, the *Young and the Restless* has at least one interracial couple currently on its program, Phyllis and Damon. See Ed Martin, *Viewers Bail from Daytime Soaps, While “The Young & the Restless” Shines On*, JACK MYERS ENT. REP., May 11, 2004, at 1, available at http://www.mediavillage.com/JMER_Archive/2004/05-11-04ER.pdf.

7. *The Last Taboo? Does Wave of Interracial Movies Signal a Real Change?*, EBONY, Sept. 1991, at 74, 78-79 [hereinafter *Last Taboo*] (“[M]ore than 100 fans, many of them Black, . . . wrote the show complaining that an interracial romance had no place on a program depicting life on a Black college campus.”); Sharony Andrews, ‘A Different World’s’ *Brown Speaks Out on Interracial Couples*, CHI. TRIB., Jul. 27, 1991, at C18 (describing the opposition to Brown's role as part of an interracial couple on the show). Cast members have not always based their opposition to interracial storylines on distaste for such relationships. Some cast members have opposed these relationships because they believed that the relationships were portrayed in a way that reinforced negative racial stereotypes. For example, in 1999, actor Eriq LaSalle asked the producers of *ER* to end his character's interracial romance with a white woman because of differences in his on-screen relationships with black and white female characters. Aldore D. Collier, ‘ER’ *Star Eriq LaSalle Tells Why He Balked at Interracial TV Love Affair*, EBONY, Aug. 1999, at 52. LaSalle said the following:

I hated ending something that was working, but I felt there was a greater issue. I felt we were inadvertently sending a very strange message that I wasn't comfortable with, which is: Here's [a] successful Black man who can only have dysfunctional relationships with Black women. But, when he dates outside his race, he is more vulnerable, more open, sweeter, more romantic, sensual. All the things I think are false. I feel it's a shame we can't point to a positive, three-dimensional, fully developed Black-on-Black relationship in recent memory. As a Black artist and as a Black man, I do have a responsibility to my community not to perpetuate things that are detrimental to my community and myself.

Id.; see also Eriq LaSalle *Requested That His Interracial Relationship on ‘ER’ End*, JET, Apr. 5, 1999, at 16, 16.

Despite the ways in which assumed consumer preferences have shaped casting in Hollywood, our society has arguably come a long way since the decision of *Loving v. Virginia* in 1967.⁸ Interracial couples are less taboo than they historically have been in this country.⁹ In fact, the growing acceptance of interracial couples is reflected in the progression of popular films in Hollywood, beginning with 1915's *The Birth of a Nation*, which portrayed black men as predators who raped white women,¹⁰ to 1967's *Guess Who's Coming to Dinner*,¹¹ which addressed the hypocrisy of a white liberal father who was initially reluctant to allow his white daughter to marry a black overachieving doctor,¹² to 2005's *Guess Who*,¹³ which injected humor into the story of a young white man

8. 388 U.S. 1 (1967). In *Loving*, Virginia citizens Mildred Jeter and Richard Loving challenged the constitutionality of the state's antimiscegenation statutes. *See id.* at 2-3. Jeter, a black woman, married Loving, a white man, in Washington, D.C., which did not prohibit interracial marriages. *See id.* at 2. The Lovings then returned to their home in Virginia, where they were arrested, charged with leaving the state to evade the law and unlawfully residing as an interracial couple in Virginia, and threatened with a one-year prison sentence unless they left the state without returning for twenty-five years. *See id.* at 2-4. Ruling in favor of the Lovings and striking down Virginia's antimiscegenation statutes, the Supreme Court rejected Virginia's argument that its antimiscegenation statutes did not violate the Equal Protection Clause because they equally disadvantaged both Whites and non-Whites. *See id.* at 10. The Court also held that the statutes violated the Due Process Clause. *See id.* at 12.

9. *See Last Taboo*, *supra* note 7, at 75-76 (noting the increase in television and movie storylines involving black-white interracial couples, such as *The Bodyguard* with Whitney Houston and Kevin Costner and *Love Field* with Michele Pfeiffer and Dennis Haysbert). *But see* Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 757-61 (2006) (book review) (detailing how black-white relationships are still taboo); Randall Kennedy, *How Are We Doing with Loving?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 818-20 (1997) (noting the significant gaps between interracial marriages involving Whites and Blacks and Whites and other minority racial groups).

10. THE BIRTH OF A NATION (D.W. Griffith Corp. & Epoch Producing Corp. 1915); *see also* Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 926-38 (2003) (describing the movie's storyline and impact on race relations in society); Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41, 41, 47-49 (1998) (citing *The Birth of a Nation* as one of three films that show how "[t]ransgressions by those perceived to be 'illegitimate,' such as Asians and Blacks, are policed either by rule of law or the force of sanctioned vigilante violence").

11. GUESS WHO'S COMING TO DINNER (Columbia Pictures 1967).

12. *See* John Horn, *Plan for 'Dinner': Invert It*, L.A. TIMES, Mar. 23, 2005, at E1. In addition to marking the year of the *Loving* decision and the release of the movie *Guess Who's Coming to Dinner*, 1967 also marked the year in which *Time Magazine* first put an interracial couple—the white daughter of then-Secretary of State Dean Rusk and her black husband—on its cover. Kristof, *supra* note 1.

13. GUESS WHO (Sony Pictures 2005).

who desperately wanted to impress his black fiancée's successful father.¹⁴

In today's society, however, alleged customer preferences affect not only whether actors are cast across racial lines in films that involve intimate couples,¹⁵ but also which kinds of interracial couples are cast in movies and even whether actors of the same race are cast opposite each other. In essence, the influence of race in entertainment is becoming increasingly complex. As one author noted, "these days African American leading men tend to be cast opposite Latinas instead of black actresses" in a way that "is meant to reflect—perhaps even flatter—a society that increasingly sees itself as multicultural."¹⁶

Although such depictions of interracial, or rather interethnic, couplings between Blacks¹⁷ and Latinas should be applauded and highly encouraged in Hollywood, the question remains: in what ways does this new form of multicultural casting for couples reinforce current racial hierarchies in society? For example, one could argue that this new form of multicultural casting reinforces notions of white supremacy that the Supreme Court rejected in *Loving* by both demonizing and exoticizing the casting of relationships on screen between Blacks and Whites, devaluing intimate relationships between Blacks (in other words, any

14. See Horn, *supra* note 12.

15. See Morago, *supra* note 3. One interlocutor noted that decisionmakers in Hollywood have also shied away from casting male-female friends across racial lines. Specifically, Michael Weithorn, a white comedic writer, asserted that CBS and NBC turned down his script for a pilot about a young black man who shared an apartment with a white woman because they "were afraid that the affiliates wouldn't carry the show and advertisers wouldn't sponsor it because of the threatening nature of a Black man and a White girl living in the same place." *Last Taboo*, *supra* note 7, at 77.

16. Allison Samuels, *Why Can't a Black Actress Play the Girlfriend?*, NEWSWEEK, Mar. 14, 2005, at 52, 52; see also Kristof, *supra* note 1 ("More typically, you get a film like 'Hitch,' where the studio pairs a black man with a Latina."); Tom Carson, *Skin Flicks*, GQ, June 2005, at 119, 120 (describing *Hitch* as one example of "Hollywood's favorite way of dabbling in cross-racial sexuality without scaring moviegoers—the Latina Option"). In this sense, Latina actresses are being used as a wedge group between Blacks and Whites in a way that arguably only reifies racial segregation across love lines. See *infra* notes 19-23. Although the terms "Latinas" and "Latinos" are not considered to refer to a racial group but rather an ethnic group, I use the terms "race," "racial," and "interracial" when I refer to these groups throughout this Article.

17. This Article capitalizes the words "Black" and "White" when used as nouns to describe a racialized group, but not when these terms are used as adjectives. Also, this Article uses the term "Blacks" instead of "African Americans" because it is more inclusive. "It [also] is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4.

romantic relationship considered to be all black),¹⁸ and viewing as non-controversial those relationships between certain groups of non-Whites. As the Court reasoned in *Loving*, “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”¹⁹ Likewise, this emerging form of multicultural casting that almost always avoids black-white loving relationships on screen yet treats intimate on-screen relationships between certain minorities—such as black men and Latinas—as less noteworthy, must, to some extent, accomplish the same task. Indeed, the use of Latinos as a wedge group has historical significance in contexts outside of the media. For example, in early school-desegregation cases, Mexican Americans were used as a wedge group to prevent the integration of both Blacks and Mexican Americans with those who were perceived to be the “real”²⁰ white students in schools.²¹ In an attempt to prevent the entrance of Mexican American students into schools with Whites, certain Texas school districts accepted Mexican American activists’ claims that they were white in order to avoid real integration.²² After endorsing such claims, these districts then “integrated” the schools with Mexican Americans and Blacks and left those considered to be the real white students segregated within their own schools.²³

Hollywood’s new approach to casting multicultural couples can be viewed as working in the same way as these integration schemes. By declaring Mexican American students to be “white,” segregationists were

18. See *infra* Part II (discussing how this new form of multicultural casting also devalues blackness by creating a hierarchy of “castability” among female actors of color).

19. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

20. Steven Harmon Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust Upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201, 208 (2005).

21. See Steven H. Wilson, *Brown Over “Other White”: Mexican-Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 178 (2003) (“In order to delay the court-ordered desegregation of all-white schools, and also to obscure its slow pace, school district officials in Texas and elsewhere frequently assigned African and Mexican Americans to the same schools, a practice often made easier under a neighborhood school concept by the close proximity of urban ghettos to barrios. School administrators maintained that because Mexican Americans were ‘white,’ these schools had been desegregated under *Brown* and its progeny.”); Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805, 827 (2005) (book review) (“[S]chool authorities used to comply with desegregation decrees by mixing Chicano and black schoolchildren in one school and pronouncing it integrated.”).

22. See Wilson, *supra* note 21, at 178; Delgado, *supra* note 21, at 827.

23. See Wilson, *supra* note 21, at 178; Delgado, *supra* note 21, at 827.

able to avoid public school integration of Whites with either Blacks or Mexican Americans and could escape challenging notions of inequality and hierarchy based on race and ethnicity. Likewise, by choosing to pair black male actors with Latina actresses such as Eva Mendes, the entertainment industry also fails to challenge racial hierarchies and social boundaries. In a sense, casting Latinas as the love interests of black male actors serves as a compromise to the possibility of the more controversial choice of casting black men with actresses like Kate Hudson and allows Hollywood—and society in general—to avoid the seemingly sensitive task of grappling with intimate relationships between Whites and non-Whites on screen, especially those between Whites and Blacks.

More importantly, for the purposes of this Article, I explore the following question: given the role that race plays in various casting decisions and the ways in which such decisions may reinforce racial hierarchies, what distinguishes Hollywood from other places of employment such that customer preferences should be permitted to dictate casting decisions based on race? This Article examines why our post-*Loving* society allows, without legal challenge, customer preference or discrimination to unduly influence casting decisions for actors in television and movies when it does not allow—at least openly—such discriminatory influences in other workplaces under current antidiscrimination law. This Article then examines how existing antidiscrimination law can and should be used to address these improper influences in the entertainment industry. Part II of this Article the growing trend of multicultural casting in films and television in Hollywood and examines how such casting—despite its initial appeal—may work to further entrench racial hierarchies in our society. Part III details statutory law, specifically Title VII, and case law regarding employment discrimination based on customer preference to investigate how and why current law should be used to eliminate discriminatory casting decisions based on perceived customer preferences, even in light of the First Amendment. This Article concludes by highlighting the need to contest general societal practices that work to maintain racial boundaries on love and intimacy.

II. A MISSION IMPOSSIBLE?: BREAKING DOWN RACIAL HIERARCHIES OF LOVE ON FILM

Given the history of racism in the United States, especially as it concerns interracial couples,²⁴ society can applaud the way in which television and film are increasingly casting actors of different races and ethnicities together in love story lines.²⁵ If nothing else, this emerging mode of interracial casting is a sign of changing times, in which Americans may still engage in double takes of interracial couples, but may not necessarily gasp at their sight.²⁶ Consider some of the more recent interracial couples on the television and movie screen, such as the couples once played by Korean Canadian actress Sandra Oh and African American actor Isaiah Washington on the hit television series *Grey's Anatomy* and by British Indian actress Parminder Nagra and African American actor Sharif Atkins on the hit television series *ER*.²⁷

Although some may view this new form of multicultural casting as a sign of progress in Hollywood and society in general, it actually helps to reveal another way in which racial hierarchies have remained stagnant. When examined more carefully, this new mode of multicultural casting actually exposes how hierarchies among both racial minorities and

24. See Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 898-905 (2006) (detailing the racism against interracial couples); see also Johnson, *supra* note 9, at 754-61 (discussing the taboo on black-white relationships, with a focus on Jack Johnson and Essie Mae Washington-Williams, Strom Thurmond's half-black daughter).

25. See Ann Oldenburg, *Love Is No Longer Color Coded on TV*, USA TODAY, Dec. 12, 2005, at 1D (discussing the growing number of interracial couples on television).

26. See generally R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115, 129 (2005) ("While rates of marriage have declined during the past few decades, rates of interracial marriage have risen substantially . . ."). Greg Morago wrote the following about changing trends of interracial marriage:

In 2003, there were about 2.1 million interracial married couples overall in the United States, more than double the number in 1990, when the country had about 964,000 interracial married couples. Of that total in 2003, about 416,000 marriages involved black and white spouses. There were about 275,000 black husbands married to white wives, and 141,000 white husbands married to black wives. Marriages between white husbands and black wives are increasing more quickly however, up 131 percent between 1990 and 2003, while marriages between a black husband and white wife were up by 83 percent during those years.

Morago, *supra* note 3; see also Kimberley Shearer Palmer, *Movie Reflects Interracial Issues*, USA TODAY, Jan. 22, 2001, at 15A ("[A] 1997 USA TODAY/Gallup Poll [found] that 57% of teens who date have gone out with a person of another race or ethnic group.").

27. See Oldenburg, *supra* note 25.

interracial couplings, although improving in some respects, have essentially remained the same in the United States. First, as several commentators have highlighted, interracial couples are generally invisible within the industry; they tend to be absent from television shows and movies unless the interracial relationship itself is the storyline.²⁸ For example, the 1997 hit movie *Fools Rush In* with Salma Hayek and Matthew Perry focused almost exclusively on clashes of their cultures and customs, based on her being Mexican American and his being white.²⁹

Additionally, although the subject of interracial coupling has become less taboo, the scripts for many stories in the entertainment industry either fail to deal “honestly with race,”³⁰ depict such relationships as certain to end in tragedy,³¹ or present interracial relationships only in pairings that society has most commonly seen and “accepted.” The end result is the preservation of interracial relationships as outside of the norm and only acceptable in certain forms. For instance, some commentators have argued that what appears to be a greater acceptance of love stories involving white men and black women—such as Whitney Houston and Kevin Costner in *The Bodyguard*,³² Halle Berry and Billy Bob Thornton in *Monster's Ball*,³³ and Whoopi Goldberg and Ted Danson in *Made in America*³⁴—exists only because of white men's

28. See, e.g., Susan Pizarro-Eckert, Discussing “Hitch”: Deciding the Race of the Leading Lady, <http://racerelements.about.com/od/raceinthemovies/a/hitch.htm> (“The key difference with . . . movies [that star interracial couples] is that the interracial relationship *is* the plot! Without it, there would be no movie. So, while Hollywood may dare to portray the interracial couple as an oddity, a case study, something to laugh at, or an object for voyeurism, it has yet to develop a comfort level with the idea of casting in an interracial couple in a movie that just isn't about their interracial status!”). Journalist Renee Graham similarly noted, “There's the issue of interracial relationships, which rarely seem to exist in mainstream films unless it's an essential plot line.” Renee Graham, *Hollywood Steers Clear of African-American Couples*, *CONTRA COSTA TIMES*, March 15, 2005, at F4.

29. *FOOLS RUSH IN* (Columbia Pictures 1997).

30. See Fahizah Alim, *Goofy 'Guess Who' Still Pushes Buttons*, *NEWS & OBSERVER* (Raleigh), Mar. 31, 2005, at E1 (quoting Christine Acham).

31. See *id.* (“There are a fair amount of films that deal fairly seriously with interracial relationships, especially between white men and black women, such as ‘Show Boat’ and ‘Imitation of Life,’ but they all end tragically . . .” (quoting Eric Smoodin)).

32. *THE BODYGUARD* (Warner Bros. 1992) (telling the story of a white man who becomes the bodyguard for a black female pop singer and falls in love with her).

33. *MONSTER'S BALL* (Lions Gate Films 2001) (depicting a poor, black widow who enters into an intimate relationship with a racist, white prison guard).

34. *MADE IN AMERICA* (Warner Bros. 1993) (involving the relationship of a single black mother and the white man whom she mistakenly believes fathered her child as an anonymous sperm donor eighteen years before).

sexual access to black women during slavery.³⁵ The argument is that black female-white male relationships are considered “more palatable [only] because of the very nature of our notorious American history of white masters and black slaves.”³⁶ For this reason, it is argued, white society is, at least on a basic level, willing to accept the notion of white male “access” to black women on film.³⁷ In fact, television’s first forays into interracial intimacy support this very argument; it is worth noting that what is commonly referred to as the first interracial kiss on American network television appeared on a November 22, 1968 *Star Trek* episode when Captain Kirk, played by William Shatner (a white man), kissed Lieutenant Uhura, played by Nichelle Nichols (a black woman).³⁸ Likewise, one of the first married, interracial couples to

35. During the antebellum period, although a few white slavemasters actually engaged in sincere, intimate relationships with their slaves, many of them forced their black female slaves to have sex with them. See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 42-46 (2003); see also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 27 (2001) (noting that black women were even more vulnerable to sexual assault after emancipation and “[a]s a result, the number of mulatto offspring increased”); Osagie K. Obasogie, *Anything But a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 *YALE J.L. & FEMINISM* 451, 457 (2006) (raising the question of why Thurmond’s relationship with his biracial daughter’s mother was “understood as hypocritical rather than criminal” and not viewed as a “reflection of the sexual exploitation prevalent among Black women at the time”). These sexual crimes perversely resulted in profits for the slavemasters, who would often enslave their own children or sell them on the slave market. See Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 *STAN. J. C.R. & C.L.* 51, 82 (2005) (“Additionally, some white masters abused their enslaved black women by rape or seduction. Consistent with the tenets of the legal support given to the property-enslavement nexus, the law allowed a white master to legally ‘rape’ his enslaved black women. Adding one tragedy to another, one white master both sexually abused his enslaved black woman and later sold her and their son to another white master.”).

36. Morago, *supra* note 3; see also Melanie McFarland, *TV Taking Mundane View of Interracial Couples*, *SAN JOSE MERCURY NEWS*, Feb. 15, 2006, at 6 (“[O]n television, you’re more likely to see a black woman with a white guy—think Aisha Tyler’s Charlie with Ross on ‘Friends’—or a black man with another minority woman. It seems hang-ups about seeing black men and white women together in prime time still exist.”); Carla Hall, *Love in Black & White*, *WASH. POST*, Dec. 20, 1992, at G1 (“Most interracial relationships you see in movies and on television are the opposite [of a black man and white woman]—suggesting that it’s riskier to see a white woman with a black man.”).

37. See Morago, *supra* note 3.

38. See David Golumbia, *Black and White World: Race, Ideology, and Utopia in Triton and Star Trek*, *CULTURAL CRITIQUE*, Winter 1995-96, at 75, 84 (1995); McFarland, *supra* note 36 (referring to the *Star Trek* kiss as the first interracial kiss on television); see also Rick de Yampert, *Is “Desperate” Stunt a Black-White Affair?*, *DAYTONA NEWS-J.*, Nov. 26, 2004, at 1D (same). In actuality, Lucille Ball and Desi Arnaz had kissed on television by the time this episode of *Star Trek* aired. The fact that the Shatner-Nichols kiss is what ignited controversy over interracial intimacy on

appear regularly on television was Tom and Helen Willis, a white male-black female couple on the popular television show *The Jeffersons*.³⁹

Even in those scripts where black women are the lovers of white men, what appears to be a certain socioeconomic class hierarchy or lower-class acceptability among the two lovers tends to underscore the picture. The choices are twofold. In one of the common storylines, such as in *Monster's Ball*, the black woman and the white man are from the same lower or poor class⁴⁰—a depiction that leaves audiences with the comfortable notion that any race-mixing is occurring solely among the lower classes. In the other storyline, such as in *Something New*, the black woman is the noticeably more successful one⁴¹—a depiction that essentially leaves hierarchies unchallenged by presenting audiences with the seemingly comfortable notion that while the black woman may be “marrying up” with respect to race, the white man is also “marrying up” with respect to class.⁴²

On the flip side, although films exist that have black leading men and white leading women cast opposite one another (with hints of sexual tension)—such as *The Pelican Brief* starring Denzel Washington and Julia Roberts⁴³ and *Mission Impossible II* starring Tom Cruise and Thandie Newton⁴⁴—they have “hardly fogged up any windows.”⁴⁵

television, however, highlights an important point made by scholars such as Professor Kevin Johnson: that black-white, intimate relationships are the most taboo of interracial couplings. See Johnson, *supra* note 9, at 757-61. Also, the kiss between Captain Kirk and Lieutenant Uhura occurred only under the most compelling of circumstances. The two did not kiss voluntarily, but instead through force by aliens, and the kiss was necessary in order to save the world. See de Yampert, *supra* (“Though touted as the first interracial kiss on the boob tube, that milestone deserves an asterisk: The plot had Kirk and the beautiful Uhura kissing only because an alien villain forced them to do so.”); McFarland, *supra* note 36 (“But the underlying message [of the Kirk and Uhura kiss] was, ‘If I have to kiss you to save my ship and crew, by God, I’ll do it.’”).

39. See Mark L. Berrettini, *Private Knowledge, Public Space: Investigation and Navigation in A Devil in a Blue Dress*, 39 *CINEMA J.* 74, 87 n.11 (1999).

40. *MONSTER'S BALL* (Lions Gate Films 2001).

41. *SOMETHING NEW* (Focus Features 2006).

42. Clearly, there are exceptions to these rules. Tom and Helen Willis of *The Jeffersons* serve as one example of a black female-white male couple who come from similar socioeconomic backgrounds. In general, one should note that my critique of the ways in which couples are—or are not—cast across racial lines in Hollywood is a general one. Just as Tom and Helen Willis broke the mold of the poor, interracial couple or of the interracial couple consisting of the upper class black woman with the lower class white man, there are a number of major films that have challenged racialized and gendered lines regarding black male-white female intimacy by casting black men with white female love interests, such as *Guess Who's Coming to Dinner*.

43. *THE PELICAN BRIEF* (Warner Bros. 1993).

44. *MISSION IMPOSSIBLE II* (Paramount Pictures 2000).

45. Horn, *supra* note 12 (asserting that, if interracial romance is the crux of the story, it “is limited to movies made outside of the studio system”); see also Omayra

Because of the stigma attached to black male–white female relationships, this terrain has remained virtually uncharted in the film industry. This absence of black male–white female relationships on film has only deepened existing racial hierarchies of love.

Although certainly a step in the right direction, the emerging mode of multicultural couples casting in Hollywood also works in a way that further entrenches racial boundaries on intimacy. In a sense, this new form of casting serves as a compromise between casting monoracial relationships deemed not as attractive to audiences⁴⁶ and casting black-white relationships deemed too controversial for society.⁴⁷ In this vein, the new mode of multicultural casting works only to maintain current racial hierarchies by sending a subtle message that all non-Whites are unworthy of integration with Whites as social equals but are free to intimately mingle among themselves.⁴⁸ As noted before, the Supreme Court in *Loving* highlighted how Virginia’s antimiscegenation statutes were structured around the goal of maintaining white supremacy by prohibiting marriages only of Whites with non-Whites and not those between non-Whites of differing racial categories with each other.⁴⁹ With this point in mind, one must then wonder if Hollywood’s current form of multicultural casting primarily functions in a way that merely reifies these binary categories of White as insider and desirable and non-White as outsider and undesirable. The simple truth is that, while Hollywood decisionmakers often avoid black-white couplings (especially those

Zaragoza Cruz, *Easy Lover: Calculating the Upside of Eva Mendes*, POPMATTERS, Apr. 6, 2005, <http://www.popmatters.com/columns/cruz/050406.shtml> (discussing the lack of intimacy between main characters in movies such as *The Pelican Brief* and *The Bone Collector*, which starred Angelina Jolie and a quadriplegic character played by Washington). In fact, Omayra Zaragoza Cruz has marveled at how even Will Smith is not deemed safe enough to be cast with a white female love interest:

Will Smith, the Fresh Prince of Bel-Air and poster child for Philly’s harmless suburban rap, is conceivably the ‘safest’ image of black masculinity available to the film industry. Yet even he is not immune to the legacy of this particular stereotype in that he cannot be cast as a fully sexual person with a white woman.

Id.

46. See Robinson, *supra* note 4 (“[O]pportunities to play a lead tend to go to white actors, because the industry executives believe actors of color lack the universal appeal to sustain such an expensive project.” (footnote omitted)).

47. See *supra* notes 2-4 and accompanying text.

48. To the extent that some nonwhite actors—excluding black actors, Asian American actors, or biracial actors of African descent—are portrayed as social equals on film, they are often playing white characters themselves. See Graham, *supra* note 3; see also *THE WEDDING PLANNER* (Columbia Pictures 2001) (featuring Jennifer Lopez, a Puerto Rican actress, as a wedding planner of Italian descent); *infra* note 54.

49. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

involving black men and white women), they often treat couplings among differing groups of non-Whites as considerably less taboo.⁵⁰

In fact, *Hitch's* leading lady, Eva Mendes, agrees that the entertainment industry's new form of multicultural casting is in line with the age-old idea of separating non-Whites as a whole from Whites, but not necessarily from each other.⁵¹ Specifically, Mendes has critiqued the way in which she is so readily cast against black men in major Hollywood movies—as fit for the love interest of black men but not white men.⁵² Although Mendes has acknowledged the way in which she may benefit from this form of casting by receiving the opportunity to work with famous black actors such as Will Smith, Denzel Washington, and Ice Cube, she recognizes the limits placed on her career by many filmmakers' perceptions about audience receptiveness to on-screen interracial relationships.⁵³ As one commentator asked, “why is [Mendes] considered too dark to be paired with a white lead, but just right for an African-American?”⁵⁴ Perhaps the answer is, as another journalist

50. Jeannette Walls, *Was Race an Issue in 'Hitch' Casting?*, MSNBC.COM, <http://www.msnbc.msn.com/id/7019342/> (“[T]he black/Latina combination is not considered taboo.”).

51. See Samuels, *supra* note 16, at 52.

52. See *id.*

53. See *id.*

54. See *id.* (“I wish the mentality wasn't so closed.” (quoting Eva Mendes)); Soren Baker, *Hollywood's Latest Take on Interracial Romance*, L.A. TIMES, Jun. 17, 2000, at F12 (“[S]tudio executives more often seem comfortable backing a film that has a minority involved with another minority than one that has a white linked with a minority.”). Eva Mendes, however, was cast opposite both Matt Damon and Greg Kinnear, two white actors, in the Farrelly brothers' comedy, *STUCK ON YOU* (20th Century Fox 2003) and Nicolas Cage in the movie *GHOST RIDER* (Sony Pictures 2007).

Others have argued that once Latina actresses hit a certain level of success in Hollywood, they are then always cast opposite leading white men. For example, journalist Renee Graham noted that, while Jennifer Lopez began her career as a leading lady cast against stars such as black actor Wesley Snipes in *MONEY TRAIN* (Columbia Pictures 1995), she has now transcended race such that she becomes Italian in some instances and is rarely cast against men of color. See Graham, *supra* note 3; see also *GIGLI* (Sony Pictures 2003) (starring Ben Affleck); *MAID IN MANHATTAN* (Sony Pictures 2002) (starring Ralph Fiennes); *THE WEDDING PLANNER* (Columbia Pictures 2001) (starring Matthew McConaughey). Graham asserted, “Years ago, when Jennifer Lopez's profile was beginning to rise, my uncle predicted that audiences would never again see her paired with a black actor . . . as her romantic lead. He was right.” Graham, *supra* note 28. Jessica Alba's career has taken a similar path. She began her movie career cast opposite Mekhi Phifer in the movie *HONEY* (Universal Studios 2003) but moved on to roles opposite actors such as Paul Walker in *INTO THE BLUE* (Sony Pictures 2005).

Ironically, the black male-Latina couplings that are growing in on-screen movies tend to reflect the real-life romantic couplings for several of the most successful and popular Latina actresses. For example, Alba has been in a long-term relationship with Cash Warren, a producer who is black-biracial. Eva Longoria, who starred in the thriller *THE SENTINEL* (20th Century Fox 2006) with Michael Douglas and Kiefer Sutherland, is

explained, that “Mendes’ Latinidad is the easy answer: not quite white enough to require protection from lingering fears of black men’s virility, not so black as to alienate audiences, and just exotic enough to be titillating.”⁵⁵

Additionally, black actress Nia Long has commented about how such casting reinforces the notion of Blacks as outside the norm, asserting that in Hollywood, “two black characters equals a black film and not just a movie about two people.”⁵⁶ The consequence is that black actresses become nearly frozen out of Hollywood,⁵⁷ deemed unsuitable for roles opposite both black and white leading men. While some Latina actresses have broken down barriers and have been cast as white opposite white male actors,⁵⁸ black-identified actresses, including Halle Berry—who is half-white and who is clearly appealing to white men⁵⁹—are rarely cast as love interests for men who are not black. Actress Jasmine Guy, formerly of *A Different World*, bluntly proclaimed:

engaged to Tony Parker, a black-biracial NBA player. *See Sightings*, N.Y. POST, May 13, 2006, at 13; Johnny Ludden, *Eva Got a 5-Carat Surprise from Tony*, SAN ANTONIO EXPRESS NEWS, Dec. 2, 2006, at 3A. Prior to marrying Marc Antony, Jennifer Lopez was involved in a long-term relationship with black music mogul Sean “P. Diddy” Combs. *See Note Worthy*, MILWAUKEE J. SENTINEL, Dec. 14, 2001, at 12.

55. Zaragoza Cruz, *supra* note 45 (“Of Cuban descent, Mendes is considered too dark to play the love interest for a white lead. Instead, she has appeared across from other notable black actors. . .”).

56. Samuels, *supra* note 16, at 52; *see also Actress Speaks on Leading Lady Racism*, JACKSONVILLE FREE PRESS, Mar. 31–Apr. 6, 2005, at 13 (“My take is America’s racist . . . It’s like, ‘How can we make the most money?’ I hate the idea that you can’t have a black couple . . .” (quoting Queen Latifah)); Patrick Goldstein, *Marketing the Color Black*, L.A. TIMES, Apr. 18, 1989, at 6-1 (“It was clear to us that with two leading characters being black it would be hard for us to make this a broad-based picture . . .” (quoting David Forbes, president of MGM/UA Distribution)); *cf.* Jill Nelson, *Hollywood Distorts Black Romance*, USA TODAY, Mar. 25, 2005, at 13A (“It’s not progressive or multicultural to eliminate black women as romantic leads. It’s offensive, and I think, bad business. It would be nice to see more women who look like me in Denzel’s arms, and I know I’m not the only woman who’d plunk down money to enjoy it. The truth is that the overwhelming majority of Americans marry people of the same race. It’d be nice for Hollywood to reflect the relationships and romance that get us to the altar.”).

57. *See* Robinson, *supra* note 4, at 22-23 (noting that 78 percent of African American leads went to men).

58. Of course, the fact that Jennifer Lopez should have to downplay her racial and ethnic identity at all for these roles and play, for example, the role of an Italian woman, is highly problematic. On the other hand, it is a sign of progress that a Latina who openly declares her heritage is not being limited to just roles for Latinas.

59. *See* Vivian B. Martin, *Change Won’t Come in the Form of a Golden Statuette*, HARTFORD COURANT, Mar. 28, 2002, at A15 (noting that Halle Berry is half white and is widely admired for her looks). In real life, Halle Berry is dating white model Gabriel Aubry. *See Meet Halle’s New Man*, PEOPLE WEEKLY, Feb. 27, 2006, at 86.

I used to fight battles with my agents. . . . “Why can’t I go up for a part that Meg Ryan and Julia Roberts are going up for? That’s what I am.” They’re like, “They won’t make this an interracial couple, the pretty woman thing.” I’m like, “Do you know how many Black prostitutes there are out there, and how many White boys go out to buy it?” That wasn’t realistic to them. But they didn’t want to be realistic. They wanted White people.⁶⁰

In many ways, then, the new form of multicultural casting not only freezes black women out of acting but ends up pitting actresses of color against each other. Black actress Gabrielle Union explained this dynamic by stating that “after Halle Berry does her films and Latifah does her films, it’s left to all the black, Latino and Asian actresses to fight over a couple of roles.”⁶¹ In this sense, the problem is not that Latina actresses are being cast against black men in movies—an image that should be encouraged in films—but rather that black, Latina, and Asian American women generally are not seen as viable love interests for white male actors and, in particular, that Hollywood assumes “that black women can at most play opposite black men.”⁶²

Some interlocutors contend that these multicultural, interethnic casting decisions are simply a matter of business.⁶³ The argument is that

60. Isabel Wilkerson, *Hollywood Shuffle*, ESSENCE, Mar. 1997, at 71; see also Leonard M. Baynes, *WHITE OUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 311 (2003) (“[T]here is a phenomenon that if you don’t specify race in a script, nine times out of ten a white person will be cast—that if you want a person of color you write it down” (quoting Rene Balcer, executive producer of *Law and Order*) (footnotes omitted)). Black actor Raymond Forchion stated as follows:

It has been my experience that casting directors tend to think in very traditional terms. . . . I read characters all the time that I feel I would absolutely be right for, but because the word, ‘Black’ is not in front of the character description, I would never be considered for the role.

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, 516 (1999).

61. Ta-nehisi Coates, *The Color of Money: No Longer Black and White*, N.Y. TIMES, July 10, 2005, at 2-1.

62. E-mail from Russell Robinson, Professor of Law, UCLA School of Law (May 11, 2006).

63. See 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, 111 (2000) (“Several commentators have asserted that the color of faces we see on any screen, and the way those faces are portrayed, are simply matters of economics. For these observers, the whiteness of television is a product of the law of supply and demand, and nothing more.”); see also Michael J. Frank, *Justifiable*

the selection of television and movie casts is pure economics.⁶⁴ Jeff Friday, a producer and the founder of the American Black Film Festival, noted that the casting of Will Smith and Eva Mendes in *Hitch* “just is good business sense.”⁶⁵ From the look of it, everyone in the entertainment industry—from casting agents to directors to producers to film companies to actors—seems to fear the consequences of negative audience reaction to interracial love. In fact, the fear of negative customer reaction has even caused some actors to turn down roles involving interracial relationships. For example, in 1991, Walt Disney Studios experienced significant trouble finding a prominent white male actor who would even accept the starring role in what was supposed to be the movie project *Randall and Juliet*, with black actress Sheryl Lee Ralph.⁶⁶ As one columnist has noted, “What is disturbing is that we make accommodations for . . . not-so-subtle racism in our most popular forms of entertainment.”⁶⁷

But even assuming that people such as Spike Lee are correct that the “last taboo . . . still is taboo”⁶⁸ and that producers such as Friday are correct about the rationale for adhering to customer preferences about race, what makes Hollywood distinct from other places of employment such that customer preference should dictate its casting choices in situations where race is not central to the very essence of the project? Why allow a form of discrimination in entertainment that is not acceptable in any other workplace? After all, from an actor’s perspective, the consequences of such discriminatory customer influence are dire, resulting in an environment where the actor may be denied a job on set largely because of race⁶⁹ or worse, may not even have the chance to audition for a role.⁷⁰ In fact, with the exception of a limited number of

Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?, 35 U.S.F. L. REV. 473, 521 (2001) (“Entertainment executives use this consumer choice argument to justify the lack of minorities in the industry.”).

64. See Williams, *supra* note 63, at 111.

65. Samuels, *supra* note 16, at 52. Allison Samuels further asserts that, because “Hispanics are now the largest American minority group[,] businesswise, it’s a no brainer.” *Id.*

66. *Last Taboo*, *supra* note 7.

67. Morago, *supra* note 3; see also Graham, *supra* note 3 (“More disheartening, though, is the notion that moviegoers will still avoid certain films simply because of the race of their stars.”).

68. *Last Taboo*, *supra* note 7.

69. See Robinson, *supra* note 4, at 8. In some cases, actors may not even know that race-specific breakdowns caused them to not be cast. See *id.*

70. See *id.* In a survey of breakdowns from June 1, 2006, through August 31, 2006,

22.5% of roles were designated for whites, and 22.7% were designated for another racial/ethnic group. Although the largest group of listings, 46.5%,

stars, minority actors and actresses of all races are virtually invisible on screen, and part of this invisibility is due to perceived customer preferences based on race.⁷¹

III. SOMETHING NEW?: HOW SHOULD SOCIETY CHALLENGE CASTING DISCRIMINATION?

As in the average workplace, customer racial preferences in the entertainment industry should not be deemed a legitimate basis for refusing to hire a particular employee, in this situation, any particular actor.⁷² Otherwise, the white-supremacist notions about race mixing that the *Loving* Court challenged and rejected will continue to dominate the media.

Title VII of the Civil Rights Act of 1964 governs discrimination in the workplace.⁷³ Section 2000e-2(a) explicitly provides that it is unlawful for an employer

comprised roles that did not designate a race/ethnicity, these roles were understood to be for white actors. . . . Thus, 69% of available roles were reserved for white actors.

Russell Robinson, *Hollywood's Race/Ethnicity and Gender-Based Casting: Prospects for a Title VII Lawsuit*, LATINO POL'Y & ISSUES BRIEF, Dec. 2006, at 1 http://www.chicano.ucla.edu/press/briefs/documents/LPIB_14December2006_001.pdf (footnotes omitted). *But see* Kristal, *supra* note 4 (“[I]n the three years since SAG released its casting report, the union has documented the percentage of minority actors on the rise.”).

71. *See* Suzanne C. Ryan, *In Living Color, Most Stars Are White, Blacks, Asians, Latinos Still Playing Limited Roles on TV*, S.F. CHRON., Nov. 29, 2002, at D12; *see also* Gaby Wood, *We're Latin Lovers Now*, OBSERVER, Oct. 27, 2002, at 7 (describing how the movie industry froze out Latino actors for years); Robin Givens, *Why Are Black Actresses Having Such a Hard Time in Hollywood?*, EBONY, June 1991, at 36, 36 (describing the difficulty black actresses experience in finding work in Hollywood). In an article, writer Gaby Wood notes how white actresses have been cast as Latinas in films, such as Catherine Zeta-Jones, who was cast as Mexican in *THE MASK OF ZORRO* (Sony Pictures 1998); Madonna, who was cast as Eva Peron in *EVITA* (Miramax 1996); and Jennifer Connelly, who was cast as John Nash's El Salvadorian wife in *A BEAUTIFUL MIND* (Dreamworks SKG 2001). Wood, *supra*. Black actress Kimberly Russell, formerly of the television show *Head of the Class*, noted the following about the “dilemma of the Black actress”: “The feeling is greater than frustration. It's an injustice. It's almost as if we are being raped or robbed of our craft because we are so limited in our opportunities.” Givens, *supra*. Similarly, Peruvian American actor Benjamin Pratt has asserted, “If we are really to be honest with ourselves . . . the issue of racism in this country hasn't truly been dealt with.” Wood, *supra*.

72. *See, e.g.*, *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (rejecting customer preference as a justification for discrimination against a black woman); *EEOC v. St. Anne's Hosp. of Chicago*, 664 F.2d 128, 133 (7th Cir. 1981) (holding that race discrimination is not justified by customer preference).

73. *See* 42 U.S.C. § 2000e-2 (2000). Additionally, Title VII prohibits the publication of “any notice or advertisement relating to employment . . . indicating any

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁷⁴

Section 2000e-2(e) of the statute provides an exception to 2000e-2(a) by allowing employers to discriminate on the basis of sex, religion, and national origin as long as the discrimination constitutes a "bona fide occupational qualification reasonably necessary to the normal operation" of the business.⁷⁵ This exception, however, does not apply to race.⁷⁶ In fact, the drafters of Title VII expressly rejected race as a bona fide occupational qualification (BFOQ).⁷⁷

Nevertheless, the drafters recognized the need of the entertainment industry to cast actors with certain appearances where race was necessary to the functioning of the project and acknowledged that decisionmakers could hire someone with the appearance of a black person, for example, in casting for the role of a black person in a movie or show. The record notes:

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 Negro⁷⁸

Thus, where race is necessary for the credibility of a role in a movie or television project, casting directors can select actors based on the way they look, not their race, without violating Title VII.⁷⁹

preference, limitation, specification, or discrimination, based on race [or] color." *Id.* § 2000e-3(b).

74. *Id.* § 2000e-2(a).

75. *Id.* § 2000e-2(e)(1).

76. *Id.*

77. *See* 110 CONG. REC. 2550 (1964).

78. *Id.* at 7217.

79. *See id.*; *see also* Frank, *supra* note 63, at 498 (quoting Congressman James O'Hara as asserting that seeking a person of a "particular hue" does not come "within the

In his research of the casting process in Hollywood, Professor Russell Robinson found no published decision of a case that was filed by an actor who alleged race discrimination based on discriminatory customer preferences in casting;⁸⁰ however, no one denies the existence of casting discrimination within the entertainment industry, and the case law concerning such customer-based decisionmaking in other workplaces suggests that such processes in the entertainment industry should also be illegal under Title VII. In other words, case law indicates that, where race might not be deemed central to the function of a creative project, casting selections based on such appearances, including those influenced by customer preferences, technically violate Title VII.

For example, in *Diaz v. Pan American World Airways*, the Fifth Circuit made it clear that adherence to alleged customer preference did not justify an employer's sexually discriminatory hiring practices.⁸¹ In *Diaz*, Celio Diaz, a man who had applied for a job as a flight attendant, challenged the airline's practice of hiring only female flight attendants due to overwhelming customer preferences.⁸² In addition to customer preference, the airline claimed that being female was a BFOQ because women were better at certain "non-mechanical aspects" of the flight attendant's job, including "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making the flights as pleasurable as possible."⁸³ Although sex, unlike race, may be recognized as a BFOQ, the Fifth Circuit rejected the airline's arguments, holding instead that "customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."⁸⁴ According to the Fifth Circuit, the word "necessary" in section 2000e-2(e) of Title VII requires that courts "apply a business *necessity* test, not a business *convenience* test."⁸⁵

Thus, discrimination based on sex would be "valid only when the essence of the business operation would be undermined by not hiring

meaning of the unfair practices described in" Title VII); *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) ("A business necessity exception may also be appropriate in the selection of actors to play certain roles. For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr.").

80. See Robinson, *supra* note 4, at 2; see also Kristal, *supra* note 4 (describing one actor's reasons for not filing a Title VII lawsuit as a belief that "such a suit would ultimately fail to change the status quo").

81. See 442 F.2d 385, 389 (5th Cir. 1971).

82. See *id.* at 386-87.

83. *Id.* at 387.

84. *Id.* at 389.

85. *Id.* at 388.

members of one sex exclusively.”⁸⁶ After noting that the essence of the airline’s business was to safely transport people from one place to another, the court held that female attendants’ apparent ability to perform the “non-mechanical aspects” of the job was not “reasonably necessary to the normal operation” of the business.⁸⁷ Consequently, the employer could not exclude all men simply because “most men may not perform adequately.”⁸⁸ More importantly, the court reasoned that allowing customer preferences to dictate what a legitimate BFOQ is would completely undermine Title VII’s purpose, asserting that “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether sex discrimination was valid.”⁸⁹

Likewise, in *Sarni Original Dry Cleaners, Inc. v. Cooke*—a case dealing explicitly with the exclusion of members of a certain race and applying the Massachusetts state version of Title VII—the Supreme Judicial Court of Massachusetts held that “an employer must show that ‘the essence of the business operation would be undermined by not hiring members of one [race] exclusively’” to qualify for a BFOQ exception.⁹⁰ In *Sarni*, young boys had thrown rocks at a truck that a black male employee, Ronnie Cooke, was driving to the employer’s store in South Boston.⁹¹ Although the incident did not interfere with Cooke’s duties or cause Cooke to feel that he was in any danger (except that of losing his job), Sarni, the employer, fired him after an attendant at a nearby gas station warned “that if Cooke came back there would be trouble.”⁹² Sarni thereafter replaced Cooke with a white man, and Cooke challenged Sarni’s actions, which included offering Cooke one week’s pay to resign after Cooke refused to switch routes and admitting that it would not have hired a black man to replace Cooke.⁹³

In reviewing Cooke’s claim, the court rejected Sarni’s excuse that its decision was due to racial prejudice in South Boston and held that

86. *Id.* (emphasis omitted). One exception is *Dothard v. Rawlinson*, where the Supreme Court found sex to be a BFOQ for the employment of guards in maximum-security male prisons because more was at stake than the “individual woman’s decision to weigh and accept the risks of employment.” 433 U.S. 321, 335 (1977). The Court determined that the presence of a female guard could cause violence to break out, an effect that went to the essence of the job, which was to maintain security at the prison. *See id.*

87. *Diaz*, 422 F.2d at 385, 387.

88. *Id.* (emphasis omitted).

89. *Id.* at 389 (“Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”).

90. *See* 447 N.E.2d 1228, 1233 (Mass. 1983) (quoting *Diaz*, 442 F.2d at 388).

91. *Id.* at 1230.

92. *Id.* at 1230-31.

93. *See id.* at 1231.

Sarni's "decisional criterion was facially improper" because it "was admittedly and exclusively racial."⁹⁴ The court agreed with the Massachusetts Commission Against Discrimination's reasoning that "to allow such flagrant criminality to serve as the justification for a racial termination . . . would reward and encourage the very lawlessness and racism which it is the purpose of [the antidiscrimination statute] to eliminate."⁹⁵ Moreover, the court highlighted that it was not necessary to show that the employer itself acted with racial hostility or animosity toward the employee, but only that the employer acted intentionally because of the employee's race—in this case, allegedly because of a negative and violent reaction from the public.⁹⁶

For all of the reasons asserted in cases such as *Diaz* and *Sarni*, customer preference should not be able to withstand legal challenge as a proper basis for determining casting selections in the film and television industry. Even sex, which is recognized as a valid BFOQ under Title VII, can be one only "[w]here it is necessary for the purpose of authenticity or genuineness."⁹⁷ Furthermore, as the Code of Federal Regulations notes about the use of sex as the basis for a BFOQ, employment decisions cannot be based on the preferences of co-workers, the employer, clients, or customers, unless the preference relates to an actor's authenticity.⁹⁸

Unless the appearance of race is central to the authenticity of a role, such as when the story line actually requires an interracial couple of particular races, studio executives, producers, directors, agents, and casting directors should not be permitted to exclude from casting a particular class of actors of a certain race, even when those decisions are based on economic considerations—specifically, customer preferences. Title VII would not permit a store owner to refuse to hire black store clerks because the store owner's customers would buy goods only from white clerks.⁹⁹ Consequently, Title VII should also preclude decisions in the entertainment industry that are based purely on whether an interracial couple would stop customers from purchasing tickets at the box office.¹⁰⁰

94. *Id.* at 1231-32 (quoting the Massachusetts Commission Against Discrimination).

95. *Id.* at 1233 n.7 (quoting the Massachusetts Commission Against Discrimination).

96. *See id.* at 1232 & n.5.

97. 29 C.F.R. § 1604.2(a)(2) (2006).

98. *See id.* § 1604.2(a)(1)(iii).

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

100. *See Robinson, supra* note 4, at 33 ("If the law simply catered to customer expectations, Title VII and the other civil rights laws enacted in the 1960's never would have been able to integrate workplaces, housing and places of public accommodation due

The importance of revenue from audiences in the film industry is not sufficient to justify any differences in how we treat the entertainment workplace and other work environments. Although it may be acceptable to base casting decisions on the images of the actors or employment decisions on the appearances of store clerks irrespective of race or other impermissible factors, where race improperly creeps into those decisions, illegal discrimination has occurred. Clothing giant Abercrombie and Fitch recently learned this difficult lesson when it agreed to a forty-million-dollar settlement after black, Latino, and Asian American workers who were not deemed to fit the “Abercrombie look” filed a lawsuit against the company.¹⁰¹

One could argue that films are different from other types of employer-produced goods because rather than just selling the good itself—presumably the script—the actor, unlike a store clerk who sells a good from a store, is an integral part of the good. But the issue here is not whether the actor is an integral part of the good itself; certainly he or she is. Rather, the issue is whether that actor’s racial appearance is also an integral part of the good. Where it is not, it is discrimination to make casting decisions based upon such considerations.

One could argue, however, that creative works such as films are protected by the First Amendment and thus are distinct in a way that should allow filmmakers and producers to select casts based on customer preferences, whether or not such preferences are racially discriminatory. After all, the First Amendment protects expressive materials, including films.¹⁰² Therefore, filmmakers could argue that such restrictions on the freedom to cast actors would unfairly impact the content of the film or the views expressed within it. In fact, courts have repeatedly protected the rights of filmmakers to not have their messages regulated.¹⁰³ But, regulations on the use of race in the hiring of actors do not involve restrictions on the content of the film. A studio can express the view that interracial relationships are bad and socially undesirable in its movie and

to the pervasiveness of racist and sexist preferences and attitudes. Because the law requires virtually all employers not to discriminate, no employer is hobbled with a competitive disadvantage. So if courts override and reshape customer preferences in other contexts, why should they defer to them with respect to casting? The guidelines do not say.”).

101. See Steven Greenhouse, *Abercrombie & Fitch Bias Case is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16. Abercrombie & Fitch did not admit to discrimination, but the clothing company settled the case that alleged discrimination in the hiring of sales clerks based on racialized beauty standards and appearance codes. *See id.*

102. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Federation of Turkish-Am. Soc’ys, Inc. v. Am. Broad. Cos.*, 620 F. Supp. 56, 57 (S.D.N.Y. 1985).

103. See, e.g., *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959).

thereafter have that content protected under the First Amendment.¹⁰⁴ Such a view, while not desirable, is certainly worthy of protection so long as it is not intended to incite violence.¹⁰⁵ However, the refusal to cast actors across racial lines, where objections to the couple are not central to the project's message,¹⁰⁶ is not content deserving of protection. Rather, it is an employment decision that should be subject to antidiscrimination law. Here, there is no attempt to censor ideas, but simply to prevent employment discrimination.

Admittedly, as with any discrimination case, the major obstacle here will not be in identifying the type of discrimination that is occurring, but rather in proving the discrimination itself. Rarely will an employer admit that it based an employment decision on the public's discriminatory reactions, as the employer in *Sarni* did.¹⁰⁷ Although a traditional disparate-treatment or mixed-motive claim does not require direct evidence of discrimination,¹⁰⁸ it will be difficult for any plaintiff to challenge a casting decision based on race in a world where a film creator can identify—whether true or not—many other seemingly race-

104. Cf. *Cohen v. California*, 403 U.S. 15, 18 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Federation of Turkish-Am. Soc'ys*, 620 F. Supp. at 58-59.

105. Cf. *Cohen*, 403 U.S. at 18 (asserting that speech is not protected if it is intended to incite violence); see also *Brandenburg*, 395 U.S. at 448; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Vietnamese Fishermen's Ass'n v. The Knights of the KKK*, 543 F. Supp. 198, 208 (S.D. Tex. 1982); *Federation of Turkish-Am. Soc'ys*, 620 F. Supp. at 58.

106. See Robinson, *supra* note 4 (“[F]ew films grapple with race explicitly—only 5% of the 2004, and 6% of the 2005, films either had racial themes or the casting of the leads otherwise clearly implicated race.”).

107. Cf. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1285 (asserting that discrimination has generally become more subtle); Angela P. Harris, *The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 208 (1996) (“[T]he open espousal of racist ideology is now taboo.”); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5 (2006) (“[M]any scholars contend that modern-day employment discrimination is characterized less by overt, intentional discrimination than by unconscious or subtle biases.”); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 169-70 (2004) (“These days discrimination rarely takes the form of a per se refusal to hire women or men because of their sex . . .”).

108. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-03 (1973); Paul R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200-19 (2003); see also Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas*, 53 EMORY L.J. 1887, 1922-48 (2004) (discussing what the author views as the nullifying effect of *Costa* on *McDonnell Douglas*).

neutral reasons for not hiring a particular actor.¹⁰⁹ Likewise, where race is not specified in a breakdown, it will be difficult to show that one was denied the opportunity to try out for the role because of race.¹¹⁰ Still, it is important that we bring such issues to the attention of the public as a means of challenging the racial hierarchies that the *Loving* Court identified as the foundation for maintaining notions of white supremacy. Cases that challenge the use of race in the casting of romantic couples and in casting in general could move writers to include an explicit call for a diverse group of actors in their scripts, spur agents to send more actors of color to try out for roles in which the race of the character is not specified,¹¹¹ or result in the hiring of a more racially and ethnically diverse group of writers, directors, and producers.¹¹² Overall, such legal challenges are especially important if we want to address discrimination in casting because the media is such a powerful instrument in shaping public attitudes and opinions about race and, here, interracial couples forty years after the decision in *Loving v. Virginia*.¹¹³

IV. CONCLUSION

In sum, while we have come a long way since *Loving v. Virginia* and the contemporaneous release of *Guess Who's Coming to Dinner*, we have an even longer way to go. As a society, we cannot be lulled into

109. See Robinson, *supra* note 4, at 50 (“Although a discriminatory breakdown could function as a ‘smoking gun,’ where such breakdowns are not used, an actor would have extreme difficulty prevailing because of the discretion, opaqueness and subjective nature of the casting process.”).

110. Cf. Robinson, *supra* note 4, at 2.

111. See generally The Yin Blog, http://yin.typepad.com/the_yin_blog/ (Nov. 30, 2006, 17:00) (citing Reggie Lee of *Prison Break* and Daniel Dae Kim of *Lost* as examples of Asian actors cast “in secondary roles that would traditionally go to non-minority actors”).

112. See generally Kristal, *supra* note 4 (“[Angel Rivera, the Screen Actor Guild’s national director of affirmative action and diversity] believes the solution lies in hiring more-diverse writers, directors, producers, and executives at the studio.”). It is worth noting that the writer and creator of *Grey’s Anatomy*, which features a richly diverse cast of actors, is a black woman. See Lola Ogunnaike, ‘Grey’s Anatomy’ Creator Finds Success in Surgery, AZCENTRAL.COM, Sept. 27, 2006, at <http://www.azcentral.com/ent/tv/articles/0928greys.html>; see also Aldore Collier, *Shonda Rhimes: The Force Behind Grey’s Anatomy*, EBONY, Oct. 2005, at 204 (discussing the creator’s commitment to diversity on set and avoiding stereotypical roles for actors).

113. See Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 620-24 (2000) (explaining the impact that media images in advertising can have on perceptions of race); Baynes, *supra* note 60, at 301-07, 326-27 (discussing the effect of negative racial stereotyping in television); see also Chen, *supra* note 60, at 516 (discussing the consequences of a lack of diversity in the film and television industry, “including diminishing racial identities for minorities”).

complacency by the emerging form of multicultural casting that seems to expand racial boundaries of love but also replicates the binary interracial hierarchy that existed in many former antimiscegenation statutes—that of acceptability of relationships between non-Whites with each other and the rejection and prohibition of relationships between Whites and non-Whites.

Rather, we must follow Will Smith's lead in exposing and critiquing the racial biases that underlie many of the casting decisions in Hollywood. To rephrase Professor Randall Kennedy's question in his article on *Loving* ten years ago, we should ask ourselves, "How is Hollywood doing with *Loving*, both in script and on screen?"¹¹⁴ Although such questions are difficult to answer and challenges to discrimination are difficult to prove, society, including the film industry, will not advance without them. Perhaps we need one brave actor to break new ground by filing an official challenge to a casting decision that was influenced by race-based customer preferences.¹¹⁵ Who will he or she be? That's another hitch altogether.

114. See generally Kennedy, *supra* note 9.

115. See Robinson, *supra* note 4, at 6 n.12 (listing the "clubby, relationship-driven nature of the industry, its unbridled creative culture, and the threat of losing employment opportunities for contravening community norms" as obstacles set before an actor in bringing a lawsuit); Frank, *supra* note 63, at 512-14 (discussing several reasons why an actor has not yet sued); see also Kristal, *supra* note 4 ("I think what we need in terms of a lawsuit are actors that are willing to take a chance and accept the possibility that they might never work again, but that in the long run it might create more opportunity for people." (quoting Professor Russell Robinson)).