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# **The Rockettes: Out of Step With the Times? An Inquiry Into the Legality of Racial Discrimination In the Performing Arts**

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## **Introduction**

The Rockettes are a dance troupe consisting of thirty-six women. Their precision dancing is world famous and has attracted over 255 million patrons to Radio City Music Hall over the past fifty-two years. More than five thousand women have danced with the group since it was created in the 1920's, every one of them white.<sup>1</sup> The New York City Ballet has a roster of 108 classical dancers. There are only five minority dancers in the troupe and none of them is ranked among the company's principal dancers.<sup>2</sup> The Metropolitan Opera has only one non-white male lead vocalist on its roster of 111 basses, baritones and tenors.<sup>3</sup>

This Note will examine the racially exclusive hiring practices of the Rockettes and other performing arts institutions including those which present classical ballet, opera and legitimate theater. It will discuss the pervasiveness of racial discrimination in the performing arts and suggest a test to determine whether the racial characteristics of a performer may justify excluding him or her from employment, and analyze what influence the unique exigencies of the performing arts have upon their relation to the anti-discrimination laws of Title VII of the Civil Rights Act of 1964.<sup>4</sup>

## **I. Equal Employment in the Context of the Performing Arts**

Title VII of the Civil Rights Act of 1964<sup>5</sup> is one of the many federal and state constitutional and statutory provisions which reflect

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1. See *infra* notes 24-30 and 50-75 and accompanying text.
  2. See *infra* notes 31-38 and 76-110 and accompanying text.
  3. See *infra* notes 39-40 and 112-30 and accompanying text.
  4. 42 U.S.C. § 2000e (1982) [hereinafter cited as the Act].
  5. *Id.*

this country's deep commitment to the principle of equal opportunity.<sup>6</sup> The Act expressly prohibits discrimination in employment on the basis of an individual's race, color, religion, sex or national origin.<sup>7</sup> Exceptions to this rule are provided for in certain narrow circumstances in which "religion, sex or national origin operates as a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that business or enterprise. . . ."<sup>8</sup> However, the BFOQ defense is not available to charges of race or color discrimination under Title VII.<sup>9</sup> Since race and color are conspicuously

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6. See, e.g., U.S. Const. amends. XIII, XIV, XV, XIX, XXIV; 42 U.S.C. §§ 1981, 1982, 1983, 1985, 2000a (Subchapter II of the Act, on Public Accommodations), 2000c (Subchapter IV of the Act, on Public Education) (1982).

7. 42 U.S.C. § 2000e-2(a) provides that:

It shall be an unlawful employment practice for an employer -

(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.

8. 42 U.S.C. § 2000e-2(e) states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, 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, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Senators Joseph S. Clark and Clifford P. Case commented on the BFOQ:

This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.

H.R. Doc. No. 7152, 88th Cong., 2d Sess., 110 Cong. Rec. 7213 (1964).

9. *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157 (2d Cir.), cert. denied, 454 U.S. 818 (1981) (unlawful to assign black employee to minority group recruitment because

absent from the BFOQ exception, one may conclude that there is no exception for any discrimination based on race or color.

In *Griggs v. Duke Power Co.*,<sup>10</sup> a case in which employment in an electrical power generating plant was contingent upon the applicant's having a high school diploma or passing an intelligence test, the Supreme Court developed what has come to be known as the "business necessity" doctrine. It prohibits unintentional, discriminatory hiring practices which are racially neutral but affect minorities and women adversely. The Court noted, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is 'business necessity.' If an employment practice cannot be shown to be related to job performance, the practice is prohibited."<sup>11</sup> If a business necessity can be found, the doctrine inferentially protects practices which are fair in form but discriminatory in operation. Theoretically, therefore, if the music director of a symphony orchestra were to audition all applicants strictly on the basis of their musical technique he would be protected by the business necessity doctrine even if the result were an exclusively white orchestra, provided the director could prove that the auditions in fact separated the best qualified from those lesser qualified. The rule would not protect him if he were to decide arbitrarily he wanted an all-white orchestra and intentionally exclude minority applicants on the basis of an irrelevant test.

While being of a certain race is not a necessity for the business of playing a musical instrument, the physical attributes of an artist may have a profound influence on his effect on a production in other areas of the performing arts. It is in these contexts that the business necessity question takes on a new dimension. For the producer of a staged version of *Gone With the Wind*, is it a business necessity to cast the play strictly along racial lines in order to effectively communicate the meaning of the work? Would intentional discrimination be justified in casting a play in which the race of the characters is not at issue, or in an abstract dance production where there is no plot? Can the specific color of a performer be elevated to a business necessity on the basis of the employer's aesthetic preferences alone?

Statutory guidance on these questions is practically nonexistent. The only regulation promulgated under Title VII which addresses

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there is no BFOQ for race).

10. 401 U.S. 424 (1971).

11. *Id.* at 431.

the theater business appears in the Code of Federal Regulations.<sup>12</sup> This regulation, though at first glance directly analogous to the instant question, is of little applicability. First, there is no BFOQ for race.<sup>13</sup> Second, where the employment of a performer is determined on the basis of color alone and without regard to ethnic qualities (e.g., for the sake of visual symmetry), the issue of "authenticity" or "genuineness" is irrelevant.<sup>14</sup> No federal or state court has decided a case involving intentionally discriminatory hiring practices in the context of the theater, and the question of whether race or color may qualify as a business necessity with BFOQ overtones remains unsettled.

The legislative history of Title VII does much to explain why race was not included as a BFOQ—it was not believed necessary, even in the context of a theatrical enterprise. In their Interpretive Memorandum of Title VII of the Act, Senators Joseph S. Clark and Clifford P. Case stated the following:

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 non-Negro. Therefore the act would not limit the director's freedom of choice. . . .<sup>15</sup>

The hypothesis implicit in this statement, that an actor may successfully portray a character of another race, has recently been proven by the English actor Ben Kingsley, who won an Oscar in 1983 for his performance in the title role of the motion picture *Ghandi*, and by the black American actor Louis Gosset, Jr., who appeared as Anwar El Sadat in a 1983 biographical television docudrama.<sup>16</sup>

Also implicit in the statement by Senators Clark and Case, however, is the notion that in a performing arts context a person's racial attributes may, and often will, determine whether he or she is hired. As the Senators reasonably noted, "[a] movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possi-

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12. "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 an actress." Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (1984).

13. See *supra* notes 8 and 9 and accompanying text.

14. See generally *infra* note 48 and accompanying text.

15. 110 Cong. Rec., *supra*, note 8, at 7217.

16. The two-part television movie, *Sadat*, aired October 30 and 31, 1983.

ble."<sup>17</sup> If at the casting call for Africans more than enough genuine Africans were to apply, it would be reasonable to expect any non-African applicants to be rejected that day. The filmmakers would not be expected to be blind to the applicants' physical attributes since these attributes would, in fact, be the only relevant qualifications for the job. Acting ability in such a situation would be inconsequential. To what standards of review might a court refer to decide whether a performer's race means all, as it might with the hypothetical African extras, or nothing as it would in the use of a symphonic instrumentalist? Should the law protect the filmmakers' racially exclusive hiring choice? If so, under what legal authority?

Authority on the applicability of the business necessity rule to intentional discrimination is "scarce if not non-existent,"<sup>18</sup> although lower courts have generally assumed that the doctrine excepts only unintentionally discriminatory practices.<sup>19</sup> No federal court has considered whether a person's race may function as a business necessity in a performing arts context, although the issue was examined in a real-life situation by the Fifth Circuit, which only speculated about a performing arts application in dicta.<sup>20</sup> Therefore, if the business necessity doctrine's applicability is restricted to instances of intentional discrimination, its use in the performing arts would probably be limited to orchestras and other aural media. Where, on the other hand, the performers are seen by the audience, exclusion of an artist on the basis of race would be intentional, albeit sometimes justifiable. This observation seems to call for an extension of the BFOQ exception to Title VII, to include race and color.

The absence of judicial review and scholarly analysis of the problem at hand can be attributed to the uniquely subjective and non-recurring nature of hiring procedures and qualifications in the theater which tend to preclude litigation. It is not attributable to a lack of

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17. 110 Cong. Rec., *supra*, note 8, at 7217.

18. A. Larson, *Employment Discrimination*, § 72.10 (1984).

19. E.g., *Garcia v. Gloor*, 609 F.2d 156, 163 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (dictum); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 244 (5th Cir.), reh'g denied, 494 F.2d 1296 (5th Cir. 1974), cert. denied, 439 U.S. 1115, (1979) (stating in dictum that the doctrine excepts only "those few employment practices, which are *non-intentionally* discriminatory or neutral, but perpetuate the consequences of past discrimination, because of their overriding business necessity"). See Annot., 36 A.L.R. Fed. 9 (1978).

20. *Miller v. Texas State Bd. of Barber Examiners*, 615 F.2d 650 (5th Cir.), cert. denied, 449 U.S. 891 (1980). *Miller* involved a black undercover investigator who challenged being restricted to work in colored neighborhoods. In dicta, the court hypothesized that in the absence of a BFOQ for race, "[a] business necessity exception may . . . be appropriate in the selection of actors to play certain roles." *Id.* at 654.

potential plaintiffs. Nor may one conclude that the absence of law exists because equal employment legislation does not apply to the arts.<sup>21</sup> Likely reasons for the lack of legal attention are many. First, because of the nebulous nature of casting requirements, it is extremely difficult for a performer to ascertain why he or she has been refused any given role. Although a performer may suspect that he or she has been discriminated against, it is most infrequent that a case could be made sufficiently concrete to be proven in court. Second, employment opportunities are extremely scarce in the entertainment industry. Many potential plaintiffs are impecunious. Performers are very reluctant to take potential employers to court, thereby taking the risk of getting a reputation as being difficult to work with, which would further reduce their employment prospects. This is particularly true in the dance world where performers are also especially young and vulnerable to economic distress.<sup>22</sup> Third, performers often avoid auditions for producers who they feel may not want performers of their race or color, regardless of whether they believe they should have the right to do so, thereby avoiding conflicts before they arise. Fourth, patterns of racial discrimination discourage victims, who develop a sense of futility and often of defeat. As a consequence, not only do they tend not to sue, but ultimately they may abandon the art forms in which such conflicts arise for them. Finally, the non-recurring nature of casting for any particular show makes discrimination against a class of performers difficult to prove.

These obstacles to judicial redress are less prohibitive, however, in the following three art forms, the racially discriminatory hiring practices of which will be the primary focus of this article: Precision Dancing, Classical Ballet, and Opera. In all three instances the racially discriminatory casting patterns evidenced through existing statistics are the subject of much controversy.<sup>23</sup>

To many people, New York City is best symbolized by the Rockettes,<sup>24</sup> "thirty-six of the most beloved young women in America."<sup>25</sup> They have travelled throughout the United States and abroad to represent New York in appearances sponsored by the New York State

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21. See *infra* note 130 and accompanying text. Indeed, non-discriminatory treatment in casting is required by agreements and rules governing employment under the production contracts of Actor's Equity, SAG, AFTRA and AGVA.

22. The average Rockette is 28 years old. *New Kicks for Radio City's Legendary Rockettes*, N.Y. Times, Mar. 21, 1982, § 2, at 1, 25 [hereinafter cited as *New Kicks*]. However, most dancers' careers begin in their teens and end in their early thirties.

23. See notes 73, 105, and 122 and accompanying text.

24. *New Kicks*, *supra* note 22, at 1.

25. Hering, *The Rockettes, Pin Point Perfectionists*, Theatre Arts, May 1952 at 46, 48.

Department of Commerce as part of the "I Love New York" campaign.<sup>26</sup> They are considered an American institution.<sup>27</sup> Ask a member of the audience at Radio City Music Hall what he finds appealing about the Rockettes and he is likely to mutter something about "typically American girls."<sup>28</sup>

It has been said that the Rockettes' charm lies in their ability to achieve the illusion of perfect teamwork.<sup>29</sup> Yet, of the more than 5,000 women who have danced with the troupe in the more than half a century of its existence, no non-white woman has ever been counted among the team.<sup>30</sup> Assuming the availability of minority women in New York City with sufficient skills to perform as professional tap dancers, this statistic may be seen as uniquely conclusive evidence of intentional racial discrimination. Should this discrimination be challenged under Title VII, or is being white in this instance a BFOQ?

In classical ballet racial discrimination is also readily apparent. Historically, black dancers were restricted to popular dance forms.<sup>31</sup> By the end of the century there were all-black musicals,<sup>32</sup> and by the 1920's Harlem was the primary source of American popular dance and music.<sup>33</sup> But this heritage, extending from minstrel shows to the tap dancer Bojangles Robinson, had fixed in the public's mind a confining stereotype of the black dancer:

[B]lack dancers were. . . limited. . . to three basic types: the jive-ass sharpie, the loose-jointed, foot-shufflin' comic, and the exotic. As long as they were reconstructing voodoo dances or ballin' the Jack, everything was fine. If they attempted something else, something "white," this was not so fine. In the words of John Martin, the *Times* dance critic, "Negroes cannot be expected to do dances designed for another race" (*New York Times*, March 12, 1933). What was operating here was not racist separatism, but a more sophisticated derivative thereof: a deep sense of aesthetic inappropriateness. To audiences of the time, blacks doing "white" dance looked *wrong*, like a dog in a tree.<sup>34</sup>

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26. The group travelled to Houston, Dallas, San Francisco, Miami, London, Paris and Frankfurt for the "I Love New York" campaign. The Rockettes, Radio City Music Hall Press release (Jan. 6, 1983).

27. Hering, *supra* note 25, at 46.

28. *Id.* See also, Lahr, *Fearful Symmetry, The Rockettes: Conformity on Parade*, Harper's, July, 1977, at 83.

29. Hering, *supra* note 25, at 46. See also Lahr, *supra* note 28 at 83.

30. New Kicks, *supra* note 22, at 25.

31. See generally Acocella, *Dance Magazine*, Mar. 1982, at 22.

32. E.g., *The Creole Show* (1889). *Id.*

33. Jazz music and jazz dance—the Charleston, the Lindy Hop, the Black Bottom—were the prevailing popular dances of the period. *Id.*

34. Acocella, *supra* note 31, at 23.



Fifty years later this view is still alive. In the nation's two most highly acclaimed major ballet companies, the New York City Ballet (NYCB) and the American Ballet Theatre (ABT), only two black men are presently seen in prominent roles:<sup>35</sup> Mel Tomlinson of NYCB and Ronald Perry of ABT. Low black and minority representation is typical of the major troupes, all of which are overwhelmingly white.<sup>36</sup> Mr. Tomlinson, along with four others, comprise the only five non-white dancers out of a company whose members number 108.<sup>37</sup> There is not now, nor has there ever been, a non-white principal ballerina with either company.<sup>38</sup> These facts tend to support a finding that blacks and other minorities have been systematically excluded from classical ballet.

The debut of mezzo-soprano Marian Anderson at the Metropolitan Opera as Ulrica in *Un Ballo in maschera* in 1955<sup>39</sup> began what may now be considered a tradition of racial integration at the nation's foremost opera house. Ms. Anderson paved the way for an unbroken succession of black women who have enjoyed prestigious international careers.<sup>40</sup> Yet whereas in ballet a few non-white men have gained recognition in the major companies, the situation in opera is reversed. Non-white women have made their marks over the past thirty years and discrimination in this art form is not as severe as in the dance forms described above. But there is evidence that non-white males have been prejudicially excluded from opera.

## II. A Test to Determine the Legitimacy of Race-Specific Hiring.

The value of casting a performer of a specified race may vary both from role to role within a production, and in different productions of the same work. The decision whether the race of a performer is a BFOQ in a given situation must necessarily be made on a case-by-case basis. In seeking to determine whether a performer's race is genu-

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35. Alvin Ailey, quoted in Garske, *Three American Choreographers*, Ballett International, Nov. 1983, at 18.

36. Tobias, Arthur Mitchell and the Dance Theatre of Harlem, *Dance Magazine*, Jan. 1982, at 72.

37. As of this writing they are Hermes Condé, Gen Horiuchi, Cynthia Lochard and Jock Soto, who are Hispanic, Japanese, Haitian and Navajo Indian, respectively.

38. See generally, Garske, *supra* note 35.

39. *Metropolitan Opera Annals*, 1st Supplement 1947-1957, H.W. Wilson Co., publishers, 1957, at 78. The first non-white featured performer at the Met was dancer Janet Collins who debuted on the opening night of the season, Nov. 13, 1951, performing in an "ethnic" dance in the triumphal scene of *Aida* by Verdi. *Id.* at 41.

40. Leontyne Price, Grace Bumbry, Martina Arroyo, Reri Grist, Kathleen Battle, Jessye Norman and Christiane Eda-Pierre, *inter alia*.

inely essential to his or her effective participation in a production, this Note offers the following three-pronged test as an aid to the analysis. A BFOQ will be found where the race of a performer must be specific A) to achieve a realistic effect, B) to make an artistic or societal statement, or C) in some instances to satisfy the aesthetic view of the creator.

#### A. *Textural Realism*

The first step of the test determines to what extent the creation of a realistic texture (i.e., a convincing evocation of the world as it exists in nature), is integral to the accomplishment of the work's objectives. Either the work as a whole may require a high degree of verisimilitude, or a particular character or group of characters may be required to look as they would have in real life.

Three factors may serve as indicators of the extent to which "textural realism" is an essential ingredient to the work as a whole:

a) *Medium*: The medium conveying the work to the public is the first indicium. Feature films and television programs involve minute scrutiny of the performers by the camera's eye, and generally great care is taken to present a naturalistic impression to the audience. The devices used in stage presentations to produce a realistic illusion are much more artificial. Unlike the film or videotape audience, a theater audience is required to work actively to suspend its disbelief for the illusions to take effect. Moreover, in a large theater, opera house, music hall or stadium, visual acuity may be minimal. A requirement of realism in a live theatrical presentation would, therefore, have a lesser claim to necessity than would be true for a screen presentation. In radio presentations and recordings where the audience's imagination is most active, there is obviously a negligible dependence on realism.

b) *Form*: The form of the presentation also affects one's expectations as to its fidelity to real life. A conventional play will generally rely on the trappings of realistic stagework more than a musical, opera or dance production.

c) *Style*: 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.

The second question to consider in this prong of the test is whether the racial component is essential to the identity of any spe-

cific character being cast. To discern this, one might look to the following factors to determine what the character is likely to represent to the audience:

a) *Recognizable Public Figure (Historical or Contemporary)*: The public generally expects a character to accurately resemble the public figure he or she is modeled after, regardless of the medium, form or style of the work. The race of the performer portraying the character may be decisive in determining how this should be effectively accomplished.

b) *Non-specific Character in a Specific Historical Setting*: Audiences may expect characters to be of a certain race in a given historical situation. For example, while the specific identities of a troop of SS guards in Nazi Germany may not be known, the audience may reasonably expect them to be Caucasian in a realistic film.

c) *Member of a Racially Coherent Family Unit*: The presence of a family member of a race differing from his relatives would probably impair the realistic illusion of a dramatic work.<sup>41</sup>

Having submitted the hiring decision to the above analysis it may be decided whether the race of a performer will affect his or her ability to portray a given character and thus give rise to a BFOQ, justifying discrimination in hiring. Any given hiring situation may be regarded as ranging along a spectrum. At one end there are strong reasons for discriminatory hiring. At the opposite end there is little or no justification. For example, at one end of the spectrum it would be found that a stage production of a comedic opera set in a fantasy location in which the character in question is not shown to be a member of a racially coherent family unit will have the least necessity to hire a performer of any specified race.<sup>42</sup> At the opposite pole would be a serious, biographical film production about a recognizable public figure.<sup>43</sup> Where the above analysis yields no BFOQ, however, there may still be a legitimate case for race-specific hiring in two exceptional circumstances: to make an artistic or societal statement, or

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41. For example, *Cat on a Hot Tin Roof* by Tennessee Williams is a conventional drama about a white family in the 1950's, set in their plantation home on the Mississippi Delta. It is very specific as to its historical setting and the dramatic style is highly realistic. It is further painted against a backdrop of racial segregation. One may easily argue that to cast an Asian woman in the part of Big Mama might raise questions that would distract from the very serious issues of the play. The same may be said of Lorraine Hansberry's *A Raisin in the Sun*, which involves the struggles of a middle class black family in Chicago of the same period.

42. E.g., the role of Sarastro in Mozart's *The Magic Flute*.

43. E.g., a biography of George Washington. But N.B. the accomplishments of Messrs. Gossett and Kingsley. See *supra* note 16 and accompanying text.

for aesthetic reasons. Both have been known to occur in the theater and their validity may vary broadly depending upon circumstances.

### B. *Artistic or Societal Statement*

In rare but regularly recurring instances directors, producers and writers will cast a play according to certain racial requirements to shock or amuse the audience, or to make a statement about the characters in the play, or about society at large.<sup>44</sup>

Recently on Broadway was a curious example of this type of racially-determined casting. In the musical *My One and Only*, directed by and originally starring Tommy Tune,<sup>45</sup> there were eleven male and nine female dancers in the chorus; all of the men were black and all of the women were white. The plot of the musical, a whimsical comedy,<sup>46</sup> has no requirement for such a casting choice (indeed it may be perceived as being more whimsical because of the choice).<sup>47</sup> It is possible that this casting decision could have been intended as an artistic statement, in which case it would be a BFOQ to hire only black men and white women. Moreover, the artistic statement exception may also be defensible on First Amendment grounds. Yet there is an added dimension to racial casting here which is divorced from the content of the plot and from any societal relevance, which is analyzed in the final prong.

### C. *Aesthetic Choice*

A director or choreographer may sometimes choose a performer or an entire cast along racial lines simply because of the visual characteristics of a particular race. For example, cast members may be ex-

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44. Examples of this include the premiere of the avant-garde opera *Four Saints in Three Acts* by Virgil Thompson and Gertrude Stein, which took place in Hartford, Connecticut in 1933. The text of the absurd opera, which is actually in five acts, reveals no source for its racially restrictive casting policy. The work has no plot and its central characters are all Catholic saints, yet it was first performed with an all-black cast and in subsequent revivals has often included high percentages of blacks among the principals and chorus. More recently there was the case of an Off-Broadway production of an all-black cast in O'Neill's *Long Day's Journey into Night*. Its director, Geraldine Fitzgerald, and producer, the late Hazel Bryant, made their casting choice to demonstrate both the universality of the O'Neill play and the capabilities of black actors and actresses. The play, which involves an Irish-American family in New England, subsequently appeared on television.

45. Also starring in the show were Twiggy and tap dancer Charles "Honi" Coles.

46. The contemporary book by Peter Stone and Timothy S. Mayer is a vehicle for a collection of songs by George and Ira Gershwin.

47. The story is set in various locations around metropolitan New York including, presumably, Harlem in 1927; however, the casting of the dancers is largely arbitrary.

clusively Caucasian because the choreographer wants them to be light in appearance, or exclusively black so that they may be dark in appearance, or they may be exclusively of one race so that they may look visually symmetrical or uniform.

*My One and Only* provides an example of a possible aesthetic choice. Tommy Tune, a Caucasian, is undeniably more noticeable when dancing among a chorus consisting exclusively of black men, even when he and the chorus are all dressed in substantially identical, traditional formal attire. This visual effect may be the basis of casting according to aesthetic choice. Still, the artistic statement element is always present in the book of a musical, which prevents *My One and Only* from presenting the aesthetic choice in its naked form.

The purest example of an aesthetic choice would be found in an abstract work, completely devoid of references to man in a social context—e.g., abstract dance.<sup>48</sup> There the visual element attains a heightened level of importance and, as a consequence, is substantially more critical to the work's success or failure. Yet it may be argued that artistic statements are implicit even in the most abstract of theatrical works because the business of theater is never conducted in a societal void. Casting decisions, therefore, necessarily reflect the political realities of society at large. For example, it might be argued that the dominance of men in Elizabethan England was reflected in the exclusion of women from the stage. And it may be doubtful whether the systematic exclusion of minority members from employment opportunities, an act contravening the policy of Title VII, can be justified by the mere aesthetic prerogatives of a stage director. Whether the color *qua* color of a performer in an abstract theatrical work which is devoid of political content can be so critical to the effectiveness of the production as to be a BFOQ is a troublesome question, and aesthetic choice must necessarily be a weak defense.

When analysis of a given casting situation under the test presented above yields no substantial claim to a BFOQ for racially motivated hiring, it must be concluded that the role in question is not race-specific and that all performers must be given equal opportunity and consideration for the part. Examples of such situations are very frequent; many realistic works do not require racial specificity because race is not an issue in the plot.<sup>49</sup>

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48. See *infra* notes 50-75 and accompanying text.

49. E.g., *The Owl and the Pussycat*, by Bill Manoff, a Broadway comedy of the late 1960's which contained no mention of any character's race, was successfully cast with the black actress Diana Sands in the female lead. This was the first time such casting was seen on Broadway. It was later adapted into a film starring Barbra Streisand. More recently, in the Broad-

The BFOQ test would be the most useful in analyzing possible discrimination in casting for parts which, in their given medium, form and style of presentation, are racially non-specific, where it would logically follow that members of any race would have an equal chance of being hired. Once a given part or class of parts has been determined to be racially non-specific, systematic discrimination may be alleged against the production entity if a disproportionately small percentage of minority performers have been cast in the parts over time.

### III. An Analysis of the Legitimacy of Race-Specific Hiring in Precision Dancing, Ballet and Opera

Having established a test to determine whether the exigencies of any given performed work may give rise to a BFOQ exception from Title VII, one may apply the test to the three primary subjects of this Note.

#### A. *The Rockettes*

The initial step in applying the test to the Rockettes is to determine whether textural realism is integral to the accomplishment of their productions' objectives. The medium through which the Rockettes are primarily enjoyed is a live theatrical presentation,<sup>50</sup> in the form of a music hall revue, in one of the world's largest theaters.<sup>51</sup> The context of the productions in which their dance numbers appear are virtually exclusively whimsical presentations which make no attempt to create an illusion of reality. The style of their performances is plotless and abstract, although some may consider their routines comedic, surrealistic or absurd,<sup>52</sup> which in any event would very well

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way production of the serious drama *Agnes of God* by Lily Knight, Diahann Carroll played the part of a psychologist previously played by a white actress. These examples are among many which serve to demonstrate the insignificance of an actor's or actress's race in many theatrical roles.

50. Or occasionally a videotape or a filmed recording of a live stage number, as in the 1982 Home Box Office television special with Peter Allen and the 1983 made-for-television film, *Legs*. Radio City Music Hall: Half a Century of Spectacular Entertainment, Radio City Music Hall press release (Jan. 6, 1983); *The Rockettes*, supra note 26.

51. There are 6,200 seats in Radio City Music Hall. Lahr, supra note 28, at 83. The depth from the stage to the back of the auditorium is 160 feet. Facts About Radio City Music Hall, Radio City Music Hall press release.

52. "Over the years the Rockettes have been costumed as cowgirls, poodles, astronauts, wooden soldiers, bunnies, ponies, bon bons out of a candy box, cigars, daffodils, robins, scarecrows, baby chicks and penguins." New Kicks, supra note 22, at 25. "Sometimes they

preclude any finding that the creation of a realistic texture would be integral to their work.

The second standard of the test for textural realism instructs us to ask whether the racial component is essential to the identity of the characters the Rockettes play. They have not been known to represent any recognizable public figure, historical or contemporary; they most often portray objects<sup>53</sup> when they are not appearing simply as the Rockettes, which arguably are objects themselves. Neither do they portray non-specific characters in a specific historic setting,<sup>54</sup> nor do they purport to represent members of a racially-coherent family unit. Thus, the initial prong of the test fails to give rise to a BFOQ for race-specific casting.

Analyzed under the second prong of the test, it is highly unlikely that there is a strong "artistic or societal statement" motive in the exclusive casting decision.<sup>55</sup> This leaves only one possible legitimate claim to a BFOQ for the exclusion of non-whites, to be analyzed under the third and final prong of the test—that of aesthetic choice.

The Rockettes may be the one pure example of racial casting on the basis of aesthetic choice in the established world of entertainment. Their precise, plotless, abstract, geometric dance formations are the hallmark of their appeal.<sup>56</sup> It would be difficult to imagine a more germane test case for determining whether a dancer's color *qua* color may ever rise to the level of a business necessity. The interests are compelling for both the excluded minority dancers and the choreographers and authors of their dances. Violet Holmes, director and choreographer of the Rockettes, has been with the Rockettes for more than twenty-five years.<sup>57</sup> When asked why no black dancer has ever been chosen for the troupe, although several have auditioned, she responded:

This is a question that comes up often. . . . The No. 1 reason is that the Rockettes are a precision line, and they are supposed to be *mirror images* on stage. One or two black girls in the line would definitely distract [the audience]. You would lose the look of precision, which is the hallmark of the Rockettes.<sup>58</sup>

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. . . emerge from hat boxes, Easter eggs, hidden elevators, or other scenic devices in which the Music Hall abounds." Hering, *supra* note 25, at 47.

53. *Id.*

54. *Id.*

55. But see *supra* note 48 and *infra* note 75 and accompanying text.

56. Lahr, *supra* note 28, at 83.

57. New Kicks, *supra* note 22, at 1.

58. *Id.* (emphasis added).

But is the "mirror image" aspect of the Rockettes an essential component of a precision line, or is it merely a vestige of another era when blacks were not considered appropriate for certain types of dance? Is the Rockettes' "mirror image" objective actually a reflection of a deeper sense of racial prejudice which Title VII was enacted to combat? An inquiry into the origins of the Rockettes may be illuminating.

The Rockettes were created in 1925 in St. Louis. They were the invention of Russell Markert, were originally named the "Missouri Rockets" and numbered sixteen dancers. In 1927 their ranks expanded to thirty-two, and billed as "Russell E. Markert's 32 Roxiettes" they played at the Roxy Theatre in New York City. When Radio City Music Hall opened in 1932 in the new Rockefeller Center, the troupe moved to the Music Hall, were renamed the Rockettes, and have played there continuously with great success for more than fifty years.<sup>59</sup> "It was thrilling and immediately successful. In its nostalgia for the machine, the precision dance formation simulated the energy and the aesthetic of an industrial society enjoying unrivaled power and prosperity. . . . The Rockettes put conformity on parade. Their style is efficient, dehumanized, uncompromising, perfect."<sup>60</sup>

The contemporary public was greatly affected by their rigid conformity, as is evidenced by a poem published in the *Harvard Lampoon* in 1936.<sup>61</sup> John D. Rockefeller, Jr. himself delivered the Rock-

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59. Lahr, *supra* note 28, at 83; The Rockettes, Radio City Music Hall Press Release, *supra* note 50.

60. Lahr, *supra* note 28, at 83.

61. "Lament"

My love is a beautiful Rockette  
 With delicate graces enough to bewitch one,  
 But this is a thing I can't figure out yet—  
 I'm madly in love, but I'm not sure with which one.  
 She smiled on me there in the second row,  
 And reasoning faded, and common sense drifted:  
 But how was a yokel like this one to know  
 Her place in line was about to be shifted?  
 I search among beautiful dancers in vain,  
 Through a twisting, cavorting, anonymous crew of them;  
 And how shall I find my love ever again  
 As long as there must be forty-two of them?  
 I sit and watch them all, night after night,  
 And I always ponder the same bitter riddle:  
 Oh, is she the one that is third from the right  
 Or is she the fifth to the left from the middle?  
 Oh, glamorous lady, it lies in your power  
 To make me the happiest man in the nation.  
 Just wear on your beauty for one fleeting hour



ette's ultimate encomium. "[H]e had learned a lesson from the dancers—that of working together as a group and not striving for personal aggrandizement."<sup>62</sup>

The Rockettes' conformity of appearance is not absolutely perfect. Obviously they are not identical; their individuality is apparent in that their height, weight, faces, hair coloring and hairstyles differ.<sup>63</sup> Yet, Markert was adamant that each dancer's skin be the same color and, in a 1977 quote, Markert insisted that a Rockette could not even get a suntan, although not necessarily for the sake of precision. "If a girl got suntanned and she was alongside a girl who could not get the sun, it would make her look like a colored girl."<sup>64</sup> This quote belies the proffered rationale behind excluding non-whites, i.e. a concern for the "precision" or the "mirror image" aspect of the line. One may readily speculate that this statement implies a fear that a black woman should be seen among the Rockettes at all, an event which would subject the troupe to embarrassment, shame or ridicule. The belief that non-whites are inappropriate for certain employment typically identified with whites<sup>65</sup> displays precisely the prejudice towards minorities that Title VII was meant to combat.

Another question is whether "precision" of hue is truly indispensable to the art of "precision dancing." A recent definition of the term by a noted dance critic makes no mention of color-tonal symmetry. "Precision dancing [is a form] in which every girl literally *moves* as one . . . ."<sup>66</sup> The word "precision" itself implies that which one *does*, not what one *is*. If movement is the essential element of precision dancing, to what extent are other components of symmetry (e.g., line, form, size and color) ancillary and arguably not indispensable, as to raise them to the level of a BFOQ? It may be significant that other dance groups which perform in substantially similar abstract styles, but which were created in an era of racial integration, do employ dancers of diverse colors.<sup>67</sup> When the Rockettes were originally created, the inclusion of minorities may have been scandalous or taboo,

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Some visible mark of identification

Harvard Lampoon, reprinted in Radio City Music Hall Quarterly, Vol. I, No. 1, (Jan. 1936).

62. Kisselgoff, *Dance View - Precision Dancing as Art*, N.Y. Times, Apr. 2, 1978, § 2, at 1, col. 4 [hereinafter cited as *Precision Dancing*].

63. New Kicks, *supra* note 22, at 1.

64. Lahr, *supra* note 28, at 83.

65. See *infra* note 91 and accompanying text.

66. *Precision Dancing*, *supra* note 62.

67. The Dallas Cowboys Cheerleaders formed in 1970. The June Taylor Dancers, featured on the Jackie Gleason television variety show, became integrated in the 1960's with the addition of the dancer Mercedes Ellington.

but historical accident does not endow the maintenance of a racially-exclusive casting policy with permanent validity. The Supreme Court in *Griggs*<sup>68</sup> held that the fact that the jobs in question had formerly been filled by whites as a long-standing practice of discrimination was not a permissible factor in making out a BFOQ for discriminatory hiring practices.

What effect has the Rockettes' partially historic casting policies had in society today? The extravaganzas at Radio City Music Hall routinely feature various other vocal and dance choruses and principals, all of which are solidly integrated and have been so for decades.<sup>69</sup> This tends to preclude an argument that the Music Hall would have a blanket, racially-biased hiring policy. Yet, the Rockettes are the only Music Hall constituents with permanent contracts; the other featured groups and soloists are hired on a show-to-show basis.<sup>70</sup> The prestige associated with being a Rockette is considerable and, combined with the unusually high level of job security, competition for the three dozen jobs is stiff.<sup>71</sup> There is a three-year waiting list for auditions. Black women have auditioned, but they have not been selected,<sup>72</sup> a fact which has raised some ire among the public.<sup>73</sup> None have yet to file a discrimination charge against the Music Hall. Since racial barriers in the performing arts have fallen with regularity since the end of the Second World War and the inception of the Civil Rights Movement of the 1960's,<sup>74</sup> a re-evaluation of the Rockettes' hiring practices seems warranted. What struck audiences in the 1920's and 30's as a dazzling display of mechanistic conformity, fraternity and cooperative spirit may become unsavory to modern audiences, symbolizing instead a monolithic, racially-exclusive institution, a vestige of racial oppression.<sup>75</sup> It may communicate the implicit statement that

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68. 401 U.S. 424. See *supra* note 10 and accompanying text.

69. Including Asians, Blacks, and Hispanics. A source at Radio City Music Hall, name withheld.

70. *Id.*

71. The average dancer stays about ten years. The Rockettes' weekly base pay was \$500 a week in 1982, with extra pay for rehearsals, appearances away from the Music Hall, photo sessions and interviews. *New Kicks*, *supra* note 22, at 25.

72. *Id.*

73. *Id.*

74. See *supra* note 39 and *infra* notes 97 and 117 and accompanying text. Also note that Vanessa Williams, in 1983, became the first black winner of the Miss America Pageant. Her replacement, Suzette Charles is also black. Until the 1950's black women were excluded from the competition.

75. An interesting question might be presented if the Rockettes were advertised specifically as a historical relic and a vestige of a time when there was no multiracial casting. (This they cannot presently hold themselves to do, as they dress in contemporary fashions and have

minority women are not "typically American girls," and are incapable of achieving "the illusion of perfect teamwork." If the Rockettes were to include minority members among their ranks, one would have to ask whether what was lost in uncompromising, "mirror image" precision would be compensated for by the acquisition of a new symbolic image of racial harmony and equality.

### B. Ballet

The first step of the BFOQ test as applied to ballet is to determine to what extent textural realism is integral to the art of ballet. The medium which conveys the vast majority of classical dance programs to the public is the live theatrical performance, generally held in large opera houses and auditoria.<sup>76</sup> Within the form of classical ballet itself textural realism is rarely, if ever, an integral component of the production. "[A]ll real ballets take place in . . . a world where things, beasts and men are equally alive, a world without history and without seriousness."<sup>77</sup> The very artificial nature of dance theater logically precludes a realistic duplication of life because in real life people communicate through speech, not dance. The form (whether comedy or romance) and style (Romantic, Neo-Classical) are of little significance in determining the realistic qualities of a dance because of the extreme artificiality of the art form *per se*.

Roles typical of the ballet repertoire include swans (*Swan Lake*), furniture (*Parade*), tin soldiers (*The Steadfast Tin Soldier* and *The Nutcracker*), mythical birds (*Firebird*), a golden idol (*La Bayadere*), and mice, snowflakes, coffee, tea, candy canes and flowers (*The Nutcracker*), among others. These parts are obviously not racially-specific.

Ballet companies also frequently present abstract works which are completely divorced from realistic settings and which have no plots.<sup>78</sup> Therefore, a dancer's ability to duplicate the image of a recognizable public figure or to portray a member of a racially coherent family unit under such circumstances is inapplicable.

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been known to portray astronauts.) If they did, however, there would be an artistic or political statement inherently giving rise to a BFOQ, and they should also be protected by the First Amendment.

76. Occasionally classical ballet is presented on television, most frequently in videotaped live theatrical performances, e.g., *Live from Lincoln Center and Great Performances*, seen on PBS. There is also the rare feature film presentation, e.g., *The Turning Point*.

77. W.H. Auden, *Ballet's Present Eden*, NYCB souvenir program (1954), reprinted in NYCB program (Dec. 1983).

78. E.g., Balanchine's *The Four Temperaments*, *Symphony in Three Movements*, *Agon*, *Episodes*, *Concerto Barocco* and *Jewels*, inter alia.

Still, there are numerous story ballets which concern relatively realistic characters.<sup>79</sup> The question there arises whether, in the form of classical ballet, a non-white dancer would be found incongruous in a story ballet, the plot of which might involve non-specific characters in a specific historic setting where non-whites were rarely, if ever, seen.<sup>80</sup> An answer may be found in parallel situations in the equally artificial medium of opera, where non-white singers have been successfully portraying white European heroines for the past two decades.<sup>81</sup> One must ask whether there is anything less incongruous about a non-white performer singing the role of Carmen<sup>82</sup> in the opera with a predominantly white supporting cast than the sight of a non-white performer dancing the same role in the ballet version of the same story. Many black sopranos have performed Carmen,<sup>83</sup> yet it appears that no black or other non-white minority dancer has done so.<sup>84</sup>

With regard to the second prong of the BFOQ inquiry, research reveals no examples of racial discrimination in ballet for the express purpose of communicating an artistic or societal statement, with the unique exception of Arthur Mitchell's formation of the Dance Theatre of Harlem.<sup>85</sup>

If a ballet director does not claim to exclude non-white dancers on the basis of textural realism or artistic statement, could he perhaps share the aesthetic choice concern voiced by the director of the Rockettes, i.e., that a non-white dancer would destroy a look of uniformity? Some choreographers make this claim,<sup>86</sup> although one may question the validity and sincerity of such an assertion. Even if the visual appearance of uniformity is essential to the Rockettes, every member of whom is dressed identically and dances in unison throughout every performance,<sup>87</sup> there are very few, if any, classical

79. E.g., F. Ashton, *La fille mal gardée*; G. Balanchine, *Coppelia*; R. Page, *Frankie and Johnny*; inter alia.

80. E.g., Seventeenth century France of *Cinderella*; nineteenth century Russia of *Petrushka*.

81. See infra note 39 and accompanying text..

82. *Carmen* by Georges Bizet, based on the novella of the same name by Prosper Mérimée, is the story of a gypsy woman set in nineteenth century Spain.

83. Shirley Verrett and Grace Bumbry, e.g., at the Metropolitan Opera, and Cynthia Clarie in the legit theater version staged by Peter Brook, *La Tragédie de Carmen*, in 1983, inter alia.

84. See supra note 34 and accompanying text.

85. See infra notes 97-104 and accompanying text.

86. R. Kidder & M. Lewis, Boston Ballet Company Stumbles over Issue of Race, *Christian Science Monitor*, June 5, 1981, at 14. See supra text accompanying note 58.

87. Lahr, supra note 24, at 83.

ballets whose plots demand comparably extreme measures of conformity.<sup>88</sup> A large number of "story" ballets have as many individual parts to be danced as there are characters in the plot.<sup>89</sup> If none of the theories offered above provides a valid explanation for the absence of black and other minority dancers in classical ballet, one must ask whether racial prejudice does not lie at the root of the problem<sup>90</sup> and, if it does, whether the aesthetic prerogatives professed by the directors of our major dance institutions are merely a smokescreen to hide a tacit and persistent form of racism.

In 1981 one New York ballet choreographer stated baldly that the black body type is not suitable for ballet.<sup>91</sup> And in 1971 the late George Balanchine,<sup>92</sup> when asked what were the ideal qualities for a dancer, responded, "Their skin should be pale - you know, the color when you first peel an apple."<sup>93</sup> Mr. Balanchine, considered by some the greatest choreographer of the century and indisputably the most influential contemporary voice in classical dance,<sup>94</sup> was known to view the revelation of feminine beauty as the *raison d'être* of ballet.<sup>95</sup> This may explain why he would select a black man, Arthur Mitchell, as a principal in his company and create roles specifically for him,<sup>96</sup> yet never choose a black woman. If the man's role is presumptively viewed as less significant than the woman's, then hiring a black male principal will be inherently less objectionable.

When Arthur Mitchell joined the New York City Ballet in 1955, he made dance history.<sup>97</sup> He was the first black in the nation to become a permanent member of any major classical ballet company.<sup>98</sup> Yet, despite his successful tenure with the company no other black principals have followed in his footsteps.<sup>99</sup> Mitchell was repeatedly told he

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88. Act II of *La Bayadère* is an exception; the corps de ballet are meant to represent a kaleidoscopic vision of one woman as hallucinated by a man smoking opium.

89. E.g., F. Ashton, *Cinderella*, *La fille mal gardée*; J. Robbins, *Fancy Free*; inter alia.

90. See supra note 36 and infra note 91 and accompanying text.

91. Kidder & Lewis, supra note 86, at 14.

92. Founder and Director of the NYCB.

93. Robinson, *Dance Magazine*, Oct. 1971, at 28. Mr. Balanchine's aesthetic views are not necessarily to be confused with his political views. He was instrumental in helping Arthur Mitchell found the Dance Theatre of Harlem.

94. Kisselgoff, George Balanchine 79, Dies in New York, N.Y. Times, May 1, 1983, § 1, at 1.

95. Id.

96. Including Puck in *A Midsummer Night's Dream* (1962) and the male role in the *Agon pas de deux* (1957), inter alia.

97. Tobias, supra note 36, at 72.

98. Dance Theatre of Harlem press release.

99. Mel Tomlinson, though a leading dancer, is not ranked as a principal in the company's 1984-85 roster.

was the exception, and that blacks in general could not perform classical ballet.<sup>100</sup>

In 1968, Mitchell left the City Ballet to found the Dance Theatre of Harlem,<sup>101</sup> a black ballet company, in part "to dispel the fallacy that blacks cannot do classical ballet." Today, Arthur Mitchell believes he has dispelled that fallacy.<sup>102</sup> Mitchell initially established a dance school, and his professional company made its official debut in 1971. It quickly rose to international standing,<sup>103</sup> performing to capacity audiences in major cities around the world.<sup>104</sup> The argument that the absence of non-whites in ballet may be attributable to a lack of minority dancers adequately trained in the highly technical, demanding art form fails when confronted with the fact that Dance Theatre of Harlem dancers are trained in the Balanchine tradition and perform a large number of dances in the NYCB repertoire, as well as other, older classics, to great international acclaim. Yet, outside of Dance Theatre of Harlem, blacks in ballet remain virtually unknown. The net effect seems to be that *de facto* segregation is a fact of life for all ballet students and performers.

Frequently, black and other minority group artists make bitter complaints about what they perceive as racial prejudice and discrimination. This was brought to light when Augustus Van Heerden, a black South African, tendered his resignation to the Boston Ballet, with which he had been a principal dancer for seven years, for what he felt were racially discriminatory casting practices.<sup>105</sup> He cited five incidents of racially prejudicial casting changes. They involved his being removed from a production or being rescheduled to dance on days when fewer critics would see him.

In one such incident, Mr. Van Heerden and Stephanie Moy, a Chinese ballerina, were scheduled to dance in a New York production of *La Sylphide* under Pierre Lacotte of the Paris Opera. They were told by Lacotte that their body types and color did not fit the audience's

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100. Garske, *supra* note 35, at 18.

101. Mr. Mitchell founded the Dance Theatre of Harlem with Karel Shook. George Balanchine was also instrumental in facilitating the creation of the school and company. Robinson, *supra* note 93.

102. *Id.* Mitchell founded the Dance Theatre of Harlem as a personal commitment to the people of Harlem following the assassination of Martin Luther King, Jr. Dance Theatre of Harlem press release, *supra* note 98.

103. Garske, *supra* note 35, at 20.

104. Including London, Amsterdam, Milan, Dubrovnik, Zurich, Tokyo, Hong Kong and Munich.

105. Kidder & Lewis, *supra* note 86.

conception of the parts.<sup>106</sup> But *Diaz v. Pan American World Airways*,<sup>107</sup> a sex discrimination case, held that customer preference is not a justification for discrimination under Title VII except when it is based on an employer's inability to perform the primary functions or services it offers. Assuming a BFOQ were permitted for race or color the same rule should apply. Therefore, if it is agility and grace of movement which are the primary functions of dance and most determinative of a dancer's ability to move an audience,<sup>108</sup> then, alleged customer preference, even if it could be proven, would not be a legal ground for racial discrimination.

The incidents of racial discrimination in classical ballet, coupled with the absence of non-whites in the major and regional ballet companies, has had detrimental effects upon non-white dancers. Many are still being forced into other dance idioms, just as they were fifty years ago when blacks were told outright that they were inappropriate for ballet.<sup>109</sup> Others find work in Europe or Canada.<sup>110</sup> But even more distressing is the rejection and alienation non-white artists and audiences experiences, and the injustice felt by all sensitive viewers, when confronted with ballet troupes bearing the names "New York City" and "American" in their titles, but which may include no non-white performers among upwards of eighty dancers in a given program. To their sense of alienation may be added a sense of injustice considering that all major ballet troupes are non-profit organizations which could not function without massive tax support. Therefore, whether directly through grants, or indirectly through tax deductions for charitable gifts, there appears to be an effective governmental subsidy of settled discriminatory practices.

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106. *Id.*

107. 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex determination was valid. Indeed, it was, to a large extent, these very prejudices the [1964 Civil Rights] Act was meant to overcome." *Id.* at 389. Cf. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 228 n.8, 234 nn.24-27 (5th Cir. 1976); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981); *Fernandez v. Wynn Oil Co.*, 20 Fair Empl. Prac. Cas. (BNA) 1162, 1164 (C.D. Cal. 1979).

108. See *supra* note 66 and accompanying text.

109. Some black dancers still report that they were told as children they could never be ballet dancers. This situation has recently been dramatized in an episode of the Metro-Goldwyn-Mayer television series *Fame* entitled *Beginnings*.

110. See *supra* note 35.

### C. Opera

Opera, like ballet, is an artificial art form which relies upon a host of theatrical conventions and stylistic irrationalities to convey its emotional subtleties and power. Suspension of disbelief is essential to an opera-goer who is regularly expected to leap mental hurdles in order to penetrate a deeper realm of beauty and truth. Under such circumstances it would be a rare production that could satisfy the first prong of the BFOQ test, although on a case by case basis, the remaining prongs of the test might yield a BFOQ.<sup>111</sup>

Characters often do not speak in their native language in opera; for instance, in Mozart's *Don Giovanni* and *The Marriage of Figaro*, both set in Spain, the characters speak Italian. This detail of theatrical verisimilitude was blithely ignored by its Austrian composer, and his audiences in Prague and Vienna, because Italian was felt to be the most euphonic language and because realism was considered inconsequential on this score. In opera the plots are often defiantly convoluted and realism is shown to be irrelevant on this level as well. In many operas, principal characters who are suffering from fatal bouts with tuberculosis or gunshot wounds lift themselves up from their deathbeds and sing for fifteen minutes before they expire. Of course, the most obvious departure from realism in opera is the fact that virtually every word is sung, not spoken.

In the sphere of casting there is an endless array of incongruous and often absurd practices which have become time-honored traditions, and which demonstrate the lack of emphasis on realism. Women assume the parts of men and boys with great regularity, as for example, in the role of Cherubino in *The Marriage of Figaro* composed by Mozart in the eighteenth century. Such roles *en travesti* are so numerous that a catalogue presented here in the margins can only scratch the surface.<sup>112</sup> Men also portray women, albeit on rarer occasions.<sup>113</sup> Further examples of unrealistic casting are regularly presented in the portrayal of characters in the first blush of youth by middle-aged performers. It is also a phenomenon endemic to opera

111. See *infra* note 116 and accompanying text.

112. Other examples include Oscar in *Un Ballo in Maschera* by Verdi, written in the nineteenth century, Octavian in *Der Rosenkavalier* by Richard Strauss, created in the twentieth century, Orfeo in the opera of the same name by Gluck, Romeo in *I Capuletti ed i Montecchi* by Donizetti, Urbain in *Les Hugenots* by Meyerbeer, Prince Charmant in *Cendrillon* by Massenet, Hansel in *Hansel and Gretel* by Humperdinck, Sextus in *La Clemenza di Tito* by Mozart, the Shepherd in *Tannhäuser* by Wagner, Arsace in *Semiramide* by Rossini, the title role of *Rinaldo* by Handel and Tebaldo in *Don Carlos* by Verdi.

113. E.g., the Witch in *Hansel and Gretel* by Humperdinck.



that parts written about ostensibly dashing young heroes and stunning, sirenic heroines are frequently sung by performers who are grossly overweight.<sup>114</sup> The principal reason such incongruities are routinely overlooked is that opera is primarily an aural medium, and vocal ability plays a more central role in casting than acting ability or physical attributes.<sup>115</sup> Against this background it logically follows that whether a performer portrays a character of his or her own race should be of little moment. This hypothesis is borne out by the fact that Cio-Cio San, the Japanese heroine of *Madama Butterfly*, Otello, the tragic Verdian hero based on the Shakespearian Moor, and Aida, Verdi's Ethiopian princess, have all routinely been portrayed by Caucasians. White choruses also routinely portray the citizenry of Nagasaki and the Ethiopian army.<sup>116</sup>

Baritone Todd Duncan was the first black person known to appear with a major opera company in a role not specifically written for blacks. Mr. Duncan was celebrated as the creator of the part of Porgy in Gershwin's *Porgy and Bess* in 1935. He went on to a major international career as a concert artist, singing to great acclaim in musical centers of Europe, Australia, New Zealand, Scandinavia and Latin America. His historic operatic debut occurred with the New York City Opera as Tonio in Leoncavallo's *I Pagliacci* in 1945, ten years before Miss Anderson's Metropolitan debut—but for Mr. Duncan the Metropolitan's ears were deaf.<sup>117</sup>

114. Wadsworth, *Here to Sing*, Opera News, Feb. 2, 1979, at 11.

115. One of the most extreme examples of these incongruities in recent memory occurred in January, 1980, at the Metropolitan Opera when soprano Hildegard Behrens played the part of Leonora in the serious opera *Fidelio*, by Beethoven. Leonora is a young woman who dresses as a man in order to locate her husband in prison and rescue him. While Leonora passes herself off as male the prison warden falls in love with her. Ms. Behrens was eight months pregnant when she played the part.

116. Other examples of non-whites portrayed by whites in opera include Monostatos in *The Magic Flute* by Mozart and Turandot, the Chinese princess in the Puccini opera of the same name. The unique exception to this rule is the new production of *Porgy and Bess* by George Gershwin, scheduled to be performed with a primarily black cast, including the chorus. (N.Y. Post, Feb. 16, 1983, at 6) The Met's decision to employ a black cast may legitimately be grounded on a theory of evoking realism in staging and authenticity of musical style. In fact, the Gershwin estate requires that *Porgy and Bess* have an all-black cast when it is performed in the United States. N.Y. Times, Mar. 29, 1985, at C36, col. 1. *Porgy and Bess* tells a story of oppressed blacks in the early 1900's living in a racially segregated town in South Carolina. It is specific as to historical setting and to the ethnic attributes of its characters, and racial injustice is at the core of the work. The action of the melodramatic plot is highly realistic. But beyond the visual elements of *Porgy and Bess*, it may be said that the score, which was written in a classical-jazz idiom and which incorporates very specific southern black dialects into the music, may be more authentically performed by blacks (e.g., the duet, "Bess You Is My Woman Now").

117. Gamarekian, *Todd Duncan Tells of 5 Little Words*, N.Y. Times, Feb. 9, 1978, at

Tenor George Shirley sang leading roles at the Metropolitan in the 1960's,<sup>118</sup> but his career here and abroad was relatively short-lived. The presence of black men at the Metropolitan was all but nonexistent until the appearance of Simon Estes, the bass-baritone from Iowa, who has attained the unique distinction of becoming the only black male to achieve a major international reputation in opera.<sup>119</sup> Although Mr. Estes made his debut at the Metropolitan in 1982 and has continued to be seen there in important roles, no other black man is regularly seen in major roles,<sup>120</sup> although several are considered capable and are currently making their careers in Europe.<sup>121</sup> Mr. Estes feels that his own career has been impaired by racial prejudice, and that his Metropolitan debut would have occurred in 1966, after he won the Tchaikovsky competition in Moscow, if he had been white.<sup>122</sup>

Why black men have been excluded from opera, and not black women, appears to be a curious mixture of racism and sexism. Opera administrators have refused to cast black men in highly romantic scenes opposite white leading women, which is considered threatening, whereas casting black women in romantic scenes with white men is not.<sup>123</sup> This has had an especially harmful effect upon high-voiced black males because the preponderance of romantic leads are for the tenor voice.<sup>124</sup>

Despite the accomplishments of black women, there remains a general prejudice against non-whites in opera which exacerbates the problem. As in all situations of this nature, specific incidents of racial discrimination are difficult to unveil but occasionally they do come to light.<sup>125</sup> For example, Sir Peter Hall, a stage director on the roster of the Metropolitan Opera, refused to hire black soprano Leona Mitch-

C18, col. 5.

118. Mr. Shirley made his debut in 1961 in the role of Fernando in Mozart's *Così fan tutte*.

119. Libbey, Jr., I've Been Ready for the Met Since 1974, N.Y. Times, Jan. 3, 1982, at D15, col. 1 [hereinafter cited as I've Been Ready]. Mr. Estes has appeared in leading roles in the opera houses of Milan, Hamburg, London, Berlin, Munich, Vienna, Paris and Bayreuth.

120. Id.

121. Id. Other prominent black male opera performers include tenors Curtis Rayam and Howard Haskins, baritones Daniel Washington, Eugene Holmes and Allen Evans, and bass-baritone Arthur Woodley. Colenton Freeman performs with the San Francisco Opera.

122. Steinbrink, Simon Estes Comes Home, Saturday Review, Jan. 1982, at 22, 27.

123. I've Been Ready, supra note 119.

124. Here to Sing, supra note 114. I've Been Ready, supra note 119. Steinbeck, supra note 122. One might suggest that this situation would not arise when two black romantic leads are cast opposite each other, but see infra note 130 and accompanying text.

125. Here to Sing, supra note 114, at 11 (citing Higgins, The Making of an Opera: *Don Giovanni* at Glyndebourne).

ell to sing the role of Donna Anna in Mozart's *Don Giovanni*<sup>126</sup> which he was preparing for performance at the Glyndebourne Festival. Sir Peter claimed that it would destroy the realism of the opera.<sup>127</sup> However, it may be noted that in the climactic scene of the tragi-comedy *Don Giovanni*, a marble statue comes to life, comes to dinner with the protagonist and sends him to hell amid clouds of smoke and fire. This can hardly be considered the type of realistic plot that could give rise to a BFOQ, excusing racially-discriminatory casting. The same director refused to hire Simon Estes to play Wotan in the 1983 production of *The Ring* by Wagner at the Festspielhaus in Bayreuth, West Germany, again implying that it would be unrealistic<sup>128</sup>—this, in spite of the fact that the four-part music-drama is a fantasy in which the unrealistic elements of the plot far outweigh the realistic ones, and also despite the fact that other blacks have appeared in *The Ring* and other Wagner operas at Bayreuth, including Mr. Estes himself.<sup>129</sup>

But aside from discrimination based, at least nominally, on grounds of textural realism, opera administrators have been known to object to having more than one black person on stage at a time,<sup>130</sup> which is arguably an example of racial exclusionism in its barest form.

Legal recourse has been successful in at least one employment discrimination case in opera. Fifty-four year old Lucine Amara, a soprano, filed an age discrimination complaint with the New York State Commission on Human Rights in 1976 against the Metropolitan.<sup>131</sup>

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126. Id. While the production of *Don Giovanni* in question was being prepared for Glyndebourne, England and certainly was not within the jurisdiction of the U.S. Constitution or of Title VII, the elite, cosmopolitan attributes of the opera business foster an extremely tight-knit, cliquish atmosphere. Hiring decisions in any one opera center may have profound international repercussions. For example, Sir Peter Hall, who refused to hire Ms. Mitchell and Mr. Estes, was chosen to direct a new production of Verdi's *Macbeth* for the Met's 1982-83 season. It may be assumed that he brought his aesthetic beliefs with him. Also, casting decisions, once made, may have international consequences. Productions are often shared between opera companies, and they often travel from their city of origin with their casts intact. For example, Marilyn Horne starred in the original cast of *Rinaldo* by Handel in Ottawa, which the Metropolitan presented with Ms. Horne in 1983-84.

127. Cf. supra note 116.

128. Steinbreck, supra note 122, at 27. See also supra note 124.

129. Gwendolyn Killebrew and Grace Bumbry have both been featured in *The Ring*. Mr. Estes has appeared in the *Flying Dutchman* and *Parsifal*.

130. Grace Bumbry and Simon Estes offered to sing *Carmen* at Covent Garden and were told by the administration that they simply couldn't have two blacks on the stage. Steinbreck, supra note 122, at 27.

131. Amara prevailed in 1980. "The Met did not force the issue through to a ruling but backed down and agreed to engage Amara for at least three seasons." Henahan, Music View, N.Y. Times, Apr. 12, 1980, § 2, at 1, col. 4.

Whether legal action would be successful or wise if initiated by members of a class of performers who have the bulk of their careers ahead of them is a question those in opera who feel they have been discriminated against must weigh heavily; performers who dedicate their lives to their art will not want to risk winning a pyrrhic victory.

### Conclusion

Racial discrimination may be unavoidable in the context of the performing arts in certain instances involving "textural realism" or "artistic or societal statements," but in precision dancing, ballet and opera its justifiability is highly questionable. The time has come for the policies of Title VII to be applied to this sphere of employment. The ultimate question remains how to implement such reforms. Legal challenges to institutional artistic casting policies are rare, but they are not impossible to achieve;<sup>132</sup> still, the impracticability of an individual artist bringing suit action against a major arts institution is a formidable impediment to such efforts. In the legitimate theater, however, producers' casting policies have been brought to arbitration by artists' unions on behalf of member complainants. This route to legal action may be effective here.

The BFOQ test set forth in Section II of this Note may be a helpful analytical tool for determining whether a given employer has systematically excluded minority performers from portraying characters which are not race-specific. Yet, even where the BFOQ test is employed it will not be effective in promoting change where the aesthetic choice theory can be invoked to conceal long-standing, illegal discriminatory practices. Tension between the First Amendment and Title VII will make the legal defensibility of this principle difficult to resolve.

Whether a private, profit-making institution such as the Rockettes should be held accountable only to consumer opinion as revealed by the marketplace, and whether the government should continue to endorse such discrimination through its subsidies to ballet and opera companies which practice unjustifiable discrimination, are issues which demand public awareness and scrutiny. It is time to examine whether such racially-exclusive policies should affect one's opinion of the appropriateness of these institutions' role as representatives of a city, state and nation with multi-racial constituencies. The injustice suffered by performers who are the victims of such discrimination is

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132. See, e.g., *id.*

justification enough for a concerted effort to bring this discrimination to an end. Yet more pernicious is the signal emitted to audiences here and abroad that certain types of performing arts are restricted to whites only.