Where Are the Asians in Hollywood?
Can §1981, TITLE VII, Colorblind Pitches, and Understanding Biases Break the Bamboo Ceiling?

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Introduction

New Republic selected the title "The Triumph of Asian-Americans" to describe Asian Pacific Americans ("APAs") as "America's greatest success story."[1] American media portrays APAs as an assimilated race "that adds more to . . . society than it takes away."[2] In 2004, U.S. census data showcased APAs and Whites with similar incomes.[3] However, this data is distorted because many APAs did not report their unemployment status due to language barriers.[4] APA families also have more working members than White families and are concentrated in areas where the cost of living is higher than the national average, such as California, Hawaii, and New

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1. David Bell, *The Triumph of Asian-Americans*, New Republic, http://www.newrepublic.com/article/politics/76218/the-triumph-asian-americans (last visited Oct. 26, 2015).

2. *Id.*; *see also* Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. Rev. 771, 797 (1996). (News stations include *NBC Nightly News, 60 Minutes*, and *U.S. News & World Report*).

3. Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 Asian Am. L.J. 129, 140 (2008).

4. *Id.*

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York.[5] In reality, the incomes of all APA ethnicities are not equal to Whites; 13% of APAs, compared to 8% of Whites, live in poverty without any social services.[6]

Nevertheless, many Americans believe APAs do not deserve protection on the basis of race because APAs are already living the American Dream, which is the idea that success is based on ability rather than birthright.[7] This article shows that APAs have not achieved the American Dream in society or in the entertainment field. For example, in the 86 years of the Oscars, four out of 344 awards went to Asians[8] (0.01%)[9] while 93% of the awards went to Whites (320 out of 344).[10] In 2014, the APA population was 5.62%, but APAs only occupied 1% of credits in the media and 3% of characters on primetime.[11] While 3% is more than the 1.9% reported in 1998, there is still a large disparity between the APA population and their on-screen appearances today.[12]

This article argues that our nation's judicial and legislative leaders are aware of racial disparity, but are not ready to institute change to help minorities. The White majority cannot fully endorse minority equality until they understand the existence of explicit bias in Hollywood and the impact of implicit bias on hiring and judicial decisions. For example, Hollywood's decision-makers claim they would "love . . . to cast Asians in lead roles, but the truth is, [they do not] have access to any *bankable* Asian-American actors [they want]."[13] Instead of blaming poor casting decisions on the lack of talented minorities, decision-makers should create workable diversity programs to help minorities overcome barriers to success in film. This article addresses the barriers faced by APAs aspiring to enter the entertainment field and possible solutions. This article also provides updated statistics on

5. Wei, *supra* note 3, at 797.

6. Darren S. Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias about Asian Americans in Chin v. Runnels*, 11 Asian Pac. Am. L.J. 122, 138 (2006) (discussing specific South East Asian ethnic groups with higher poverty levels that include Hmong, Cambodians, and Laotians); Teresa Watanabe & Nancy Wride, *Stark Contrasts Among Asian Americans*, L.A. Times, Dec. 16, 2004, at A1.

7. Library of Congress, *The American Dream*, http://www.loc.gov/teachers/classroommaterials/lessons/american-dream/students/thedream.html (last visited Jan. 18, 2016) (explaining that the American Dream is the idea that anyone can achieve a richer life if they work hard).

8. The term "Asian" includes both America and foreign-born Asians.

9. Latonja Sinckler, *And the Oscar Goes to . . . Well, It Can't Be You, Can It?: A Look at Race-Based Casting and How It Legalizes Racism, Despite Title VII Laws*, 22 Am. U. J. Gender Soc. Pol'y & L. 857, 875 (2014) (7% went to minorities (24 out of 344 awards); 15 were black, 5 were Hispanic, and 4 were Asian).

10. *Id.*

11. 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, 298 (2003); Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 Berkeley J. Gender L. & Just. 140, 155 (2014).

12. Baynes, *supra* note 12, at 312. (78.9% White, 10% Black, 3.3% Hispanic, and 0.2% Native American).

13. Manaa, *Controversy Surrounds DVD Release of Movie "21"* (Jul. 23, 2008), http://manaa.org/?p=157 (article archived Sept. 19, 2015) (quoting Dana Brunetti who stated that he would have chosen to make a different film if he knew how upset the Asian American community would have been about his casting).

the number of APA actors, actresses, directors, casting directors, and screenwriters in broadcast television and movies to illustrate that the number of APAs in film decreased or was stagnant over the past four years.

Part I discusses the underrepresentation of APAs on screen and behind the camera. It also addresses how stereotypical typecasting and the model minority myth[14] limit APA mobility in entertainment. Part II analyzes the impact of explicit and implicit bias on society, the judiciary, and entertainment leaders. This section argues that Hollywood's casting calls demonstrate a preference towards Whites and explicitly discriminate against minorities. This section also asserts that members of the insular culture in Hollywood are unaware that implicit bias influences their decisions on equality. As a result, a cycle of discrimination in Hollywood is created and must be stopped by increasing awareness of racial biases. Part III addresses the merits and challenges of past suggestions on diversifying the profession, such as colorblind casting and self-regulation. It also proposes new solutions, such as encouraging careers in entertainment within the APA community, organizing with other minorities to battle discrimination, colorblind pitches to break the bamboo ceiling, and debiasing programs to shift the mindset of our nation's leaders.

I. Discrimination Against APAs Is a Problem in the Entertainment Industry and Society

Although the recent releases of Aziz Ansari's *Master of None*[15] and Eddie Huang's *Fresh of the Boat*[16] feature APAs in lead roles, this article's research shows that APAs are still misrepresented and underrepresented in front of and behind the camera.[17] This section analyzes the number of APA actors, actresses, directors, casting directors, and screenwriters employed in recent films and the common stereotypical characters assigned to APAs.

14. *The Model Minority Image*, Asian Nation, http://www.asian-nation.org/model-minority.shtml (last visited Dec. 30, 2015) (society views Asian Americans as a "model minority" — a bright, shining example of how hard work and patience lead to a good education, good job, and earning a good living).

15. *Master of None*, http://www.imdb.com/title/tt4635276/. (*Master of None* is an American comedy television series on Netflix where Aziz Ansari, an Indian actor, plays the lead role of Dev, a 30-year old actor who attempts to make his way through life in New York City).

16. *Fresh Off the Boat*, IMDb, http://www.imdb.com/title/tt3551096/ (last visited Oct. 27, 2015). (*Fresh Off the Boat* is an American comedy television series on ABC that is based on Eddie Huang's book about his Taiwanese family's life in America).

17. Ray Rahman, *Aziz Ansari discusses the 'Indians on TV' episode of Master of None*, Nov. 7, 2015, Entertainment, http://www.ew.com/article/2015/11/07/aziz-ansari-master-of-none-indians-on-tv (Aziz Ansari stated there is an idea that "there's been so much progress and there's all this diversity on TV. . .but it's still, like, there's *one* Asian guy. Does this group of people ever see another Asian guy *ever*? Just the one guy? It's just *him*? Is that it? So that's what we started talking about: "There can be one, but there can't be two").

A. APAs Are Underpresented On Screen and Behind the Camera

APA Characters Rarely Appear in Movies and Television Shows

My research recorded the race of 2,394 actors and actresses cast in 500 popular films over a span of five years (2010 to 2014). The annual sample of films included the top 25 movies grossing over $40 million during opening weekend, top 25 movies grossing under $40 million during opening weekend, the top 25 television shows with over 2 million viewers, and the top 25 television shows with under 2 million viewers. The rankings for the movies and television shows were collected from boxofficemojo.com,[18] deadline.com,[19] and tvbythenumbers.zap2it.com.[20]

The research study used the following parameters. Lead roles[21] in movies included actors and actresses whose pictures appeared on the published movie poster. Supporting roles[22] in movies included actors and actresses who were listed in the Wikipedia starring section, but did not appear on the movie poster. Lead roles in broadcast television included actors and actresses who appeared in 90% of the episodes over the lifetime of the series. Supporting roles included actors or actresses who appeared in 75-90% of the episodes over the lifetime of the series. The race

18. Total Grosses of all Movies Released in 2010, 2011, 2012, 2013, and 2014 (click the "previous year" and "next year" links to browse the rankings), http://www.boxofficemojo.com/yearly/chart/?view=releasedate&view2=domestic&yr=2014&sort=opengross&order=DESC&p=.htm (last visited Feb. 20, 2016).

19. Full Series Rankings For the 2009-10 Broadcast Season, http://deadline.com/2010/05/full-series-rankings-for-the-2009-10-broadcast-season-44277/; Full 2010-2011 TV Season Rankings, http://deadline.com/2011/05/full-2010-11-season-series-rankers-135917/; Nellie Andreeva, *Full 2011-2012 TV Season Series Rankings*, Deadline Hollywood (May 24, 2012, 11:10 PM), http://deadline.com/2012/05/full-2011-2012-tv-season-series-rankings-277941/; Primetime Shows 2013-2014 – Total Viewers, https://pmcdeadline2.files.wordpress.com/2014/05/primetime-ratings-total-audience-2013-2014-table-updated__140523003932.jpg, (last visited Feb. 20, 2016).

20. TV by the Numbers, *2010-11 Season Broadcast Primetime Show Viewership Averages* (June 1, 2011), http://tvbythenumbers.zap2it.com/2011/06/01/2010-11-season-broadcast-primetime-show-viewership-averages/94407;

Complete List of 2011-2012 Season TV Show Ratings, http://tvbythenumbers.zap2it.com/2012/05/24/final-list-of-2011-12-season-tv-show-ratings-sunday-night-football-tops-followed-by-american-idol-the-voice-modern-family/135747/; Complete List of 2012-13 Season TV Show Viewership, http://tvbythenumbers.zap2it.com/2013/05/29/complete-list-of-2012-13-season-tv-show-viewership-sunday-night-football-tops-followed-by-ncis-the-big-bang-theory-ncis-los-angeles/184781/, (last visited Feb. 20, 2016).

21. Wikipedia, *Leading Actor*, https://en.wikipedia.org/wiki/Leading_actor (last modified Oct. 12, 2015) ("A leading actor or actress plays the role of the protagonist of a film. The word lead may also refer to the largest role in the piece and leading actor may refer to a person who typically plays such parts or an actor with a respected body of work. Sometimes there is more than one significant leading role in a dramatic piece, and the actors are said to play co-leads; a large supporting role may be considered a secondary lead").

22. Wikipedia, *Supporting Actor*, https://en.wikipedia.org/wiki/Supporting_actor (last modified Dec. 27, 2015) ("A supporting actor. . .performs a role in a play or film below that of the leading actor(s) and above that of a bit part. These range from minor roles to principal players and are often pivotal or vital to the story as in a best friend, love interest, sidekick, or antagonist. A supporting actor should usually not upstage the starring or main actor or actress. The title of the role is usually specific to the performance; that is, a person may be a supporting actor in one film and the lead in another").

data for lead and supporting roles for movies and television shows were collected through various online resources, such as IMDb, Wikipedia, movie and television webpages, news articles, and the network's webpages.

The results revealed that Whites occupied 83.5% of lead roles while minorities occupied 16.5%; 9.5% Black, 2% Latino, 2.5% Asian, 0.5% Native American, and 2% Mixed/Other. For supporting roles, Whites were 85% and minorities were 15%; 7% Black, 2.5% Latino, 3.5% Asian, 0% Native American, and 2% Mixed/Other. In the movies category, Asians were only cast in 2% of lead roles and 3% of supporting roles. In the television category, Asians fared slightly better at 3% lead roles and 4% supporting roles. The 2014 U.S. Census Bureau reported 77.36% of the national population was White and 5.62% was Asian.[23] In all film categories, the U.S. population of APAs was larger than the number of APA characters on screen.

Most films in the study involved general or fantasy experiences, such as space travel, battling robots, solving crime, the drama of everyday life, comedic situations, romance, action, and adventure. These films did not require actors or actresses from a specific race to preserve regional or historical accuracy, but were still dominated by Whites. A small sample of the films in the study include *Identity Thief, Snow White and the Huntsman, Harry Potter, Twilight, 2 Broke Girls, NCIS, Criminal Minds, Transformers, Two and Half Men, CSI, Once Upon a Time,* and *Gravity.*

An Equity Survey conducted in theatre over a span of four years in the mid-1980s revealed that over 90% of professional plays had an all-white cast even though ethnic minorities made up 25% of the U.S. population during that time.[24] The Equity Survey was over 20 years ago, but its results were similar to my recent study, which proves that the move towards equal representation of minorities is incredibly slow.

APAs Hold Minimal Positions of Power Behind the Camera

APAs struggle for both screen time and employment behind the camera. In 1999, only 3 of the 839 writers for primetime television were APAs (0.004%), while 770 were White (92%).[25] In the 2014 Directors Guild of America's Diversity Report, APAs were 2% (15.5) of the 776 directors on episodic television, while 88% (638) were White.[26] My research expanded on the current studies by recording the

23. U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: Apr. 1, 2010 to Jul. 1, 2014 (2015).

24. Lois L. Krieger, "*Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater*, 43 Syracuse L. Rev. 839, 844 (1992).

25. Baynes, *supra* note 12, at 312 (55 were Black, but 84% of the writers were employed on black-themed shows, 11 were Latino, and 0 were Native American).

26. *DGA Report: Employers Make No Improvement in Diversity Hiring in Episodic Television*, Directors Guild of America (Sept. 17, 2014) http://www.dga.org/News/PressReleases/2014/140917-Episodic-Director-Diversity-Report.aspx (reporting that of 776 total episodic directors in 2013-2014, 7% were Black and 3% were Latino).

race of 417 directors, 580 casting directors, and 691 screenwriters from 2010 to 2014 using the same 500 films mentioned above.[27]

The results revealed 94.5% of directors were White and 15.5% were minorities; 2.5% Black, 1.5% Latino, 1% Asian, and 0% Native American. For casting directors, the results revealed 92.5% were White, 5.5% were Unknown, and 17.5% were minorities; 1% Black, 0.5% Latino, 0.5% Asian, and 0% Native American. For screenwriters, 95% were White and 5% were minorities; 1.5% Black, 2.5% Latino, 1% Asian, 0% Native American, and 0.5% Mixed/Other. For all three positions, the APA representation was 1% or less, which is extremely low compared to the APA U.S. population of 5.62%.[28]

My results and past studies demonstrate that APAs are underrepresented in film. Unfortunately, society ignores the statistics and often excludes APAs from the equality debate and diversity programs because they believe APAs already achieved professional success,[29] a matter that is discussed in Part 1C.

B. Typecasting in Films Misrepresents APA Culture

The current representations of APAs on screen are low and inaccurate. APAs are constantly stripped of normal American personalities and type-casted, which is when a particular character role becomes so strongly associated with the stereotypical social traits or the ethnic appearance of Asians that APAs are only cast to play that particular type of character.[30] Typecasting is a form of "racial capitalism," where someone gains social or economic value from another person's racial identity.[31] The entertainment industry commodifies Asian identities as a marketing mechanism to attract consumers,[32] which limits the acting opportunities for APAs to mostly stereotypical roles, such as the lotus blossom, dragon lady, fu manchu, Charlie Chan, foreigner, kung fu master, and model minority.

Lotus Blossom

The term "yellow fever"[33] originated pre-1965 when Asian women were imported as prostitutes to serve Asian and White males.[34] The desire for Asian women as ideal domesticated wives was heightened by the passage of the War Brides Act in 1945, where Asian women immigrated through marriage to American service-

27. *See* Part 1A in accompanying text: "APA characters rarely appear in movies and television shows."

28. U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: Apr. 1, 2010 to Jul. 1, 2014 (2015).

29. *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1935 (1993).

30. Wikipedia, *Typecasting (Acting)*, https://en.wikipedia.org/wiki/Typecasting_(acting) (last modified Apr. 9, 2016).

31. Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151, 2153 (2013).

32. *Id.*

33. *Yellow Fever*, Urban Dictionary, http://www.urbandictionary.com/define.php?term=yellow+fever (last visited Oct. 27, 2015).

34. Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. 177, 184 (1997).

men.[35] The dominance of White males over Asian wives created the lotus blossom stereotype, which is the portrayal of Asian females as submissive and sexualized to meet western male fantasies. The term lotus blossom is used interchangeably with China doll and oriental girl.[36]

An example is Anna May Wong, the first Chinese-American actress to gain prominence in film as a lotus blossom. Wong was cast as a sexualized Mongolian slave girl in *Thief of Bagdad* (1924)[37] and *In The World of Suzie Wong* where she played a prostitute working in Hong Kong who was fully available to the White protagonist.[38] *The Wolverine* (2013)[39] is a modern example. Mariko, played by Tao Okamoto, was the female protagonist who tempted Wolverine from his past true love, Jean Grey, and required his protection the entire film.

Dragon Lady

The dragon lady is the opposite of the lotus blossom because she is a wicked character who is conniving, aggressive, and domineering.[40] For example, in *Charlie's Angels* (2000), Lucy Liu represented a strong and beautiful dragon lady who wore tight and revealing clothing.[41] Li Gong also played a dragon lady as the beautiful and exotic, but dangerous wife of an arms and drug trafficker in *Miami Vice* (2006).[42]

Fu Manchu

The fu manchu is the Asian male version of the dragon lady. He is evil and treacherous. Films often display him as a western educated man with several servants, often referred to as "yellow minions," to do his bidding.[43] Lo Fong, the antagonist, in *Shanghai Noon* (2000), is an example of a westernized Asian with a labor camp full of Asian workers.[44]

35. Stewart Chang, *Feminism in Yellowface*, 38 Harv. J. L. & Gender 235, 237 (2015).

36. Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 Berkeley J. Gender L. & Just. 140, 153 (2014).

37. Joseph Worrell, *Anna May Wong*, Silent Era, http://www.silentera.com/people/actresses/Wong-AnnaMay.html (last visited Oct. 24, 2015).

38. Peter Kwan, *Invention, Inversion and Intervention: The Oriental Woman in the World of Suzie Wong, M. Butterfly, and the Adventures of Priscilla, Queen of the Desert*, 5 Asian Am. L.J. 99, 102-03 (1998).

39. Wolverine, IMDb, http://www.imdb.com/title/tt1430132/ (last visited Oct. 27, 2015).

40. Cho, *supra* note 35, at 184.

41. Li, *supra* note 37, at 155.

42. *Id.*

43. Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1, 35-36 (1996).

44. IMDb, *Roger Yuan*, http://www.imdb.com/title/tt0184894/?ref_=nm_knf_i3.; https://en.wikipedia.org/wiki/Shanghai_Noon (last visited Feb. 20, 2016).

Charlie Chan

Charlie Chan is a hard-working Asian male who is deferential to White authority, patient, and considerate. [45] Charlie Chan is usually created with minimal masculinity and requires bodily aesthetics[46] that show inferiority to White men.[47]

An example is Harold Lee, from *Harold and Kumar Go to White Castle*.[48] John Cho plays a rational and polite APA that struggles to approach his crush throughout the film and continuously helps his friend, Kumar. Kal Penn plays Kumar and is also an APA actor, but is portrayed as reckless, which serves to strengthen the Charlie Chan stereotype of Cho's character. Although Kumar did not embody the Charlie Chan stereotype, Penn did not escape the APA stereotypes of Hollywood because his character was portrayed as a model minority, which is discussed below in the section titled "Model Minority."

Foreigners

Julie Su, an advocate for APAs, received a call from a Hollywood producer who responded to her advocacy work with the following comment, "I have read all the newspaper accounts and you've really been a hero. But what we need is an American hero."[49] This discourse shows that U.S. culture still views all Asians as foreigners,[50] including Asians who were born and grew up in America.[51] Most APA actors and actresses are only sought when international regional accuracy is required, such as when a film is set in China,[52] and rarely casted as true Americans.[53] The portrayal of Asians as only foreigners limits employment for APA actors and actresses, but also negatively impacts the socialization process of APAs.[54] Some APAs experience peer exclusion or less job opportunities because they are perceived as outsiders with inadequate communication and social skills.[55]

A legal example is *Gonzales v. Abercrombie & Fitch*, where minorities were not hired for the retailer's visible positions because people of color did not fit the "All-American" image of "white, sporty males and females, with blond hair and

45. Aoki, *supra* note 44.

46. Stewart Chang, *Racial Upside: Deconstructing the "Merits' of Jeremy Lin's NBA Contract*, 14 Va. Sports & Ent. L.J. 1, 8 (2014).

47. Kwan, *supra* note 39, at 124.

48. *Harold & Kumar Go to White Castle*, IMDb, http://www.imdb.com/title/tt0366551/ (last visited Oct. 27, 2015).

49. Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry,* J. Gend., Race & Justice (1997); *see also* Cho, *supra* note 35, at 189.

50. Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 75 (2001).

51. Chang, *supra* note 36, at 266.

52. Heekyung Esther Kim, *Race as a Hiring/casting Criterion: If Laurence Olivier Was Rejected For the Role of Othello in Othello, Would He Have a Valid Title VII Claim?*, 20 Hastings Comm. & Ent L.J. 397, 399 (1998).

53. Cho, *supra* note 35, at 194.

54. Qin Zhang, *Perception of Asian American Students: Stereotypes and Effects*, 5.1 Comm. Ctr. (Apr. 2010), https://www.natcom.org/CommCurrentsArticle.aspx?id=963.

55. *Id.*

blues eyes."[56] The retailer codified this explicit bias in its "Look Policy."[57] Although the *Abercrombie* lawsuit never reached the judiciary because the retailer settled for $40 million,[58] it highlights the perception that Americans are White and not colored.

In entertainment, *Fresh off the Boat (2015)*[59] was the only APA sitcom in the last 20 years to feature the viewpoint of APA children, but could not resist the foreigner stereotype.[60] The show follows a Taiwanese family reaching for the American dream during the 1990s and mainly focuses on the two parents who embrace nearly every Asian foreigner stereotype, such as using chopsticks, smelly food, a Charlie Chan father,[61] and even a tiger mother, which is a relatively new stereotype that depicts Asian mothers as overbearing and strict.[62]Randall Park and Constance Wu were cast as the parents, Mr. and Mrs. Huang.[63] Some APAs have an accent, but Wu and Park are APAs who normally speak proper English.[64] Playing the Huangs, Wu and Park were required to speak in fake accents because jokes were written about the accents and the storyline emphasized the parents as immigrants.[65] Wu and Park's decisions to perpetuate the foreigner stereotype received much criticism from the APA community.[66]

Another example is the television series *Heroes* (2006-2010).[67] In the series, Masi Oka and James Kyson play Hiro and Ando, a duo from Japan, who set out to save the world. The inclusion of some Asian representation is better than none, but even in *Heroes,* the Asian characters were not born in America.

Kung Fu

Almost every Asian stereotype can be combined with the kung fu master, who is a master of martial arts. For example, *Martial Law* (1998-2000)[68] tells a story of a Shanghai cop who uses martial arts to fight crime in the Los Angeles Police

56. James Desir, *Note, Lookism: Pushing the Frontier of Equality By Looking Beyond the Law*, 2010 U. Ill. L. Rev. 629, 634 (2010); *see also* Consent Decree at 6, Gonzalez, Case Nos. 03-2817 SI, 04-4730, and 04-4731; *Gonzalez v. Abercrombie & Fitch Co.*, No. C 03-2817 SI, 2011 WL 2516621 (N.D. Cal. 2011).

57. *Id.*

58. *Id.* at 633; *see also* Hannah Fleener, *Looks Sell, But Are They Worth the Cost?: How Tolerating Looks-based Discrimination Leads to Intolerable Discrimination*, 83 Wash. U. L. Q. 1295, 1296 (2005), available at http://digitalcommons.law.wustl.edu/lawreview/vol83/iss4/11.

59. *Fresh Off the Boat*, IMDb, http://www.imdb.com/title/tt3551096/ (last visited Oct. 27, 2015).

60. Nolan Feeney, *Fresh Off the Boat Star: I Don't Need to Represent Every Asian Mom Ever*, Time Entertainment, http://time.com/3696111/fresh-off-the-boat-constance-wu/ (last visited, Oct. 25, 2015).

61. Aoki, *supra* note 44, at 45.

62. Wikipedia, *Tiger Mother*, https://en.wikipedia.org/wiki/Tiger_mother (last modified Jan. 1, 2016) (a strict or demanding mother who pushes her children to high levels of achievement).

63. *Fresh Off the Boat*, IMDb, http://www.imdb.com/title/tt3551096/ (last visited Oct. 27, 2015).

64. Feeney, *supra* note 61.

65. *Id.*

66. Pamela Tom, *Fresh Off the Boat: Smart or A Soy Sorry Joke?*, Huff Post Entertainment, http://www.huffingtonpost.com/pamela-tom/fresh-off-the-boat-smart-_b_6588044.html (last visited Oct. 27, 2015).

67. *Heroes*, IMDb, http://www.imdb.com/title/tt0813715/ (last visited Oct. 27, 2015).

68. Martial Law, IMDb, http://www.imdb.com/title/tt0163949/ (last visited Feb. 20, 2016).

Department.[69] Another example is *The Green Hornet* (2011) where Kato, played by Jay Chou, is a skilled martial artist who teams up with Britt Reid, played by Seth Rogen, to fight crime.[70]

Model Minority

An Asian without intellect seems like an unfathomable concept in Hollywood. The model minority stereotype portrays APAs as the ethnic minority who achieved financial and educational success in American through hard work.[71] The model minority stereotype has similar characteristics as the Charlie Chan stereotype, but differs because it refers to both women and men.

For example, both Harold and Kumar from *Harold and Kumar Go to While Castle* are examples of the model minority. Harold is a dedicated investment banker and Kumar, despite his marijuana obsession, is a medical student.[72] In *Better Luck Tomorrow,* the show's creators made the APA high school students both Ivy League bound and delinquents.[73] A recent example is *The Big Bang Theory* (2007-2015)[74] where Kunal Nayyar was cast as Raj Koothrappali, a shy and nervous Indian astrophysicist who works in the Physics Department at the California Institute of Technology. Raj also embodies the Charlie Chan and the foreigner stereotype because Raj works hard and speaks broken English.

Hollywood's practice of typecasting makes a career in entertainment undesirable for many APAs because most roles require choosing between perpetuating inaccurate stereotypes or declining the job.[75] Leaders in entertainment claim they "support" diversity, but they also believe audiences are more likely to accept White characters as American[76] and rarely depict APAs with multiple personalities and non-stereotypical backgrounds.[77] As a result, APAs qualify for fewer roles and society accepts the limited stereotypical portrayals of APAs as the true representation of all Asians.[78]

69. Baynes, *supra* note 12, at 322.

70. The Green Hornet (2011), IMDb, http://www.imdb.com/title/tt0990407/ (last visited Feb. 20, 2016).

71. Nary Kim, *Too Smart for His Own Good? The Devolution of A "Model" Asian American Student*, 20 Asian Am. L.J. 83, 90 (2013).

72. *Harold & Kumar Go to White Castle*, Wikipedia, https://en.wikipedia.org/wiki/Harold_%26_Kumar_Go_to_White_Castle (last visited Oct. 27, 2015).

73. Kim, *supra* note 72, at 85.

74. The Big Bang Theory, IMDb, http://www.imdb.com/title/tt0898266/ (last visited Oct. 27, 2015).

75. Feeney, *supra* note 61.

76. Tung Yin, *Through a Screen Darkly: Hollywood as a Measure of Discriminating Against Arabs and Muslims*, 2 Duke F. L. & Soc. Change 103, 105-07 (2010).

77. Baynes, *supra* note 12, at 325.

78. *See* Diane J. Klein, *Latino Masculinities Under the Microscope: Stereotyping and Counterstereotyping on Five Seasons of CSI: Miami*, 3 Fla. Int'l U. L. Rev. 395, 400 (2008); *see also* Baynes, *supra* note 12, at 325.

C. Society Mistakenly Believes APAs Are the Model Minority and Achieved Parity in All Industries

The model minority stereotype is not limited to characters in films, but is also used to describe APAs in society. The model minority image can be traced back to the Immigration and Naturalization Act of 1965 where America's leaders explicitly prevented Asian laborers from entering the United States and only allowed skilled workers.[79] Post-1965, there was an influx of educated and wealthy Asian immigrants.[80] In 1966, William Peterson coined the term "model minority"[81] in *The New York Times* magazine when he described APAs as the ethnic minorities who, despite marginalization, achieved high academic success and incomes, low levels of crime behavior, and a hardworking and uncomplaining nature.[82]

The model minority praise created the false belief that APAs are no longer victims of racism and are perfectly equipped to achieve professional and personal success without aid from government programs.[83] For example, APAs are not considered minorities in education. In 2008, APAs were 5.9% of the national undergraduate student population and constituted 4% of the U.S. population.[84] In 2013, APAs were 6% of the national undergraduate population[85] and constituted 5% of the U.S. population.[86] In 2013, APAs were 34% of the population on the University of California campuses[87] and, in 2015, APAs were 17% to 21% of the population at Harvard.[88]

Based on the undergraduate enrollment statistics, the U.S. Justice Department decided APAs had outgrown affirmative action protections and some schools set quotas to limit Asian enrollment in campuses, which dramatically decreased APAs access to education.[89] Affirmative action promotes the redistribution of in-

79. Kim, *supra* note 72, at 90.

80. *Id.*

81. William Peterson, "Success Story, Japanese-American Style," Jan. 9, 1966, *New York Times,* http://inside.sfuhs.org/dept/history/US_History_reader/Chapter14/modelminority.pdf (last visited Jan. 15, 2016); *see also* https://en.wikipedia.org/wiki/Model_minority.

82. Kim, *supra* note 72, at 90.

83. *Id.*; *see also* Anthony Ramirez & Barbara C. Loos, *America's Super Minority*, Fortune, Nov. 24, 1986; Li, *supra* note 37, at 156.

84. Lee, *supra* note 3, at 129-30.

85. National Center for Education Statistics, *Total Fall Enrollment in Degree-Granting Postsecondary Institutions, by Level of Enrollment, Sex, Attendance Status, and Race/Ethnicity of Student: Selected Years, 1976 through 2013* (Nov. 2014), http://nces.ed.gov/programs/digest/d14/tables/dt14_306.10.asp.

86. United States Census Bureau, *Annual Estimates of Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties*: *Apr. 1, 2010 to Jul. 1, 2013* (Jun. 2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

87. The University of California, "Table 7k: Enrollment by Ethnicity, Gender, and Level: University Total," Statistical Summary of Students and Staff, Fall 2014, http://legacy-its.ucop.edu/uwnews/stat/statsum/fall2013/statsumm2013.pdf, (last visited Jan. 15, 2016).

88. Nicky Woolf, *Why Are so Many Asian Americans Missing Out on Ivy League Schools?*, The Guardian, May 24, 2015, http://www.theguardian.com/us-news/2015/may/24/why-are-so-many-missing-out-on-ivy-league-schools (last visited Jan. 15, 2016).

89. Lee, *supra* note 3, at 142-144. (Asians constituted 6% of the state population in CA, but 20%

come and benefits by creating employment opportunities so minorities can compete for success against the White majority.[90] The de-minoritization of APAs in education leads society to believe APAs met "parity" in all industries, which is achieved when actual representation approximates the baseline percentage.[91] If a group is under parity, then there is possible discrimination, but if a group is over parity, then it is assumed discrimination no longer exists. [92]

Society fails to realize that educational success does not automatically translate into equal pay or employment in industries dominated by Whites. For example, APAs are generally paid far less than Whites with the same educational levels. APAs receive a lower return on their educational investment (worse salaries), which forces them to seek higher education with "great[] fervor."[93] In 2010, APAs were 4.8% of the U.S. population, but held only 2.1% of board of director seats in the Fortune 500 companies.[94] Whites held 90% of the director seats when they only made up 72% of the U.S. population.[95] These statistics demonstrate that APAs have not outgrown the need for affirmative action in many fields.[96]

There are many other examples that APAs are still under parity. First, Southeast Asians are living in poverty rates at least three times the national average.[97] Second, APAs constitute 1% of the general population, but only 0.3% of the nation's lawyers, a profession that provides important access to powerful government positions.[98] APAs have the lowest conversion rate from associate to partner of any minority group even though they make up half the legal associates.[99] Third, APA faculty members suffer the lowest tenure rates (41%) compared to the overall rates

of the undergraduate enrollment at UC campuses).

90. Krieger, *supra* note 25, at 859 (Affirmative action includes a broad array of race, ethnicity, and gender conscious programs voluntarily enacted by the government and private sector or imposed by court order and was created because historical racism raised high hurdles for minorities, such as less material wealth, insider knowledge, government services, and social contacts to instrument educational and professional advancement in America); *see also Beyond Self-Interest: Asian Pacific Americans Toward A Community of Justice, A Policy Analysis of Affirmative Action*, 4 Asian Pac. Am. L.J. 129, 133 (1996).

91. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward A Community of Justice, A Policy Analysis of Affirmative Action*, 4 Asian Pac. Am. L.J. 129, 153 (1996).

92. *Id.*

93. Frank H. Wu, Yellow: Race in American Beyond Black and White 20 (2002); *see* Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 Asian Am. L.J. 57, 80 (2007).

94. Li, *supra* note 37, at 145.

95. *Id.*

96. Chin, *supra* note 92, at 154 (In academia, APAs are underrepresented in numerous fields, such as history (2.2%), sociology (2.2%), English/literature (2.1%), philosophy (1.8%), education (1.6%), psychology (1.4%), political science (1.3%), and law (0.9%)).

97. Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev 1, 41 n.193 (1996).

98. Lee, *supra* note 3, at 140.

99. Li, *supra* note 37, at 145.

(52%). Fourth, APAs occupy only one of every 100 executive or managerial level positions in higher education.[100] Finally, Asians continue to experience hate crimes.

A prominent example of a hate crime occurred in 1982, when two White autoworkers killed Vincent Chin, a young Chinese American. They called him a "jap," stated it was his fault they were "out of work," smashed his skull, and beat him to death with a baseball bat. However, they only received three years probation and a fine of $3,780.[101] The guilty plea for killing Chin proves that American society has not overcome its prejudice against Asians. More recently, the National Asian Pacific American Legal Consortium (NAPALC) reported 458 anti-Asian incidents in 1995.[102] The FBI reported that 4.6% of all hate crimes in the United States between 1995 and 2012 were against Asians.[103] In 1999, Joseph Ileto, a Filipino American postal worker, was shot and killed by a White supremacist in Los Angeles.[104] In 2006, two White men, shouting racial epithets, beat four Chinese workers with a steering wheel locking bar.[105] In 2007, John Haley, a self-proclaimed "skinhead,"[106] pushed Du Doan, a 62-year old Vietnamese man, off a fishing pier into Lake Michigan where Doan drowned.[107]

Despite the evidence that APAs have not reached equivalent status to Whites in many areas,[108] America's leaders continue to believe APAs can succeed in all industries without any remedy for their ongoing struggles.[109]

II. Discrimination Against APAs in the Entertainment Industry and Society Is Caused by Explicit and Implicit Bias

By portraying APAs using negative stereotypes, the media instills explicit and implicit biases in members of society. This article argues that leaders in film base character and hiring decisions on social bias and stereotypes learned from the media. Government leaders similarly base judicial and legislative decisions on the prejudices learned from the media. This section discusses how explicit and implicit biases in America can cause discrimination against APAs and how the cycle of bias must be stopped before APAs can achieve accurate representation and equal employment in film and society.

100. Chin, *supra* note 92, at 156.

101. Wei, *supra* note 2, at 800.

102. Chin, *supra* note 92, at 158 (The 1995 anti-Asian incidents showed an 80% increase in Southern California and a 10% increase in New York and Northern California).

103. Mike Brunker, Monica Alba & Bill Dedman, *Hate Crime in America, by the Numbers*, NBC News (June 18, 2015), http://www.nbcnews.com/storyline/jewish-center-shootings/snapshot-hate-crime-america-numbers-n81521.

104. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003).

105. The Leadership Conference, *Hate Crimes Against Asian Pacific Americans*, http://www.civilrights.org/publications/hatecrimes/asian-pacific.html (last visited Jan. 15, 2016).

106. The Free Dictionary, http://www.thefreedictionary.com/skinhead (last visited Jan. 15, 2016) (defining a skinhead as a person who hold white supremacist or anti-immigrant views).

107. The Leadership Conference, *supra* note 106.

108. Lee, *supra* note 3, at 136-38.

109. *Id*. at 140.

A. APAs Lack Opportunities In Entertainment Because White Power Fuels Explicit Bias

Explicit biases are beliefs and feelings individuals knowingly possess and are, quite often, strongly associated with racism.[110] For example, White supremacy is the explicit bias that people of color are inferior culturally, socially, and politically to Whites.[111] America projects a national image of freedom, equality, and diversity, but society's prefers White employees, which is confirmed in Hollywood's yellowface and casting practices.

Yellowface is Evidence of Explicit Bias in Entertainment

In the early 1970s, Bruce Lee pitched an idea to Warner Brothers about a Chinese monk practicing martial arts in an American West setting.[112] When the studio approved the television show, it understood Lee would portray the lead character. However, the role was recasted with the non-Chinese actor, David Carradine, with minimal martial arts experience and yellowface was used. Yellowface is applying make-up on a White actor or actress to make him or her appear more Asian.[113]

The studio's treatment of Lee is an example of how explicit bias limits APA employment in film. When the storyline cannot be changed from Asian to White, Hollywood hires a non-Asian actor and employs yellowface. Many people rightfully believe yellowface is ridiculous, but incorrectly believe it no longer exists. For example, in 2013, Clifton Collins, Jr., a Mexican-American actor, portrayed, a Chinese-American character, Tendo Choi, in Pacific Rim using yellowface[114] In Disney on Ice's 2015 Dare to Dream Production, Li Shang, a Chinese general from *Mulan*, was cast as a White male who wore a black wig and painted slanted eyes.[115] Although Disney on Ice is not a film, the production is in the entertainment industry. The photo of the White "Shang" was solidified in Disney's printed program, and is readily available for parents to purchase for their children.

Casting Breakdowns are Evidence of Explicit Bias in Entertainment

In Hollywood, casting is not always about talent, but rather about finding the person who best fits the casting breakdown.[116] A breakdown is a synopsis that

110. Jessica L. Snowden, *Explicit and Implicit Bias Measures: Their Relation and Utility as Predictors of Criminal Verdict Tendency*, Department of Psychology, University of California Wilmington, (2005). http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.425.3620&rep=rep1&type=pdf (last visited Oct. 27, 2015); *see also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 469-70 (2010).

111. Chin, *supra* note 92, at 131.

112. The Slanted Screen, IMDb, http://www.imdb.com/title/tt0760185/ (last visited May 20, 2016); *see also* Megan Basham, *Unmasking Tonto: Can Title VII "Make It" in Hollywood?*, 37 Am. Indian L. Rev. 549, 573 (2013).

113. The Slanted Screen, *supra* note 113.

114. Wikipedia, *Example of Yellowface*, https://en.wikipedia.org/wiki/Examples_of_yellowface (last visited Jan. 15, 2016).

115. *Dare to Dream*, Disney on Ice, http://www.disneyonice.com/ca/en-ca/dare-to-dream (last visited Jan. 15, 2016).

116. Baynes, *supra* note 12, at 312; *see also* Debbie Sikkema, *What is a Breakdown? (Showbiz Term of the Day), Your Actor: Tips For Helping Your Child Get into Showbiz* (Dec. 7, 2015), http://www.

includes the script with character descriptions and often includes the desired race of the character.[117] Aziz Ansari, an Indian American actor and creator of the Netflix original series, *Master of None,* told Entertainment Weekly, "I don't think a white male showrunner is really going to care about 'Indians on TV,'"[118] and explained how real experiences of APAs are "not really talked about on TV much."[119]

Aziz's statement suggests individuals use their own experiences and opinions to construct character descriptions.[120] Russell Robinson's research in 2007 confirmed this theory by revealing that casting calls overwhelming request to employ White actors and actresses over minorities. In Robinson's report, out of the 45.2% of casting notices on Internet Movie Database (IMDb) that specified a race, 22.5% identified the race as White, 8.1% as Black, 5.2% as Latino, 4.3% as Asian American, and 0.5% as Native American.[121] APAs are second to last.[122]

Approximately 54.8% of the casting calls did not specify a race. However, nine out of ten times, if the race is unspecified, the role goes to a White person[123] because casting directors eliminate people of color by default. [124] Rene Balcer, the White executive producer of *Law & Order* says if you want a person of color, then you must specify it in writing; if you want a White person, then you do not specify a race.[125] For example, for the *Hunger Games*, the casting agency only auditioned White women for Katniss.[126] Katniss was described with olive-skin, gray-eyes, and straight dark-hair, which the agency interpreted as White.[127] Thus, the number of White casting calls in Robinson's study is actually 77.3% (22.5% plus 54.8%).

My research updated Robinson's numbers by analyzing the specific race of 488 casting calls on backstage.com from January 2015 to May 2015. The results were similar to Robinson's 2007 statistics on IMDb with 39% White, 10% Black, 11% Latino, 4% Asian, 2% Native American or Middle Eastern, 8% multiple races

youryoungactor.com/2009/12/07/what-is-a-breakdown-showbiz-term-of-the-day/#sthash.WdrKnqjk.dpuf (last visited Jan. 4, 2016 (describing a breakdown as a synopsis of the project that includes the script with character descriptions).

117. *Id.*

118. Jon Lisi, *Aziz Ansari Reverses Gender Roles in 'Master of None*, Nov. 13, 2015, POPMATTERS, http://www.popmatters.com/column/aziz-ansari-reverses-gender-roles-in-master-of-none/ (last visited Jan. 15, 2016) ("Indian on TV" was an episode that depicts Hollywood's insensitive treatment of Indians throughout the years).

119. Rahman, *supra* note 18.

120. *Id.*

121. Russell K. Robinson, *Casting and Caste-Ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 11 (2007)

122. *Id.*

123. Baynes, *supra* note 12, at 311.

124. Robinson, *supra* note 122, at 6-7.

125. Baynes, *supra* note 12, at 311.

126. Ted Casablanca & Taryn Ryder, *The Hunger Games Casting Controversy! Looking for White 'Underfed' Girls*, http:// www.eonline.com/news/228932/the-hunger-games-casting-controversy-looking-for-white-underfed-girls (last visited Oct. 24, 2015).

127. Katey Rich, *Jennifer Lawrence May Be Up for Hunger Games Lead, But There's Controversy Too*, http://www.cinemablend.com/new/Jennifer-Lawrence-May-Be-Up-For-Hunger-Games-Lead-But-There-s-Controversy-Too-23439.html (last visited Oct. 26, 2015).

specified, and 26% race not specified. According to industry standards, race not specified means "White."[128] Thus, the final statistics are 65% White and 4% Asian. The industry has improved since 2007, but Whites still received sixteen times more employment opportunities than Asians in film.

The preference for White actors and actresses over minorities suggests that White directors and writers are likely creating more White characters, which results in less employment of minority talent. The large number of casting calls for Whites might explain why Korean actress, Sandra Oh,[129] had difficulty getting auditions even with her extensive experience.[130] When Halle Berry[131] wanted the lead role in *Things We Lost in Fire*, she was denied because the breakdown called for a White woman. Fortunately, Berry met with the director to question why the color of her skin mattered for the role.[132] After Berry's confrontation, she was eventually offered the role.[133] The director's ability to change the role from White to Black without impacting the storyline shows that casting breakdowns with specific racial preferences are not necessary unless race is essential to the plot. Oh and Berry are talented actresses who were excluded from the hiring process based on the color of their skin. If Hollywood shifts to race-neutral casting policies, then directors will be exposed all actors and actresses, which generates more opportunities for minorities.

Entertainment Leaders Deny Explicit Bias Exists and Blame Minorities for Low Representation

Despite the overwhelming number of casting calls requesting Whites over minorities, Hollywood claims underrepresentation of APAs in film is due to the lack of minority applicants and not to the lack of casting calls.[134] Producer of *The Bachelor*, Mike Fleiss, stated that "[the network] always want[s] to cast for ethnic diversity. It's just for whatever reason, they don't come forward. I wish they would."[135] The lack of minorities is a common excuse in all entertainment arenas, not only film. Phillip Oesterman explained that minority dancers did not audition for musicals.[136] Barry Moss, the casting director for *The Will Rogers Follies,* claimed he made a specific casting call for Black dancers, but found the Black

128. Baynes, *supra* note 12, at 311.

129. Sandra Oh, IMDb, http://www.imdb.com/name/nm0644897/ (last visited Feb. 20, 2016) (Sandra Oh is a prominent Korean actress originally from Canada).

130. Hilary De Vries, *All That Korean Rage, Unbottled*, N.Y. Times (Oct. 17, 2004), http://www.nytimes.com/2004/10/17/movies/17devr.html?_r=1 (quoting the actress as commenting that her agents tell her they "'have a hard time getting [her] in' and all [she] wants is a shot"').

131. *Halle Berry*, IMDb, http://www.imdb.com/name/nm0000932/?ref_=nv_sr_1 (last visited Oct. 21, 2015) (Halle Berry is a prominent multiracial actress. She is half African American and half White).

132. *Fighting to Hold On: Halle's 'Things We Lost In the Fire'*, Hollywood.com (Oct. 23, 2007), http://www.hollywood.com/static/halles-berry-things-we-lost-in-the-fire-race.

133. *Id*.

134. Complaint at 9, *Claybrooks v. Am. Broad*. Co., Inc., 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (No. 3:12-cv-00388); *see also* Joyce Chen, *'The Bachelor' Accused of Racism; Show is Facing Class Action Lawsuit*, New York Daily News, Apr. 17, 2012, http://www.nydailynews.com/entertainment/tv-movies/bachelor-accused-racism-show-facing-class-action-lawsuit-article-1.1063054.

135. *Id.*

136. Kim, *supra* note 53, at 417.

actors were not answering the calls.[137] Instead of seriously reflecting on why Hollywood's minority recruitment efforts continue to fail, entertainment leaders blame minorities for not seizing these rare casting opportunities.[138]

It is not surprising that APAs are skeptical about employment in film since there are many examples of Hollywood failing to give APAs an opportunity to audition for roles that require an Asian lead. *21 (2008)* is an example of a notorious movie casting failure. *21* was based on a true story about a team of primarily APA MIT students who were coached by an APA professor to use their math skills to gain an edge in blackjack in casinos.[139] However, White actors filled the lead roles and minority actors filled supporting roles.[140] The producer wrote "we would have loved to cast Asians in the lead roles, but the truth is, we didn't have access to any bankable Asian-American actors that we wanted."[141]

21 is an example of explicit bias in the casting process. For *21* to accurately portray the story, it required APA actors. However, producers casted White actors.[142] If producers honestly desired APA actors, then they should have conducted a thorough talent search instead of assuming all APA candidates would audition. It is possible that talented APA actors were unaware *21* was auditioning for an Asian cast due to their limited connections in the industry.[143]

The casting for *Avatar the Last Airbender (2010)* was another significant controversy. The actors in the lead roles were all White even though the film was adapted from a cartoon with heavy Asian influences.[144] The characters ate with chopsticks, used kung-fu, wore kimonos, and viewed traditional Chinese paintings and writings.[145] The casting for *Avatar* confirms that APAs are not even considered for stereotypical roles about their own culture. The casting calls for *Avatar* specifically requested "Caucasians or any other ethnicity"[146] instead of stating "all ethnicities,"

137. *Id.*; *see also* Alex Witchel, *'Will Rogers' Casting Drama Continues*, S.F. Chron, Jan. 6, 1992, at E2.

138. Complaint, *supra* note 135, at 9.

139. Ben Mezrich, Bringing Down The House: The Inside Story of Six MIT Students Who Took Vegas for Millions, 252-53 (2002); *see also* Ed Moy, *Does Hollywood 'White-Wash' the Casting of Asian Characters in Movies?*, Examiner.com, http://www.examiner.com/asian-american-movie-in-los-angeles/does-hollywood-white-wash-the-casting-of-asian-characters-movies (last visited Oct. 25, 2015).

140. *MANAA's Response to Letter from Paramount on The Last Airbender*, MANAA, http://manaa.org/?p=49 (last visited Oct. 27, 2015).

141. *Controversy Still Surrounds DVD Release of Movie 21*, MANAA, http://manaa.org/?p=157 (last visited Oct. 21, 2015).

142.

143. Lily Rothman, *The Hidden Factor in Hollywood's Racial Diversity Problem*, Feb. 13, 2014, TIME, http://time.com/7278/agencies-hollywood-racial-diversity/.

144. Margret Cho, *The Last Airbender is the Last Straw*, http://www.margaretcho.com/content/tag/race/,(last visited Oct. 26, 2015); *see also* Sinckler, *supra* note 10, at 863.

145. *Id.*

146. Interview with Russell K. Robinson, UCLA Law Professor (Oct. 9, 2009), available at http://www.racebending.com/v4/interviews/interview-with-professor-robinson/ (last visited Oct. 25, 2015) (stating it was the casting agencies' way of ensuring whites also tried out for these parts given the Pan-Asian influences of the cartoon. He mentions it is interesting they led with Caucasians instead of opening the casting to all ethnicities and not just Asians. "'It's a very blatant reminder, and it's hard to

being "race neutral," or saying "Asian or any other ethnicity."[147] Paramount Pictures apologized for the offensive casting call, but blamed it on a third-party casting agency.[148] It also never addressed why the Racebending.com website contained hints of discrimination by asking extras to come dressed in traditional cultural ethnic attire.[149]

In the end, Paramount did not employ yellowface in *Avatar*, but did dress the White leads in Asian attire to make them appear more "Asian." In response to the uproar from the APA community, Paramount replaced one of the lead characters with Indian actor, Dev Patel, but left the White leads as the heroes and minorities as the evil fire nation.[150]

A similar example is Warner Bros' live action adaption of the Japanese anime and manga, *Akira* (2011).[151] There was an Asian storyline, but the movie cast White actors in the lead roles[152] and simply assigned stereotypical Asian names, such as Ky Reed, Lady Miyako, and Kaneda.[153] Other examples include *Aloha* (2015)[154] where the leads were cast White despite the movie being set in Hawaii where the majority of the population is Asian.[155] Television shows like *Friends*, *Seinfield*, *Charmed*, and *Full House* are from regions with a large minority population, such as New York City and California, but the majority of the cast and lead roles were White.[156] *Once Upon a Time, Twilight,* and *Alice in Wonderland* are fictional stories where a person's race does not influence the fairy tale storyline, but were also cast mostly White.

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see—in any other context in this day in age—[a job listing] saying 'whites preferred. I think most of us believe that we are beyond that. It is striking to see it on the page. They softened it by saying 'and others,' but by leading with Caucasian they are indicating a preference. We prefer whites but we'll take others as well, we're [specifically] mentioning whites, only").

147. Jordan Hoffman, *Interview with the Racebender*, UGO, http://www.racebending.com/v4/in-the-news/ugo-com-interviews-racebending-com-april-1st-2010/ (last visited Oct. 25, 2015).

148. *Id.*

149. Lorraine Sammy, *Caucasian or Any Other Ethnicity,* Racebending, http://www.racebending.com/v4/campaigns/airbender/caucasian-or-any-other-ethnicity/ (last visited Oct. 25, 2015) (claiming that Gail Levin was originally Paramount's casting chief, which conflicts with Frank Marshall's declaration that the breakdown was not affiliated with Paramount Pictures; when a black woman asked if she was at a disadvantage because she was not wearing traditional attire the casting director replied, "It doesn't mean you're at a disadvantage if you didn't come in a big African thing. But guys, even if you came with a scarf today, put it over your head so you'll look like a Ukrainian villager or whatever").

150. Casey Tran, *Is "The Last Airbender" Just Another Racebender?*, Hardboiled http://hardboiled.berkeley.edu/wordpress/wp-content/uploads/2010/03/13.3.pdf (last visited Oct. 25, 2015).

151. Akira, IMDb, http://www.imdb.com/title/tt1134795/ (last visited Oct. 25, 2015).

152. Mike Bracken, *Fans Already Protesting the White-washing of 'Akira' Cast*, http://blog.moviefone.com/2011/03/23/akira-movie-protests/ (last visited Oct. 25, 2015); *see also* Justin Kroll, *Jaume Collet-Serra Returns to Direct 'Akira' (Exclusive)*, Variety, http://variety.com/2013/film/news/akira-jaume-collet-serra-1200571854/ (last visited Oct. 25, 2015).

153. Marissa Lee, *"Akira" Adaptation Courts White Actors*, Racebending, http://www.racebending.com/v4/featured/akira-adaptation-courts-white-actors/ (last visited Oct. 25, 2015).

154. Aloha, IMDb, http://www.imdb.com/title/tt1243974/ (last visited Oct. 24, 2015).

155. http://quickfacts.census.gov/qfd/states/15000.html (last visited Oct. 24, 2015).

156. Baynes, *supra* note 12, at 312.

The Last Samurai (2003)[157] features Tom Cruise as the protagonist, but is set in Japan.[158] *Godzilla (2014)*[159] and *47 Ronin*[160] are similar examples of movies in Japan that cast White leads and place Asians in minor roles. Keanu Reeves from *47 Ronin* is White and Asian, which appears better because he partially represents a minority group, but at first glance, Reeve's physical appearance looks more White than Asian. In both *The Last Samurai* and *Godzilla*, Ken Watanabe,[161] a famous Japanese actor, was cast in a supporting role, but was strangely not selected to play the lead character despite his talent and the movie taking place in Japan. In *The Forbidden Kingdom* (2008),[162] the protagonist was a White teenager thrown into China and was surrounded by Asians in supporting roles. Jet Li and Jackie Chan are renowned in Asia, but were still cast to support to the White American hero.

The selection of Whites casts, even when race is irrelevant or accuracy requires a minority cast, suggests that racial bias still heavily plagues Hollywood's casting process. In the examples above, the movies and television shows had a supporting cast of Asian descent, but no Asian leads. It is difficult to believe that from the supporting cast, not even one Asian was "bankable" enough to obtain the lead role.[163] The truth is Hollywood is not ready for an APA superstar and will continue to limit APA casting opportunities until they can overcome their explicit preference for Whites.

B. Implicit Bias Makes It Difficult for APAs to Overcome Discrimination Because Most People Are Unaware It Exists

If an APA actor, actress, director, casting director, or screenwriter overcomes explicit bias and obtains a job interview, then they must battle the implicit bias of society and leaders in film. This section discusses how society's implicit bias impacts the treatment of minorities on a daily basis and creates an insular hiring culture among Whites in Hollywood.

Society's Implicit Bias Negatively Affects the Treatment of APAs in America

Our society is not colorblind because implicit bias is present in everyone.[164] Implicit bias refers to "relatively unconscious and . . . automatic features of prejudiced judgment and social behavior."[165] Psychologists describe two types of cog-

157. The Last Samurai, IMDb, http://www.imdb.com/title/tt0325710/ (last visited Oct. 24, 2015).

158. Sam Kyung-Gun Lim, *Themes of Western Superiority in The Last Samurai,* https://twp.duke.edu/uploads/assets/7Last%20Samurai.pdf (last visited Oct. 24, 2015).

159. Godzilla, IMDb, http://www.imdb.com/title/tt0831387/ (last visited Oct. 24, 2015).

160. 47 Ronin, IMDb, http://www.imdb.com/title/tt1335975/ (last visited Oct. 24, 2015).

161. Ken Watanabe, IMDb, http://www.imdb.com/name/nm0913822/ (last visited, Jan. 30, 2016).

162. The Forbidden Kingdom, IMDb, http://www.imdb.com/title/tt0865556/ (last visited Oct. 24, 2015).

163. *Controversy Still Surrounds DVD Release of Movie 21,* MANAA, http://manaa.org/?p=157 (last visited Oct. 21, 2015).

164. *Understanding Implicit Bias,* Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited Mar. 9, 2016).

165. Michael Brownstein, *Implicit Bias,* Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/implicit-bias/ (last visited on Oct. 27, 2015).

nitive bias. First is implicit attitude, which is a positive or negative association between a given object and a given evaluation category.[166] For example, "I hate Asians for taking our jobs" or "Society likes White actors more than Asian actors." Second is implicit stereotyping, which is associating a specific attribute to a group, but without a positive or negative evaluation.[167] For example, "Asians use chopsticks" or "Asians know kung fu." Both cognitive biases are simply a way people perceive, process, and retain information about others that unconsciously influences their behavior.[168]

Implicit bias is difficult to identify and battle because it is often concealed and can conflict with a person's conscious attitudes and intentional behavior without the person's awareness.[169] Most individuals conceal their biases with politically correct answers, which skews self-reported data on discrimination.[170] Recent Implicit Association Tests (IAT) removed impression management to measure cognition[171] by having participants rapidly classify individual stimuli into categories.[172]

In 2007, an IAT conducted by Harvard Medical School found that White doctors with high levels of implicit bias against Black were less likely to treat Blacks.[173] In 1990, a social survey from the University of Chicago reported 52.8% of the respondents considered violence a trait of African Americans, 42.8% of Latinos, 21.3% of Asians, and 18.8% of Whites.[174] IAT reports also revealed that people think minorities prefer welfare over working;[175] associate guns with African Americans rather than Whites;[176] and that society finds it easier to categorize White faces with American than Asian or Native American faces.[177] One IAT required participants to categorize faces of White and Asian people with either good or bad.[178] A person with a negative implicit attitude toward Asians will select Asian and bad

166. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 469 (2010).

167. *Id.*

168. Teshima, *supra* note 7, at 131.

169. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action*, 94 Cal. L. Rev. 1063, 1064 (2006).

170. Kang & Lane, *supra* note 167, at 470.

171. *Id.* at 472.

172. *Id.*

173. Nick Kim Sexton, *Study Reveals Americans' Subconscious Racial Biases*, NBC News (Aug. 21, 2015), http://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferences-americans-n413371.

174. Baynes, *supra* note 12, at 303 (participants were asked to determine whether "welfare over working" was a characteristic associated with specific social groups. 57.1% reported yes for Blacks, 45.6% for Latinos, 19.1% for Asians Americans, and only 4.6% for Whites).

175. *Id.*

176. *Id.* (participants were shown subliminal images of an African American man for two-hundred milliseconds and asked to identify a gun or handtool. Subjects primed with the face of an African American man identified the gun more quickly or were more likely to mistaken the handtool for a gun).

177. Kang & Lane, *supra* note 167, at 477; *see also* Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005).

178. Kang & Lane, *supra* note 167, at 472.

faster than someone with less bias. [179] This test revealed that more people demonstrate negative implicit attitudes towards minority groups, such as White over Black, light skinned over dark skinned, other peoples over Arab-Muslim, abled over disabled, and straight over gay.[180]

All racial attitude IATs indicate society implicitly associates more negative concepts with minorities than Whites.[181] Whites belong to social groups deemed good and tend to favor their own group.[182] In fact, even minorities, who are the outgroup and deemed bad, show a preference to favor the White in-group or showed no strong preference to either group. [183] Currently, Whites dominate society and the entertainment industry. The IAT results suggest that if two equally qualified actors or actresses audition with one being White and the other a minority, it is more likely the White actor or actress will be selected due to the strong implicit preference for Whites. This in-group preference creates an uphill battle for APAs to achieve equal opportunity in all industries.

Implicit Bias Created a Connection-Based Culture in Entertainment that APAs Struggle to Enter

America's in-group favoritism suggests major players base hiring and character decisions on the preference for Whites. For example, a White director's decision to only create White characters might be motivated by implicit bias that favors individuals similar to the director.[184] In Hollywood, actors and actresses are hired through informal referrals from the existing circles of the "wealth[y] White elite." [185] Most films are cast without an audition or announcement of the position to the public.[186] If a casting call is distributed, a White actor or actresses is usually specified without any concrete data to confirm Whites are favored by society and are a higher box-office draw than minorities.[187] As a result, many talented minorities are never considered.[188]

179. *Id.*

180. *Id.* at 474.

181. *Id.* at 476.

182. *Id.*

183. *Id.*

184. Megan Basham, *Unmasking Tonto: Can Title VII "Make It" in Hollywood?*, 37 Am. Indian L. Rev. 549, 573 (2013).

185. *Impact of the Rooney Rule*, Fritz Pollard Alliance Foundation, http://fritzpollard.org/?page_id=167 (last visited Oct. 25, 2015) (stating that before the 2003 implementation of the Rooney Rule, the NFL hired only two minority managers out of thirty-two teams); *see also* Aaron T. Walker, Comment*, Title VII & MLB Minority Hiring: Alternatives to Litigation*, 10 U. Pa. J. Bus. & Emp. L. 245, 255 (2007) (comparing similarly low percentages of minority managers in baseball where there were fewer than ten minority team managers and general managers in over fifty years).

186. *Id.*

187. Basham, *supra* note 185, at 573; *see also* Alexis Fitts, Interview: Chris Eyre, Native American Director, and Ric Burns, Documentary Filmmaker, Mother Jones, http:// www.motherjones.com/media/2009/05/interview-chris-eyre-native-american-director-and-ric-burns-documentary-filmmaker (last visited Oct. 22, 2015) (Native American filmmaker Chris Eyre's acknowledgement that Depp was chosen for The Lone Ranger because of his "super star" quality).

188. Basham, *supra* note 185, at 573.

The insular network phenomenon in Hollywood must be broken, but implicit bias is difficult to eliminate because it is a product of cumulative experiences over a lifetime. It is also difficult to prove discriminatory hiring practices in film exist because they are concealed; rejected actors and actresses are rarely told why they were not selected for the role. However, in other American industries, such as education, scholars proved there is a correlation between social connections and success. The U.S. Department of Education reported legacy policies at graduate schools disproportionately helped White applicants because 96% of all Ivy League alumni are White[189] and the children of the alumni are admitted even though their SAT scores were 35 points below the average of all admitted students.[190] The connections between privileged people creates more opportunity for privileged people and leaves the rest of society with few opportunities if they cannot gain favor among the privileged.[191]

Hollywood is an "old boy network," which means it is dominated by White males.[192] Minorities, especially APAs, have a limited entertainment legacy in America, which makes getting access to White entertainment connections difficult. As a result, many APAs are excluded from candidacy in most films.[193] If APAs continue to have minimal influence behind the camera, then there is less opportunity to create non-stereotypical APA characters and employ APA actors and actresses. If in-group favoritism continues, Whites in society will continue to hire Whites and portray APAs in a stereotypical light. As a result, society will receive biased information that teaches future leaders, including lawmakers and entertainment leaders, to believe White is good and colored is bad and the cycle of in-group favoritism continues.

C. The Misrepresentation and Underrepresentation in the Media Creates a Cycle of Explicit and Implict Bias in Society

The media is an influential socializing factor in American society[194] because 98% of U.S. homes have a television set, 49% have multiple sets, and the average family watches over seven hours of television a day.[195] Rich Morin, the senior editor at Pew Research Center, believes most "implicit racial biases are [a] conse-

189. Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 Asian Am. L.J. 57, 63 (2007).

190. Charles R. Lawrence III & Mari J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action 96 (1997).

191. Allred, *supra* note 190, at 64.

192. *Impact of the Rooney Rule, supra* note 186; *see also* Aaron T. Walker, *Comment, Title VII & MLB Minority Hiring: Alternatives to Litigation*, 10 U. Pa. J. Bus. & Emp. L. 245, 255 (2007).

193. Li, *supra* note 137, at 146.

194. Patricia M. Worthy, Comment*, Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue*, 18 Hastings Comm. & Ent. L.J. 509, 535 (1996); *see also* Sarah Honeycutt, *The Unbearable Whiteness of ABC: The First Amendment, Diversity, and Reality Television in the Wake of Claybrooks v. ABC*, 66 SMU L. Rev. 431, 453 (2013).

195. Baynes, *supra* note 12, at 298; *see also* Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 Yale J. on Reg. 159, 162 (1984).

quence of subtle messages seen in the media . . . that suggest one group is good, and another group is bad."[196]

Dr. Bradley Greenberg's study shows that White children are more likely to learn about other races through electronic media rather than personal interactions.[197] Films often depict minorities in low-status jobs or engaging in criminal activity, which sets inaccurate expectations of reality.[198] For example, 71% of children picture Whites in the role of a boss and 59% said Blacks play the role of criminals.[199] APAs are similarly situated to Blacks because Whites have limited interaction with APA culture. Racial generalization based on television characters explains why White adults with minimal exposure to APAs hold prejudices and stereotypical opinions of how APAs behave, look, and speak.[200]

The lack of representation on television also impacts minority children. Social scientists Paul Pointdexter and Carolyn Stroman concluded that the lack of Blacks on screen generates insecurities among Black children who see negative interpretations of their culture.[201] APA children face identical challenges because APAs are rarely on screen.

If movies and television do not include real-world portrayals of positive role models from every racial group, then the cycle of discrimination cannot be broken. One-dimensional films of White as good and people of color as bad will spark biases in White children that become engrained ideas in their adult minds'. If White children become leaders in society with in-group favoritism, then they are more likely to make decisions based on preferences for Whites. Due to the dominance of Whites in film, it is more likely that a White child who become a leader in entertainment will perpetuate the same discriminatory images he or she learned from the media. As a result, the cycle will restart and the new generation of future entertainment leaders will continue the same prejudices. Films are society's most influential teachers and should be used to promote diversity rather than "foment unrest and contribute to racial polarization"[202] with biased portrayals of minorities.

III. Solutions

Scholars advocate an array of solutions, such as more lawsuits, funding of minority films, diversity programs, self-regulation, and colorblind casting. However, change is still slow. In the past five years (2010 to 2014), despite diversity being a popular initiative, the number of minorities in leading roles decreased by 0.5% (18.5% minority in 2010 and 18% minority in 2014).[203] For supporting roles,

196. Sexton, *supra* note 174.

197. Baynes, *supra* note 12, at 326-27.

198. *Id.*

199. *Id.*

200. *Id.*

201. Paula M. Poindexter & Carolyn A. Stroman, *Blacks and Television: A Review of the Research Literature*, 25 J. of Broad. 103-22 (1981); *see also* Baynes, *supra* note 12, at 326.

202. Worthy, *supra* note 195, at 533.

203. *See* Part 1A for details on how the data was collected for this research study.

there is more success with an increase of 8% (15.5% minority in 2010 and 23.5% minority in 2014).[204] The number of Asians in supporting roles in 2010 compared to 2014 decreased by 2% in television and remained the same in movies. For lead roles, Asian representation increased by 5% in television shows, but decreased by 3% in movies.[205] The progress is moving backwards for APAs and requires intervention. This section discusses the possible legal and industry solutions APAs can use to reduce discrimination and create more employment opportunities in the film industry.

A. Legal Solutions

Civil Rights Act of 1866, 42 U.S.C. § 1981

Even though television has existed for over 100 years,[206] no casting discrimination lawsuit was ever brought until three years ago. In 2012, *Claybrooks v. ABC,*[207] became the first lawsuit against a major Hollywood network. The plaintiff sued under 42 U.S.C. §1981, which prohibits intentional race discrimination in making and enforcing contracts involving both private and public actors.[208] The plaintiffs sued under §1981 instead of Title VII because it is unsettled whether reality television show contestants are considered employees.[209]

In *Claybrooks,* two African American males, who were rejected from *The Bachelor*, brought the claim.[210] The plaintiffs requested two forms of injunctive relief: (1) prohibit the defendants from engaging in discriminatory practices and (2) require defendants to consider non-whites as finalists for lead roles. The court supported interracial relationships and eradicating outdated racial stereotypes,[211] but surprisingly created a complete defense to racial discrimination in film.[212] The court held that casting decisions are a protected expression under the First Amendment

204. *Id.*

205. *Id.* (In the movie category, Asians in lead roles went from 2% in 2010 to 7% in 2014 and supporting roles went from 15% in 2010 to 13% in 2014. In television, Asians in lead roles went from 1% in 2010 to 1% in 2014 and for supporting roles went from 4% in 2010 to 2% in 2014).

206. Mitchell Stephens, *History of Television*, Grolier Encyclopedia, NYU, https://www.nyu.edu/classes/stephens/History%20of%20Television%20page.htm (last visited Oct. 19, 2015).

207. *Claybrooks v. Am. Broad. Co., Inc.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012); *see* Introduction for details on *Claybrooks v. ABC.*

208. *Claybrooks*, 898 F. Supp. 2d at 1000; *see* Introduction for details on *Claybrooks v. ABC; see also* Henna Choi, *White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation*, 37 Hastings Comm. & Ent L.J. 163, 180 (2015).

209. *Id.*

210. *The Bachelor: About the Show*, http://beta.abc.go.com/shows/the-bachelor/about-the-show (last visited Oct. 20, 2015) (*The Bachelor* features dates between a bachelor and a group of bachelorettes, or between many bachelors and one bachelorette. Each episode has an elimination ceremony where a limited number of bachelorettes are provided a rose by the bachelor. Those who do not receive a rose must leave the mansion and lose a chance at love. At the end of the season, the bachelor may propose marriage to the last remaining bachelorette).

211. *Claybrooks*, 898 F. Supp. 2d at 1000.

212. *Id*.

because they impact the show's message and producers can control what and how messages are conveyed.[213]

On appeal, the plaintiffs lost because their request for injunctive relief was "unprecedented," which made the court wary of finding that 42 U.S.C.A §1981 permitted regulation of the casting process.[214] Both courts appeared to agree the plaintiffs were morally correct, but refused to hold preventing racial discrimination was equally important to the freedom of expression. Instead, both courts legitimatized ABC's decision to create 24 seasons over the span of ten years without a single minority lead and with only a few minority contestants.[215]

After the lawsuit, *The Bachelor*'s 2013 season featured more minority contestants than ever before.[216] The lead was still blonde-haired and blue-eyed, but there were four African-American bachelorettes, one Persian, and a half-Filipino.[217] In addition, the show directly asked the bachelor, Sean Lowe, how he felt about dating diverse women.[218] Sean responded that he was looking for a "sweet, intelligent, and funny woman" and that race did not matter.[219] Although the plaintiffs lost in court, their lawsuit stimulated some change and lead to ABC explicitly discussing interracial relationships on the show.[220]

Another reality television example is *American Idol*. In July 2013, ten former contestants on *American Idol* brought a discrimination lawsuit against the production company, Fox.[221] The plaintiffs alleged they were disqualified based on previous arrests and charges that were unrelated to their performance in the competition.[222] The plaintiffs requested the adoption of antiracism regulations,[223] but their case was dismissed.[224]

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213. *Id*. (analogizing requiring the consideration of minorities to requiring a newspaper to hire a specific editor).

214. Memorandum at 9; *Claybrooks*, 898 F. Supp. 2d at 986.

215. *Claybrooks*, 898 F. Supp. 2d at 989.

216. Honeycutt, *supra* note 195, at 449.

217. Ericka Souter, *'Bachelor' Sean Lowe Loves Black Women & Sistas Might Finally Have a Chance*, The Stir, Jan. 15, 2013, http:// thestir.cafemom.com/entertainment/149607/bachelor_sean_lowe_loves_black; *see also* Honeycutt, *supra* note 195, at 449.

218. Honeycutt, *supra* note 195, at 449.

219. *Id.*

220. *See, e.g.*, Kristen Baldwin, The Bachelor preview: Sean tells Robyn "My last girlfriend [was] black", Ent. Wkly, Jan. 9, 2013, http://insidetv.ew.com/2013/01/09/the-bachelor-preview-sean-robyn-black-girlfriend/.

221. Stephen D. Hans, *Are Contestants of Reality Shows, Employees?*, NYC Employment Law Blog (Oct. 23, 2013), http://nycemploymentlawblog.wordpress.com/2013/10/23/are-contestants-of-reality-shows-employees/.

222. Hollie McKay, *Lawyer: Proposed "American Idol" Lawsuit Alleging Workplace Racism Doesn't Stand a Chance*, Fox 411 (Jan. 28, 2013), http://www.foxnews.com/entertainment/2013/01/28/lawyer-american-idol-lawsuit-alleging-workplace-racism-doesnt-stand-chance/.

223. *Id.*

224. Dominic Patten, *American Idol' $250M Racial Discrimination Lawsuit Dismissed, Win for Fox*, Nov. 20, 2015, Deadline, http://deadline.com/2014/11/american-idol-lawsuit-dismissed-racism-discrimination-fox-1201290729/.

The *American Idol* and *The Bachelor* lawsuits demonstrate that minorities are starting to object to Hollywood's discriminatory culture. However, litigation in the scripted television arena is still non-existent because minorities pursuing a career in entertainment are reluctant to seek legal action[225] and a successful film career requires connections.[226] A struggling writer, actor, or director is highly unlikely to sue the power players responsible for hiring.[227] An actor who gets a reputation for being difficult may never work in the industry again.[228] However, most reality shows are a one-time experience and not a career-building opportunity. Participants who are not selected for the reality television show are usually ordinary individuals with alternative careers who can speak out without jeopardizing their livelihoods,[229] which means they are more likely sue. Reality television examples include participants searching for love on *The Bachelor,*[230] braving the wilderness on *Survivor,*[231] and traveling the world on *Amazing Race*.[232] Reality television has created an opportunity to raise more awareness of discrimination, but the scripted movie and television show arena still remains unchallenged under §1981 and Title VII.

Civil Rights Act of 1964, Title VII

Plaintiffs who fight racial discrimination under Title VII are not guaranteed to win because the legal elements are difficult to prove and there are several important exceptions. This section reviews the history of Title VII, its exceptions, and how the judiciary's interpretations of these laws make it difficult to win a discrimination lawsuit in the film industry.

1. *Title VII Promotes Equal Employment Opportunities*

Title VII prohibits employers from engaging in racially discriminatory hiring practices.[233] Title VII's goal is to remove "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of rac[e]," but it does not guarantee employment for minorities.[234] Title VII established two pathways to relief: (1) the disparate treatment theory, where the plaintiff alleges the employer committed a discriminatory act against the plaintiff, and (2)

225. Henna Choi, *White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation*, 37 Hastings Comm. & Ent L.J. 163, 170 (2015).

226. *Id.*

227. *Id.*

228. Krieger, *supra* note 25, at 862.

229. Choi, *supra* note 226, at 165.

230. *See The Bachelor: About the Show*, http://beta.abc.go.com/shows/the-bachelor/about-the-show (last visited Oct. 20, 2015).

231. *See Survivor: About*, CBS, http://www.cbs.com/shows/survivor/about/ (last visited Oct. 20, 2015).

232. See Amazing Race: About, CBS, http://www.cbs.com/shows/amazing_race/about/ (last visited Oct. 20, 2015).

233. 42 U.S.C. § 2000e-2(a) (2006).

234. *Griggs v. Duke Power Co.,* 401 U.S. 424, 430-431 (1971).

the adverse impact theory, where the plaintiff alleges an employer's practice or policy results in systematic discrimination against a class of persons.[235]

Under the disparate treatment theory, the plaintiff must establish that (i) plaintiff was a member of the protected class, (ii) plaintiff was qualified for the job sought and the employer was actually hiring, (iii) plaintiff was rejected despite being qualified for the job, and (iv) after rejection, the employer continued to seek applicants with similar qualifications.[236] If the plaintiff establishes the prima facie case, then the defendant must provide a "legitimate, non-discriminatory reason" for refusing to hire a qualified racial minority.[237] The trier of fact then decides whether the employer's motivation was based on racial discrimination.[238]

Under the adverse impact theory, employer liability does not depend on intent, but looks at whether the company's policy adversely or disproportionately affects minorities.[239] Under both theories, even if the court finds the motivation or effect were discriminatory, the defendant can rely on several exceptions and loopholes in the law, which are discussed below.

2. *The Decision-Making Process in Entertainment Makes it Difficult to Win a Discrimination Lawsuit*

Title VII perpetrators in film are difficult to identify because many individuals are involved in the casting process. In scripted television, the casting breakdowns (character descriptions) are usually created by the producer, checked by the production company, provided to the casting directors, and then sent to talent agencies or posted on the internet.[240] The producers create breakdowns based on the director's vision and the script created by a screenwriter.[241] In all casting situations, these main players are potential defendants because they can deny applicants based on race or sex.[242]

Casting directors are blamed for discriminatory hiring because they hold the auditions, but sometimes casting directors play a limited role,[243] especially when the script calls for a race-specific character.[244] Casting directors assign roles based on the qualities listed in a breakdown, such as the character's name, gender, age, race, personality, and appearance.[245] If a race is specified, then casting directors must follow the subjective criteria provided by the director or writer and consider race before acting ability.[246] If no race is specified, then casting directors have

235. Kim, *supra* note 53, at 402.
236. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
237. *Id.* at 802-803.
238. *Id.* at 807.
239. Kim, *supra* note 53, at 406.
240. Sinckler, *supra* note 10, at 858.
241. *Id.*
242. Robinson, *supra* note 122, at 6-7.
243. Choi, *supra* note 226, at 167; *see also* Sinckler, *supra* note 10, at 881.
244. Kim, *supra* note 53, at 402.
245. Sinckler, *supra* note 10, at 858.
246. Kim, *supra* note 53, at 402.

more discretion and usually default to White unless an exceptional situation calls for a non-White actor.[247] The structure of hiring in Hollywood makes it difficult for APAs to prove intentional discrimination under Title VII because Hollywood's hiring process is concealed and involves many individuals.[248]

3. *Courts Appear to Prioritize the Freedom of Expression Over Preventing Discrimination*

The First Amendment's core value is ensuring individuals can express their views in a free society without unreasonable government interference.[249] The First Amendment protects artistic expression in "entertainment, television programs, and dramatic works," which includes casting, writing, directing, and producing.[250]

The mission behind the First Amendment is courageous, but the freedom of expression is used as a shield from wrongful acts in entertainment employment. Defendants claim requiring race-neutral casting is a substantial burden[251] because a character's race is significant to the narrative.[252] Race might be important for historical or regional accuracy, but in most cases, the color of a person's skin is insignificant to illustrate a story about romance, action, horror, drama, or comedy, etc. However, our nation's leaders seem reluctant to hold that equal employment opportunity and diversity are more compelling than First Amendment rights.[253] Recent cases show a trend that some judges prefer the freedom of expression over equal protection.

The defendants in *Claybrooks* exploited "identity-themed programming" to convince the judge that colorblind casting threatens both White television and television programs targeting particular demographic groups, such as Lifetime, Black Entertainment Television, Telemundo, or the Jewish Channel.[254] The court agreed casting was not "content-neutral"[255] and created an exception for casting discrimination under the First Amendment.[256] The court failed to realize *The Bachelor* was not an identity-theme program and applied to all viewers because everyone can identify with romance. The court should have ruled that casting discrimination was unconstitutional and developed a narrow exception that allowed identity-theme programs to consider race when casting. This alternative ruling permits the freedom of expression and prevention of racial discrimination to co-exist.

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247. *Cf.* Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 969-72 (1993).

248. Robinson, *supra* note 122, 6-7.

249. Cohen v. California, 403 U.S. 15, 24 (1971); *see also Roth v. United States*, 354 U.S. 476, 488 (1957).

250. *Claybrooks*, 898 F. Supp. 2d at 992-993.

251. Robinson, *supra* note 122, at 6.

252. *Id.*

253. *Claybrooks*, 898 F. Supp. 2d at 992-993.

254. *Id*. at 998.

255. *Id*. at 997-998.

256. *Id*. at 996.

In *Ingels v. Westwood,* a singles-oriented radio talk show station discriminated against a 65-year old man because he was not young.[257] The court held the First Amendment allows radio stations to exclude certain people from participation.[258] In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, an LGBT group was denied the right to walk in the St. Patrick's Day parade. The court held an organizer of the parade could discriminate under the First Amendment because a parade organizer was the same as a composer of music.[259] Both cases are examples of the judiciary possibly possessing implicit bias that equal protection is less important than First Amendment rights.

Redgrave v. Boston Symphony[260] is another example of the court's implicit bias influencing its final decision. In *Redgrave*, the court allowed the defendant to cancel the plaintiff's employment contract based on disapproval of their political views.[261] The court stated:

> "The first amendment, and not the equal protection clause, is the longstanding tradition. The passage of the equal protection clause, and its concomitant application to Blacks came over one hundred years after the passage of the Bill of Rights. And the application of the equal protection clause to women is too recent to characterize as anything short of an innovation."[262]

The court showed bias by using the timing of passage to justify discrimination. The court ignored that the Equal Protection Clause came after the First Amendment because White males created the Bill of Rights when minorities and women were subjugated. It took over a hundred years for racial and gender minority groups to convince the largely White male majority that equal treatment was important. The First Amendment is older than Equal Protection, but freedom of expression is not more significant than preventing discrimination.

Although the decisions in *Claybrooks, Ingels, Hurley,* and *Redgrave* were questionable, other courts show a glimmer of hope. In *Adarand Constructors Inc. v Pena,* the court held a program that uses race as a foundation must be narrowly tailored to meet a compelling government interest.[263] In *EEOC v. Pacific Press Publication Association,* a church was responsible for denying a female employee monetary allowances paid to similarly situated male employees.[264] The court recognized that Title VII liability did not infringe on the church's free exercise rights because the church advocated non-discrimination against women and minority groups.[265]

257. *Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1074 (2005).
258. *Id.*
259. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).
260. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 925 (1st Cir. 1988).
261. *Id.*
262. *Id.*
263. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).
264. *Equal Emp. Opportunity Comm'n v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982).
265. *Id.*

Progress is slow, but *Pena* and *Pacific Press* created a small opening for future success under Title VII for APAs fighting employment discrimination.[266]One court recognized that "[u]nwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination,"[267] and "acts of bias and discrimination . . . against women and minorities on our nation's faculties is far from ended."[268] This shows that some judges understand that implicit bias is sometimes invisible, but it does not change the fact that prejudice exists.[269] However, several judges and legislatures are still unaware that years of biased learnings from the media impacts their interpretation of various legal situations. An example of implicit bias in action is the business necessity and bona fide occupational qualification ("BFOQ") defenses.

4. *The Business Necessity and Bona Fide Occupational Qualification Defenses are Additional Hurdles to Relief Under Title VII*

The business necessity defense allows employment discrimination when a certain quality is significantly related to successful performance of the position.[270] The business necessity defense only applies to adverse impact cases. In *Miller v. Texas State Bd. Of Barber Examiners,* the court determined in dicta that a business necessity exception may be appropriate when casting actors to play certain roles, such as a Black actor for the role of Martin Luther King, Jr.[271] Although the court declined to officially expand the business necessity doctrine to entertainment situations,[272] *Miller* shows courts are leaning towards protecting the bottom lines of companies over the equal opportunity rights of individuals.

The BFOQ is similar to the defense of business necessity because it allows discrimination based on "religion, sex, or national origin" in disparate treatment claims if the preference is a necessary qualification of the position.[273] First, defendants must prove the preferred characteristic is so essential to job performance that a member of a different group could not do the same job.[274] Second, defendants must show the preference is so important that the operation of the business would be undermined if employees were from the wrong group.[275] The two-part test re-

266. Chin, *supra* note 92, at 134.

267. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987); *see also* Kang & Lane, *supra* note 167, at 494.

268. *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1563 (9th Cir. 1994).

269. *Hopkins*, 825 F.2d at 469; *see also* Kang & Lane, *supra* note 167, at 494.

270. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); *Griggs*, 401 U.S. at 426 (holding that the employer's hiring practice of requiring intelligence tests did not relate to job performance); *see also* 42 U.S.C. 2000e-2(k)(1)(A)(i); *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1460-61 (11th Cir. 1990).

271. Kim, *supra* note 53, at 412.

272. *Id.*

273. 42 U.S.C. § 2000e-2(e) (2014); *see Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 (11th Cir. 1999).

274. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 299 (N.D. Tex. 1981); *see also Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

275. *Wilson*, 517 F. Supp. at 299.

quires courts to determine the "essence of the business" and whether the "essence" makes it necessary for the employer to discriminate.[276]

Similar to the First Amendment, courts likely possess implicit biases when analyzing "essence" and necessity. In *Dothard v. Rawlison*, the Court determined that being a male was a necessary characteristic for a prison guard to preserve the safety of inmates and others in the community.[277] The court stated:

> "The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood [because] . . . [t]here [is] a real risk that other inmates . . . would assault women guards because they were women. In a prison system . . . every institution is understaffed, and . . . [t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel."[278]

First, *Dothard* supports the false stereotype and overgeneralization that all women are weaker than men. Second, *Dothard* fails to realize the problem might be an understaffed facility rather than an employee's womanhood. Courts state Title VII exceptions are constitutional when its application is "morally acceptable [and] makes economic sense" to preserve the authenticity of the position,[279] but reasonable minds differ on what is morally acceptable or economically sensible.

Dothard is not about race or the entertainment industry, but the case confirms that APAs will likely need to overcome implicit biases to convince the bench that the BFOQ and business necessity defenses do not excuse discrimination in films. Another example of implicit bias is the legislation's interpretation of the BFOQ statute omitting "race".

5. *Race is Not a BFOQ, but the Appearance Exception Creates a Loophole that Allows Discrimination*

The BFOQ defense intentionally omits race in the statute to narrow the Title VII exceptions.[280] Subsequent administrative guidelines and case law confirm race is never a permissible BFOQ.[281] However, legislators claim the omission of race in

276. Karen Zakrzewski, Comment*, The Prevalence of "Look" ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. Pa. J. Lab. & Emp. L. 431, 432 (2005).

277. *Dothard v. Rawlinson*, 433 U.S. 321, 346-47 (1977).

278. *Id.* at 336.

279. 29 C.F.R. § 1604.2(a)(2) (2014).

280. *See* William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 Duke J. Gender L. & Pol'y 153, 166 (Jan. 2007); *see also* Basham, *supra* note 185, at 568 (The language of the statute states: "[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

281. *See*, *e.g.*, *King v. Bd. of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir.

the statute does not preclude employers from considering appearance for authenticity,[282] such as the sex[283] or the physical characteristics of an actor or actress.[284] This logic is flawed because appearance and race are intertwined. Dr. Jamie R. Riley states "race relates to a person's appearance" because every race has dominant physical appearances that are biologically determined through genetic traits, such as hair, eye, and skin color.[285]

Nevertheless, Senator Joseph Clark, a White male, insists race and physical appearance are different.[286] Senator Clark stated "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." When applied to APAs, Senator Clark's statement asserts "a director [] could specify that he wished to hire someone with the physical appearance of a [White person] – but such a person might actually be [Asian]."

The problematic rationality of the above assertion becomes apparent when the statement is modified to reflect the relationship between APAs and White appearances. It is rare to find an APA with blonde hair and blue eyes. The physical appearances of APAs are easily identifiable, even in children from a mixed race background. A Google image search on "Asians" and then "Whites" confirms the extremely low chance an APA would be cast for a role requesting a White appearance. It is impossible to separate race and appearance because visual characteristics are always associated with a particular race.[287] However, in-group favoritism prevents legislators from realizing the appearance loophole indirectly allows racial discrimination and limits the opportunities for minority employment in film.

6. *Customer Preference is Not a Defense, But Industries Continue to Use the Public's Preference as a Justification for Discrimination*

Courts rarely allow discrimination based on customer preference,[288] but the entertainment industry bases most of its hiring decisions on customer preferences. Title VII requires proof of discriminatory intent, which is difficult to prove if deci-

1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989); *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 652 (5th Cir. 1980); 29 C.F.R. § 1604.2(a)(2) (2013); 110 Cong. Rec. 2550 (1964).

282. 29 C.F.R. § 1604.2(a)(2).

283. *Id.*

284. 110 Cong. Rec. 7213, 7216 (reporting comments by Senators Joseph Clark and Clifford Case regarding the BFOQ exception).

285. Jamie R. Riley, *Race & Ethnicity: The Biological v. the Socialized*, The Office of Diversity and Inclusion at Longwood Univ., http://www.longwood.edu/assets/mcaffairs/Race_and_Ethnicity_.pdf (last visited Jan. 4, 2016); *see also Ethnicity & Race*, Diffen, http://www.diffen.com/difference/Ethnicity_vs_Race (last visisted Jan. 4, 2016).

286. Basham, *supra* note 185, at 569.

287. Kim, *supra* note 53, at 410.

288. *See Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir.1994); *see also* 29 C.F.R. § 1604.2 (a)(1)(iii) (2013); Ashley R. Brown, *Mirror, Mirror on the Wall, Who Are You to Say Who Is Fairest of Them All?*, 13 Va. Sports & Ent. L.J. 54, 62-63 (2013).

sion makers genuinely believe discriminatory casting will maximize the box office potential[289] and have no explicit negative intent to harm a certain race.[290] In some cases, Hollywood's employment decisions are a product of unconscious implicit biases related to business profits and not based on race.[291]

"Network programming decisions are based on economic considerations"[292] because production companies reasonably seek to maximize profits. A production company usually needs the movie or television show to make millions[293] to recoup its initial investment. The word minority is defined as "the smaller number," which presumes a smaller audience that contributes less to the bottom line.[294] Hollywood purposefully creates films that are relatable to the White majority by casting Whites.[295] This Hollywood practice is based on the belief that Whites only watch Whites and minorities only watch minorities. Producers believe "[t]here's not enough money in diversity to make it a priority"[296] because White actresses and actors generate positive viewer responses.[297] Without intervention, directors and producers are unlikely to invest resources on talented APA actors and actresses because they believe APAs cannot appeal to the larger White audience.[298]

The decision to target White audiences is flawed in part because minorities are twice as likely to go to the movies as Whites.[299] Although the minority population is smaller, in 2013, UCLA Newsroom reported racial diversity in casting makes a measurable difference to the bottom line because the U.S. population is becoming more diverse and people watch shows that reflect their own experiences.[300] Researchers found that for cable television shows, median household ratings were highest among programs with casts that were 31 to 40% minorities and lowest among shows with casts that were less than 10% minorities.[301] If the goal is to maximize profits, then continuing to cast an all Whites is not a good strategy

289. Basham, *supra* note 185, at 571; *see also* Robinson, *supra* note 122, at 56.

290. *Id.* at 572.

291. Michael J. Frank, *Justifiable 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); *see also* Basham, *supra* note 185, at 571.

292. Robinson, *supra* note 122, at 6.

293. Ryan Nakashima, *Hollywood and Big Budget Movies: Is the Love Affair Over?*, Huffington Post, Sept. 17, 2011, http:// www.huffingtonpost.com/2011/09/17/hollywood-big-budget-movies_n_967559.html.

294. *Minority*, Dictionary.com, http://dictionary.reference.com/browse/minority (last visited Jan 11, 2016).

295. Jesse Algeron Rhines, Black Film/White Money (1996).

296. Robinson, *supra* note 122, at 6.

297. Kim, *supra* note 53, at 410.

298. *Id.* at 399.

299. Karen Grigsby Bates, *Minorities at the Movies Fill Seats, But Not Screens*, NPR, June 24, 2011, http:// www.npr.org/2011/06/24/137374242/minorities-at-the-movies-fill-seats-but-not-screens.

300. *See* Cynthia Lee, *Study Finds TV Shows with Ethnically Diverse Casts, Writers Have Higher Ratings*, UCLA Newsroom, http://newsroom.ucla.edu/releases/study-finds-that-tv-shows-with-248757 (last visited Oct. 20, 2015).

301. *Id.*

because emerging American viewers are drawn to shows with ethnically diverse cast members and writers.[302]

Linsanity is an example of the sports industry accessing a previously untouched minority consumer market. Linsanity describes a period in National Basketball Association (NBA) history where Jeremy Lin, an APA basketball player, led a winning turnaround with the New York Knicks[303] and shattered the false stereotype that Asians cannot play basketball.[304] Yao Ming is another NBA example. The Houston Rockets recruited Ming with the international market in mind.[305] Unlike Lin, Ming was born in China and though less successful with mobilizing the domestic APA community,[306] had huge draws in the Asian market overseas.[307] ESPN reported that approximately 200 million viewers frequently watched the Rockets play[308] during a single NBA season on CCTV (China Central television). An average of only 5 million viewers in China watched an NBA playoff game,[309] which meant Yao attracted about 195 million by himself.[310] When Yao retired in 2011, a poll on Webio, the Chinese equivalent to Twitter, indicated that 57% of people would stop watching if Yao retired.[311] Although Yao was not White, he influenced countless Chinese to take an interest in basketball and helped NBA China to reach a value of $2.3 billion when it launched in 2008.[312]

Sports and film are both profit-driven and highly consumer-dependent. The film industry can purposefully target a diverse viewership to generate similar economic success instead of relying on its archaic idea that viewers prefer Whites. Hollywood might want to cast White leads to capitalize on the international market because other cultures view Americans as White,[313] but this outdated belief indirectly promotes discriminating against minorities and should not be allowed because customer preference does not justify racial discrimination.

Unfortunately, despite the proven advantages of diversity, Hollywood still maintains the belief that Whiteness sells and the courts have yet to correct Hollywood's misunderstanding. For example, in *Craft v. Metromedia*, a female co-anchor received a demotion after viewer polls reflected an "overwhelmingly negative" perception of her appearance.[314] *Craft* held hiring decisions based on the

302. *Id.*

303. Chang, *supra* note 47, at 11.

304. *Id.*

305. *Id.* at 4.

306. *Id.* at 6.

307. Gene Wang, *Yao Ming's Influence Was Far-Reaching During Distinguished NBA Career*, Wash. Post (Jul. 20, 2011), https://www.washingtonpost.com/sports/wizards/yao-mings-influence-was-far-reaching-during-distinguished-nba-career/2011/07/19/gIQAnOyfOI_story.html.

308. Michael Wilbon, *Can't Overestimate Yao Ming's Impact*, Dec. 20, 2010, ESPN, http://espn.go.com/espn/commentary/news/story?page=wilbon/101220.

309. *Id.*

310. *Id.*

311. Wang, *supra* note 308.

312. *Id.*

313. Sinckler, *supra* note 10, at 870.

314. Serafina Raskin, Note, *Sex-Based Discrimination in the American Workforce: Title VII and the*

public's desires in the entertainment field are constitutional.[315] In *Claybrooks,* the courts allowed racial discrimination after the ABC executives admitted to not casting a person of color in a pivotal role due to the potential customer controversy that might stem from an interracial romance.[316] Both cases contradict the dominant policy that customer preference is not a defense.[317]

7. *Implicit Bias Against APAs in Judicial Decisions Makes it Difficult to Win a Discrimination Lawsuit*

For APAs to succeed under Title VII, courts must understand the influence of implicit bias on the industry's deference to perceived customer preferences[318] and recognize this behavior is detrimental to diversifying the profession. However, some courts display the same implicit bias as the discriminatory defendants, which puts APA plaintiffs at a disadvantage before the lawsuit even begins. Justice Field wrote, "If [Asians] are permitted in [white schools], there will be at all times conflicts arising out of the antagonism of the races . . . I think it is for our race – the Caucasian race."[319] This disapproval of desegregation was in 1927, but it is naïve to believe America is in a period of post-racism. Anti-Asian attitudes still exists among our judiciary and will not change until our leaders understand how implicit bias impacts their decisions.

In *Chaddah v. Harris Bank Glencoe-Northbrook,* employees told an Asian plaintiff that foreigners should not work at the bank if they can't speak English.[320] The court determined the plaintiff failed to show a reasonable person under her circumstances would not resign.[321] The court explained that comments about the plaintiff's inability to pronounce customers' names would not affect a reasonable person's performance or be perceived by a reasonable person as hostile.[322] The court determined the defendants did not discriminate because the plaintiff continued to perform well at work and failed to file a formal complaint about the harassment incidents.[323]

Prohibition Against Gender Stereotyping, 17 Hastings Women's L.J. 247, 252-53 (2006).

315. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985).

316. *Claybrooks v. ABC, Inc.*, 909 F. Supp. 2d 986, 990 (M.D. Tenn. 2012); *see also* Honeycutt, *supra* note 195, at 442.

317. Brown, *supra* note 289, at 55.

318. Michael Omi, In Living Color: Race and American Cultures, in Cultural Politics in Contemporary America 111,113 (Ian Angus & Sut Jhally eds., 1989)*; see also* Basham, *supra* note 185, at 572.

319. Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. Rev. 771, 791 (1996).

320. *Chaddah v. Harris Bank Glencoe-Northbrook, N. Am.*, No. 93 C 0397, 1994 WL 75515, at *1 (N.D. Ill. Mar. 8, 1994).

321. *Id.*

322. *Id.* at *4-5, *aff'd sub nom Chaddah v. Harris Bank Glencoe-Northbrook, N.Am.*, No. 94-1715, 42 F.3d 1391 (7th Cir. 1994).

323. *Chaddah*, No. 93 C 0397, 1994 WL 75515, at *4-5 *aff'd sub nom Chaddah*, No. 94-1715, 42 F.3d 1391.

Chaddah is an example of implicit bias in the courtroom. First, the court bases its evaluation on how a reasonable White person would behave when their English is attacked. The court failed to realize reasonable Asians might possess different insecurities because there is a long history of discriminatory portrayals of Asians as foreigners who can never assimilate into America due to the language barrier. Second, the court assumed a plaintiff experiencing racial harassment would file a complaint. The court did not understand the racial dynamics between White bosses and minority workers. Finally, the court determined the work product of a person experiencing harassment would automatically deteriorate without considering whether the plaintiff might be reliable and hardworking. *Chaddah* shows how the majority is willing to endorse the model minority stereotype when it is advantageous to them, but completely dismisses the same stereotype when these stereotypical traits would result in a favorable ruling for the plaintiff.

Lam v. University of Hawaii is another example of the court failing to understand the implicit bias of the White majority. In *Lam,* the court held the university conducted a fair search for the Director of the Pacific Asian Legal Studies Program (PALS) even though the committee selected a White male candidate during the first search and a White female Harvard Law graduate with a Ph.D in Chinese History during its second search.[324]

The court held that the university's failure to hire Lam was due to faculty uncertainty about the PALs program's goals and the unorganized search, rather than discrimination.[325] The court questioned Lam's claim because the university considered an Asian male as a finalist.[326] The court assumed mere consideration of a minority for a power position automatically removes implicit bias among the hiring committee. The court determined that "although members of the faculty may [] have harbored prejudices against Asians and women in general," employment decisions are made by a group and without proof the named defendants shared the prejudices, Lam's claim could not succeed.[327] However, the court never considered implicit bias as a contributing factor to the hiring committee's decision.

Chin v. Runnels exposed 36 years of bias at the San Francisco courthouse. A Chinese plaintiff claimed his equal protection rights were violated because the judges and officials failed to select a single Asian foreperson from 1960 to 1996, which is a statistical chance of 3 in 8.5 million (0.00000035%) because Chinese Americans and Filipino Americans constitute 17.45% of grand juries.[328] The court ruled against the plaintiff, but acknowledge in dicta that there is a "growing body of social science [that] recognizes the pervasiveness of unconscious racial and ethnic

324. *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994), as amended (Nov. 21, 1994), as amended (Dec. 14, 1994); *see also* Wei, *supra* note 320, at 783-84.

325. *Lam*, 40 F.3d at 1565.

326. *Id.* at *1561.*

327. *Id. at 1560.*

328. Opening Brief for Petitioner-Appellant, *supra* note 3, at *7; *see also Chin*, 343 F. Supp. 2d at 895.

stereotyping and group bias."[329] The statistics in *Chin* are disturbing, but the court showed an increased awareness of the role implicit bias plays in the American legal system. However, while hopeful, dicta is not controlling or strong enough to merit a favorable decision for minority plaintiffs.

Chaddah, Lam, and *Chin* suggest that White judges who handle discrimination cases have different interpretations of the plaintiff's experiences than minority judges. Judge LaDoris Cordell believes minority judges "are less likely to engage in . . . stereotyping when some [plaintiff] who is of the same background comes before that judge."[330] However, Whites dominate our judicial leadership. In 2008, 66% of judges on state appellate benches were White despite only being approximately 37.5% of the general U.S. population.[331] The prevalence of White judges makes it more likely a White judge will handle a discrimination case.[332] If a White lawmaker lacks direct experience with racial discrimination or interactions with those who experienced racial discrimination, it is extremely difficult to ignore implicit assumptions that naturally influence their view of the situation.[333] If minority plaintiffs can help courts reanalyze their blind faith in the legal system's objectivity, then they have a fair shot at succeeding on a Title VII claim in all industries.

B. Industry Solutions

The limited success of legal solutions means industry solutions must be implemented. This section discusses possible ways to diversify the entertainment industry.

More Funding of Minority Films and Diversity Programs

Filmmakers need money to make films, but historical discrimination left minorities economically disadvantaged[334] and with minimal connections to Hollywood's decision makers.[335] A study by UCLA revealed minority actors were represented by smaller agencies, which means the talent selected for high-profile work are largely non-minority directors, writers, and actors.[336] Scholars believe more diversity programs and government grants to minority filmmakers will create more employment of minorities in entertainment and accurate portrayals of the minority experience.[337]

However, this idea is difficult to implement because many programs lack concrete goals and upper management does not fully commit resources to diversifying

329. *Chin v. Runnels*, 11 Asian Pac. Am. L.J. 122 (2006).

330. Judge LaDoris Cordell, *Is the System Racially Biased?,* Frontline, KQED, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html (last visited Jan. 15, 2016).

331. *Improving Judicial Diversity," Brennan For Justice* 8, http://brennan.3cdn.net/96d16b-62f331bb13ac_kfm6bplue.pdf (last visited on Oct. 27, 2015)

332. Cordell, *supra* note 331.

333. *Id.*

334. Teshima, *supra*, note 7, at 138 (discussing specific South East Asian ethnic groups with higher poverty levels that include Hmong, Cambodians, and Laotians).

335. Rothman, *supra* note 144.

336. *Id.*

337. Basham, *supra* note 592.

the company.[338] Many scholars argue that cultural pluralism[339] cannot be achieved until diversity programs transform into real pipeline programs that allow minorities to enter at any point in the education cycle.[340] As discussed above, this article believes implicit bias is a cause of failed diversity. America's recent explosion of diversity as an important initiative in the workplace should bring APAs hope,[341] but some diversity programs are a sham and the government is unlikely to fund entertainment programs when it is still recovering from the great economic recession.[342]

Diversity is a current corporate fad, similar to "Going Green."[343] Several companies use diversity programs as marketing tools to show "progressive[ness]" [344] so customers feel valued and give business to their organization.[345] Companies seldom create programs sincerely dedicated to helping minorities obtain stable careers in top management positions.[346] As a result, APAs are rarely employed in the decision-making positions behind the camera and are unable to adequately influence the race of a film's characters.

Self-Regulation

Some scholars suggest self-imposed regulation by entertainment leaders to create rules promoting diversity in the profession.[347] The National Football League

338. Martin Davidson, *Why Diversity Efforts Fail and How to Make Them Succeed*, The Washington Post (Oct. 24, 2011), http://www.washingtonpost.com/business/why-diversity-efforts-fail-and-how-to-make-them-succeed/2011/10/24/gIQAJeuLTM_story.html; *see also* David Ciliberto, *Top 3 Things Wrong with Diversity & Inclusion Training*, Talent Management, http://www.talentmgt.com/articles/7002-top-3-things-wrong-with-diversity-inclusion-training (last visited Oct. 26, 2015).

339. William Powell, *Why Workplace Diversity is a Fraud*, The Leadership Advisor (July 26, 2011), http://www.theleadershipadvisor.com/blog/2011/07/26/why-workplace-diversity-is-a-fraud/ (Cultural pluralism is when the majority culture understand and embraces the positive contributions of all participating cultures instead of taking a cultural elitist position).

340. Christopher Johnson, *Increasing Diversity and Creating Responsible Citizens and Leaders* 33, Mich. B. J. (Jan. 2012), http://www.michbar.org/file/journal/pdf/pdf4article1973.pdf (reporting that Pipeline programs are designed to help people of color enter certain careers and start as early as high school); *see also 3 Case Studies: Why Companies Decline on the Diversity Inc Top 50*, http://www.diversityinc.com/diversity-management/3-case-studies-why-companies-decline-on-the-diversity-inc-top-50/, (last visited Oct. 21, 2015).

341. Martha Ross & Carolyn Gatz, *The Diversity Explosion Remakes the Labor Market – From the Bottom Up*, Brookings, Aug. 6, 2015. http://www.brookings.edu/blogs/the-avenue/posts/2015/08/06-diversity-explosion-labor-market-ross-gatz (there is an increase of minorities in the labor market); Selena Rezvani, *Five Trends Driving Workplace Diversity in 2015*, Forbes, Feb. 3, 2015, http://www.forbes.com/sites/work-in-progress/2015/02/03/20768/ (corporate diversity departments are more visible compared to a report in 2014 where Diversity was reported as one of the least important issues on leaders' minds); Vicki Salemi, *Trends in Diversity Recruiting: U.S. Employers Weigh In*, U.S. News and World Report, Oct. 8, 2014, http://www.forbes.com/sites/work-in-progress/2015/02/03/20768/.

342. *The Great Recession*, https://en.wikipedia.org/wiki/Great_Recession, (last visited Jan. 15, 2016).

343. Steve Tobak, *10 Signs that 'Going Green' Is Just a Fad*, CBS News, http://www.cbsnews.com/news/10-signs-that-going-green-is-just-a-fad/ (last visited Oct. 27, 2015).

344. Powell, *supra* note 340.

345. *Diversity in the Workplace Benefits Employers*, Adecco, http://www.adecco.co.uk/news/diversity-in-the-work-place.aspx (last visited Dec. 30, 2015).

346. Powell, *supra* note 340.

347. Basham, *supra* note 185, at 584.

(NFL) created the Rooney Rule to battle severe underrepresentation of minorities in coaching positions.[348] The Rooney Rule encourages fair hiring criteria by requiring the submission of minority candidates for top management positions.[349] The rule requires teams to interview at least one minority candidate in person when filling senior coaching positions; phone interviews were eliminated to avoid sham interviews.[350] The guidelines promote transparency by explicitly stating the hiring criteria and deadlines to give minority candidates equal access to information.[351] If the rule is violated, then fines are imposed.[352] Since the creation of the Rooney in 2003, the number of minority coaches increased from 6% to 22% within four years.[353] NCAA football also adopted a similar rule that doubled the number of minority coaches within a single year of implementation, but it does not impose any penalty for violations.[354]

Society would benefit from a rule equivalent to the Rooney Rule for the film industry. However, the probability of Hollywood voluntarily monitoring itself is low. Hollywood's insular network has not changed for years.[355] Large performers' unions, such as SAG-AFTRA and the Writers Guild of America, have the bargaining power to spark change, but it is difficult to organize the members because unions protect a vast range of performing arts.[356] Thus, a requirement for face-to-face interviews with minority artists is unlikely to happen anytime soon.

Colorblind Casting

To be colorblind is to be perceptually unaware of a person's race so as to avoid the automatic classification of an individual into a racial category.[357] People notice appearance and make judgments within the first twenty seconds of meeting

348. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 Fordham Urb. L.J. 615, 645 (1995) (discussing the stereotype that African American athletes lack the intellectual rigor to excel at team leadership).

349. Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN (Feb. 9, 2007), http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645.

350. Douglas C. Proxmire, *Coaching Diversity: The Rooney Rule, Its Application, and Ideas for Expansion* 6, Am. Const. soc'y Issue Brief (Dec. 2008), https://www.acslaw.org/files/Proxmire%20Issue%20Brief.pdf.

351. Patrick K. Thornton, *The Increased Opportunity for Minorities in the National Football League Coaching Ranks: The Initial Success of the NFL's Rooney Rule*, 6 Willamette Sports L.J. 45, 50 (2009); *see also* Basham, *supra* note 185, at 587.

352. Sean O'Connell, Book Review, *Advancing the Ball: Race, Reformation, and the Quest for Equal Coaching Opportunity in the NFL*, 8 DePaul J. Sports L. & Contemp. Probs. 117, 120 (2011).

353. *Id.*; *see also* Paris D. Butler et al., *Addressing the Paucity of Underrepresented Minorities in Academic Surgery: Can the 'Rooney Rule' Be Applied to Academic Surgery?*, 199 Am. J. Surgery 255, 258 (2010).

354. Steve Wieberg, *Minority Coaches Gaining Traction in NCAA*, USA Today, Dec. 8, 2009, at 1.

355. Lisi, *supra* note 119.

356. Basham, *supra* note 185, at 590.

357. Kang & Lane, *supra* note 167, at 468-69.

someone.[358] Currently, Hollywood considers an applicant's race or appearance,[359] which makes it difficult for minorities to break into the entertainment industry.[360] Colorblind casting improves employment opportunities for underrepresented minorities[361] by asking decision makers to ignore race throughout the casting process.[362]

A great example of successful colorblind auditions is NBC's singing competition, *The Voice*, which gives contestants a bias-free opportunity to pursue their dream.[363] The judges face backwards and evaluate the singer's voice purely on talent without seeing the artist.[364] This prevents judges from selecting a contestant based on their good looks, which tends to sell more in entertainment. Studies show blind auditions in the music industry increased the number of women selected for roles.[365] The success of women in blind auditions reinforces the idea that appearances "shape [our] life."[366]

However, colorblind casting is difficult to implement in film because talented acting requires conveying feelings through body language and facial expressions. It is difficult to hold an audition without physically seeing the actor or actress. A film's success also depends on accuracy. Colorblind casting promotes cross-racial portrayals that allow White artists to be cast in roles traditionally held by a minority.[367] For example, a White actor playing Martin Luther King Jr. or a Black and Asian couple with a White child is likely going to confuse audiences.[368] It is naïve to believe America's audience is colorblind.[369] Humans always possess some meaningful attitude or stereotype towards others, if not explicitly, at least implicitly.[370] As a result, the industry is reluctant to use colorblind casting because a miscast could significantly hurt the film's success.

Colorblind Pitches

Although the bamboo ceiling is a barrier for APAs to obtain influential decision-making positions, APAs can break it with colorblind pitches. Most Americans believe we live in a post-racial society, and point to the election of President Barack

358. Karen Zakrzewski, Comments, *The Prevalence of "Look" ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. Pa. J. Lab. & Emp. L. 431, 432 (2005); *see also* Daily Mail Reporter, *First Thing Women Notice About Other Women is How FAT They Are*, Mail Online, http://www.dailymail.co.uk/femail/article-1391477/Women-pass-judgement-20-seconds-meeting-them.html (last visited Oct. 21, 2015).

359. Sinckler, *supra* note 10, at 885.

360. Lisi, *supra* note 119.

361. Basham, *supra* note 185, at 584.

362. Sinckler, *supra* note 10, at 885.

363. Sarah Macdonald, *The Beautiful People*, Daily Life, Apr. 16, 2012, http://www.dailylife.com.au/news-and-views/dl-opinion/the-beautiful-people-20120416-1x38l.html.

364. *The Voice*, http://www.nbc.com/the-voice/video (last visited Oct. 21, 2015).

365. Kang & Lane, *supra* note 167, at 511.

366. Gordon L. Patzer, Looks: Why They Matter More Than You Ever Imagined, 4 (2008).

367. Basham, *supra* note 185, at 584.

368. Kim, *supra* note 53, at 416.

369. *Id.*

370. Kang & Lane, *supra* note 167, at 469.

Obama as proof.[371] However, the bamboo ceiling still exists, which keeps APAs from advancing to high-ranking leadership positions[372] in all industries, including film. This section defines the bamboo ceiling as a barrier in entertainment and suggests using colorblind pitching to hire more APAs in roles behind the cameras so they can create accurate APA portrayals.

1. *What is the Bamboo Ceiling?*

The bamboo ceiling is an invisible barrier based on attitudinal or organizational bias that prevents minorities from advancing to high-level positions, despite their qualifications.[373] Success requires talent, but without the right look, connections, and luck it is difficult to break the bamboo ceiling. The bamboo ceiling differs from the glass ceiling, which refers to the barriers to advancement for women.[374] Both ceilings appear as common work practices and unbiased cultural norms, but actually put minorities and women at a significant disadvantage.[375] Examples include informal recruitment practices, lack of training and mentorship, exclusion from informal networks, menial assignments rather than challenging ones, and placement in jobs with few advancement opportunities.[376]

These ceilings exist in entertainment because White men dominate the industry and judge everyone else on traits stereotypically associated with White males, such as toughness and aggressiveness.[377] APAs, both female and male, are seen as competent, hardworking, intelligent, and ambitious, but White males assume they lack the necessary warmth and social skills to be leaders[378] without individually assessing each strength and weakness. APA women face issues of intersectionality because they must overcome additional barriers as a result of being both Asian American and female."[379] For example, if women do not speak up, they lose opportunities to defend themselves, but if they do speak up, then they are seen as control freaks.[380] In contrast, men who speak up are seen as passionate.[381] However, this article focuses on the traits applicable to all APAs regardless of gender.

Both ceilings exist due to explicit and implicit bias. Many White decision makers consciously or unconsciously favor Whites and promote members of their in-group to maintain White privilege and high status.[382] If an Asian does get their

371. Li, *supra* note 37, at 141.
372. *Id.*
373. *Id.*
374. *Id.* at 143.
375. *Id.* at 144.
376. *Id.*
377. *Id.*
378. *Id.* at 146.
379. *Id.* at 141 (Intersectionality, the study of individuals who occupy multiple socially constructed categories, such as race, gender, and sexual orientation, has the potential to shed light on the experiences of Asian American women).
380. *Id.* at 144-45.
381. *Id.*
382. *Id.* at 146.

first major film, the success is usually short lived unless the star can break the closed connection culture within the industry.[383] As shown above, the insular network among White Hollywood directors, producers, writers, and casting directors is the primary cause of non-diverse casts.[384] Film leaders claim they want more minorities on screen, but do not put in the necessary effort required to achieve diversity. Because top management failed to understand the limitations of the bamboo ceiling, APAs must stimulate change from the bottom up.

2. *How do APAs Break the Bamboo Ceiling?*

Breaking the bamboo ceiling requires more Asians in high-level positions behind the camera. Higher-level executives usually play an important role in the final decision of the cast.[385] My research revealed 50.5% of the minority lead and supporting roles in the 500 movies and broadcast television shows from 2010 to 2014 had a person of color in a position of power, such as director, casting director, producer, or writer.[386] Although 50.5% is not an overwhelming correlation, the statistic shows that minorities are more likely to be cast if there is a minority working behind the scenes.

Colorblind pitching requires Hollywood to accept pitches from screenwriters without any reference to race. Similar to blinding names on resumes, Hollywood leaders would read scripts without knowing its author identity.[387] Colorblind pitches, like colorblind casting, can generate employment for minorities in roles behind the camera and lead to more casting calls for minorities and accurate portrayals of minority characters. If the White majority continues to create films without cultural input from the races they present on screen, then the media will continue to be filled with exaggerated caricatures of how White filmmakers think APAs act and the cycle of bias continues.[388]

Shonda Rhimes, an African American television producer, wrote the pilot for the TV show *Grey's Anatomy*, but omitted ethnicities and last names for the roles so all actors and actresses had an equal chance to personify the character during the audition.[389] The result was a diverse cast with African Americans, Latinos, Caucasians, and Asians who were all interwoven within the storyline without focusing on race or ethnicity.[390] The cast was very diverse and the show has been a tremendous success.[391] Rhimes was in a power position that allowed her to shape the path of

383. Basham, *supra* note 185, at 581.

384. *See* Ken Wheaton, *Ad Industry Should Consider Trying NFL's Rooney Rule*, Advertising Age (May 17, 2010), http://adage.com/article/print-edition/ad-industry-nfl-s-rooney-rule/143883/.

385. Sinckler, *supra* note 10, at 870.

386. *See* Part 1A for details on the research study.

387. Kang & Lane, *supra* note 167, at 511.

388. Chang, *supra* note 36, at 262.

389. *See* Matthew Fogel, *Grey's Anatomy Goes Colorblind*, N.Y. Times (May 8, 2005), http://www.nytimes.com/2005/05/08/arts/television/08foge.html.

390. *Id.*

391. *Id.*

this show. As a producer and writer of the show, she made a concerted effort to recruit diverse applicants rather than settle for an all-White cast.

Rhimes is an example of the legacy theory in action: a minority opens the door for other minorities to succeed in entertainment. Another example is Whitney Houston's version of *Cinderella*, where Houston used multiethnic casting for the roles.[392] There was a black Cinderella and an Asian prince and many more minorities throughout the film.[393] Houston was an African American singer who believed a multiethnic cast would ensure everyone could relate to the film and not just the White majority.[394]

In 1994, *All American Girl* debuted as the first all-Asian American sitcom and starred Margaret Cho, a stand-up comedian.[395] Similar to *Cinderella* and *Grey's Anatomy, All American Girl* had two APA writers and a consultant on Korean culture.[396] Unfortunately, the show was cancelled after its first season. The show received mixed reviews because it focused on APAs, the culture clash with foreign-born Asians, [397] and stereotyped APAs by making a character in the Asian family unable to speak English.[398]

In 2015, APAs received a second chance for a successful sitcom with *Fresh Off the Boat*. The sitcom was based on a biographical book written by Eddie Huang[399] and opened the door to a full Asian cast. However, identical to *All American Girl,* Hollywood managed to impose its stereotypical bias on the show, which led Huang to publicly disapprove of the sitcom. The credits say "inspired by" instead of "based on" Huang's book because the writers of ABC modified his story so drastically.[400] Nevertheless, *Fresh Off the Boat* is another example of APA writers opening the doors for APA actors and actresses.

Shanghai Calling (2012)[401] is a movie example of the legacy theory in the APA community. The film was written by Daniel Hsia, an APA director, screenwriter, and producer who casted Daniel Henney, a Korean-Irish American actor, as the lead male. Henney played an ambitious New York attorney who was sent to

392. *Cinderella*, IMDb, http://www.imdb.com/title/tt0128996/ (last visited Oct. 27, 2015).

393. *Id.*

394. *See* Rick Kushman, *The Cast May Be Multiracial But the Messages Are Still Mixed*, Sacramento Bee tv Critic, http://www.csus.edu/indiv/t/tanakar/eng20/kushman%20cinderella.pdf (last visited Oct. 27, 2015).

395. All-American Girl, IMDb, http://www.imdb.com/title/tt0108693/ (last visited Oct. 27, 2015).

396. Baynes, *supra* note 12, at 322.

397. *Id.* at 321 (discussing Sumi Haru, President of Asian Pacific Artists, and Guy Aoki, head of Media Action Network for Asian's approval of the film's display of cultural and generational difference compared to Jerry Yu, Executive Director of the Korean American coalition, who stated the community group was bothered by the pilot because it wasn't funny, but instead shows a confusion of cultures rather than Korean culture itself).

398. *Id.*

399. Scott Collins, *'Fresh Off the Boat' Writer Eddie Huang Slams ABC Comedy Hit*, Los Angeles Times (Apr. 7, 2015), http://www.latimes.com/entertainment/tv/showtracker/la-et-st-fresh-off-the-boat-writer-eddie-huang-slams-abc-comedy-hit-20150407-story.html.

400. *Id.*

401. Shanghai Calling, IMDb, http://www.imdb.com/title/tt2070597/ (last visited Oct. 26, 2015).

China on an assignment and struggled with the foreign culture overseas. Hsia's film portrayed APAs in a non-stereotypical role and created an employment opportunity for Asians in film. Henney did not have an accent, did not know kung fu, and made several references throughout the film that he was American and not familiar with the customs of China.

Wong Fu Productions[402] is a YouTube Channel where the directors, producers, and writers are all APAs. *Wong Fu's* YouTube Channel has almost 400 million views and more than 2.5 million subscribers.[403] *Wong Fu's* greatest contribution is writing and casting stories for APAs in both non-stereotypical and stereotypical roles. Lee Ki Hong, an APA actor, collaborated with *Wong Fu* since 2012 and was featured in several short films and *Wong Fu's* first feature film, *Everything Before Us.* In 2013, Hong broke the bamboo ceiling when he was cast as Minho in the *Mazerunner (2014)*.[404] Even though Hong was not the main protagonist, he had a non-stereotypical lead role. Without his experiences, connections, and support from *Wong Fu*, Hong might not have built a portfolio that showcased his talents enough to be noticed by Hollywood's leaders.

The examples above are only a few of the successful legacy theory stories. Minority writers, directors, and producers display an awareness of racial discrimination and consciously decide to lower the barriers by specifically searching for a diverse cast. Minority writers understand non-stereotypical experiences and write stories about the experiences of normal everyday people of color without furthering the historical biases that plagued television for the past hundred years. Although this solution does not resolve how minorities would get their pitches read by the studios or how to eliminate implicit bias against minority characters in the script, colorblind pitches could at least remove the bias against employing minority writers. The next challenge is encouraging more minorities to become writers, directors, or producers so they can begin generating non-stereotypical characters and casting opportunities.[405]

APA Culture Must Shift Towards the Arts

It is difficult to convince the entertainment industry and U.S. government to diversify its leadership and workforce due to financial concerns, implicit bias, and implementation concerns. Thus, the best way to promote equality and accurate representation is to focus on factors the APA community can control. Hollywood claims the applicant pool lacks qualified APA actors and actresses because APA culture does not support acting.[406] This assertion incorrectly shifts blame to APAs and intensely overgeneralizes APA cultures. There are talented APAs in the art, but

402. Wong Fu Productions, http://wongfuproductions.com/ (last visited Oct. 26, 2015).

403. Wong Fu Productions/About, YouTube, https://www.youtube.com/user/WongFuProductions/about (last visited Oct. 26, 2015).

404. The Maze Runner, IMDb, http://www.imdb.com/title/tt1790864/ (last visited Oct. 27, 2015).

405. Kim, *supra* note 53, at 416.

406. Sinckler, *supra* note 10, at 867.

Hollywood genuine believes APAs do not support film careers. Thus, APAs must rebut Hollywood's perception by openly supporting careers in arts.

APAs should diversify their chosen professional careers, but many APA families still wonder "why [kids] are choosing a major like Art . . . instead of medicine or engineering."[407] In 1993, almost 70% of all APA PhDs were in engineering, life sciences, and physical sciences.[408] In 1997, Asians received 12% of the U.S. doctorate degrees and more than one-quarter of the doctorates were in engineering.[409] A report in 2003 revealed APAs typically obtain bachelor degrees in "business, management, social sciences, or humanities,"[410] and work in scientific and technical jobs, like nuclear scientific research.[411]Studies reveal APAs search for jobs with strong educational backgrounds over the artistic fields.[412] If Hollywood's claim that the entertainment field lacks APA applicants had merit, then an injunction requiring the consideration of APA artists would not change onscreen representation without APA applicants.

Nevertheless, APA culture is not the perpetrator of this situation because history suggests that careers for APAs outside of education are a dead end.[413] Past racial, social, economic, and immigrant discrimination blocked off careers in politics, sports, and entertainment for APAs so they naturally turned their attention to scientific and technical fields because these fields lead to stable careers.[414] For example, an unknown minority actor is not on equal footing with an unknown White actor because there is a preexisting bias favoring Whites in Hollywood's casting process and connection-based hiring structure. The statistics of on-screen appearances and casting calls for minorities show Hollywood prefers to employ Whites over Asians. As a result, APA artists are likely accustomed to being excluded from most roles and stop responding to casting calls because they believe there is a low chance of employment.[415] Eventually, many APA actors eventually give up pursuing careers in the arts[416] because a sustainable lifestyle in entertainment is rare for individuals with limited connections.

However, APAs should not avoid careers in entertainment. If APAs continue to focus on scientific and technical fields, then the stereotypical viewpoints of APAs portrayed in films are unlikely to change. Jeremy Lin is an APA who overcame the limited number of careers choices for APAs. Lin was an undrafted third-string point

407. UT Counseling and Mental Health Center. *Model Minority Stereotype for Asian Americans,* University of Texas at Austin. http://cmhc.utexas.edu/modelminority.html (last visited Oct. 22, 2015).

408. Chin, *supra* note 92, at 155-56.

409. Wu, *supra* note 94, at 80.

410. Lewin, Tamar, *Report Takes Aim at 'Model Minority' Stereotype of Asian-American Students*, N.Y. Times (Jun. 10, 2008), http://www.nytimes.com/2008/06/10/education/10asians.html?_r=0.

411. Turnbull, *supra* note 51, at 85.

412. *Id.* at 85-86; *see also* Stanley Sue & Sumie Okazaki, *Asian-American Educational Achievements: A Phenomenon in Search of an Explanation*, Am. Psychol. (1990).

413. Chin, *supra* note 92, at 150.

414. Turnbull, *supra* note 51, at 85-86.

415. Krieger, *supra* note 25, at 862.

416. *Id.*

guard that drifted from team to team in the National Basketball Association (NBA) without any opportunity to actually play.[417] Both Lin and the former NBA Commissioner David Stern acknowledge race and stereotypes played a factor in Lin's inability to break into the league despite his talents.[418] Lin was overlooked and undervalued because he was not expected to possess the same talent as Black and White athletes who traditionally dominated basketball.[419] When given the opportunity, Lin proved his abilities, and opened the door for APAs in the sport. Groundbreaking APAs like Lin, who proved APAs can achieve a financial stable career in entertainment, must emerge more often within the APA community.

Linsanity proved the bamboo ceiling can be broken, but also confirmed racial discrimination exists in today's society. The public was amazed with how an APA succeeded in the NBA, which shows that race is still a big deal. For example, ESPN used the derogatory slur "Chink" in its headline following New York's first loss during Linsanity and no one at ESPN flagged the term as offensive.[420] ESPN only issued an apology after receiving the criticism. The incident proves how the majority of America is unaware of its own implicit bias[421] and might explain why APA parents still do not push their children into the sports careers. However, APAs cannot shy away from the challenges of fields dominated by Whites, especially because both sports and films play a large role in educating society about APA culture. APAs must keep fighting and supporting talented people, like Lin, who can break racial barriers when given the chance.

APAs Should Organize Among Themselves and Other Minority Communities

Individually battling Hollywood is impossible, but mass mobilization has proven successful in the past. Unfortunately, the model minority myth has created a division between Asians and other minorities. Historically, Whites used Asians to blame other minorities for being lazy and undeserving of aid, but never fully accepted APAs as equals.[422] Whites used Asians as replacements and the counter-examples to politically active African Americans and to blame other minorities for lack of success, high crime rates, and poverty stricken lives.[423]

In *Gong Lum v. Ric* (1927), the court held that Chinese children, while not Black, could be excluded from attending schools for White children.[424] Courts put Asians in a precarious position in the war between Black and White.[425] Asians were

417. Chang, *supra* note 47, at 1.

418. *Id.* at 8; *see also Houston Rockets' Jeremy Lin on Asian Stereotype,* Cbs News, http://www.cbsnews.com/news/houston-rockets-jeremy-lin-on-asian-stereotype/ (last visited Oct. 25, 2015).

419. Chang, *supra* note 47, at 1.

420. *Id.* at 9; *see also* Gregory S. McNeal, *ESPN Uses 'Chink in the Armor' Line Twice Update-ESPN Fires One Employee Suspends Another*, Forbes (Feb. 18, 2012), http://www.forbes.com/sites/gregorymcneal/2012/02/18/espn-uses-chink-in-the-armor-line-twice-did-linsanity-just-go-racist/.

421. *Id.*

422. Li, *supra* note 37, at 157.

423. *Id.*

424. *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927).

425. Allred, *supra* note 190, at 69 (explaining how Asian American political organizations such as Asian American Legal Foundation sided with white plaintiffs while the Asian Law Caucus and the Asian

never members of either side, which made it hard to mobilize with other minorities.[426] For example, Asians are often on opposite sides of the affirmative action debate. Affirmative action's goal is to "emancipate[] a race [that was] held in slavery [and deprived] of all the civil rights that the superior race enjoy[ed],"[427] which refers to Blacks and not Asians.[428] As the model minority, many APAs oppose affirmative action because they believe it works against them[429] and reinforces the model minority myth.[430] APAs who oppose affirmative action have valid concerns, but are viewed as siding with Whites. As a result, there is a battle between different minority groups, which makes fighting injustices as a coalition a challenge.

In entertainment, there are several race-based advocacy groups, such as the National Association for Advancement of Colored People (NAACP), the National Latino Media Council (NLMC), and Media Action Network for Asian Americans (MANAA),[431] but they tend to operate separately. The NAACP (African Americans), the Golden Eagle Awards (Latinos), and the Golden Ring Awards (APAs) individually recognize and highlight the achievements of members in their own race,[432] but rarely recognize those of other races. In fact, Asians are still attempting to unify among themselves.

Asia is a continent with many different ethnicities, such as Chinese, Filipino, Japanese, Korean, Hmong, Thai, Malaysian, Taiwanese, Vietnamese, Cambodian, etc. Although the Asian American Advancing Justice is a national community coalition that includes many different ethnicities and organizations, such as the Asian Law Caucus, Advancing Justice LA, Advancing Justice-Chicago, and Asian American Justice Center,[433] many APAs still divide themselves and fall into the trap of an "Asian-on-Asian" mentality, especially in locations where there are enough Asians to separates by ethnic group.[434] For example, modern APA gangs target members of their own Asian community based on ethnic groups.[435] Schools like the University of California, Berkeley have approximately 42 different Asian ethnicity identity based groups.[436]

The intricacies of the interethnic conflict in the APA community are complex and not the subject of this article, but this article recognizes the first step to overcoming White dominance is to find common achievements and struggles. White

Pacific American Legal Center filed amicus briefs in support of the Michigan admission policies).

426. Chin et al., *supra* note 92, at 161 n.161.

427. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

428. Allred, *supra* note 190, at 69.

429. *Id.* at 58.

430. *Id.*

431. Sinckler, *supra* note 10, at 883.

432. Kim, *supra* note 53, at 418.

433. Asian Americans Advancing Justice, http://www.advancingjustice.org/ (last visited Feb. 20, 2016).

434. Kim, *supra* note 72, at 99.

435. *Id.* at 96.

436. *Organizations Directory: Cultural & Identity Student Organizations*, https://callink.berkeley.edu/organizations, (last visited Oct. 27, 2015).

privilege[437] pervades all levels of American life and is invisible, especially to those who possess it.[438] Thus, a critical mass[439] is necessary to change America's social system. In 2014, Whites were 78% of the population and minorities were 22%.[440] Even if all racial minorities banned together, they are still at a distinct disadvantage. Thus, minorities fighting among themselves immediately reduce the potential number of supporters for their individual racial cause. Scattered organizations fighting similar battles on different fronts are less effective than one unified movement.

An example of successful organizing happened in Fall of 1999. NLMC and NAACP threatened to boycott the television networks and file lawsuits under the Communications Act of 1934 because the new television line-up had no minority leads or supporting actors and actresses.[441] NAACP held hearings and invited each network to submit testimonies. At the end of the ordeal, the NAACP announced FOX, CBS, ABC, and NBC agreed to hire more actors, producers, writers, and directors of color.[442] Four networks hired vice presidents of diversity to monitor hiring employees from diverse backgrounds, which was a step in the right direction and led to a 2000 fall line-up with minorities in main and supporting roles.[443]

Miss Saigon (1975) is another success story where the Actors Equity Council refused to let the British actor, Jonathan Pryce, portray an Asian character on Broadway after the producer of the play did not audition any Asian actors.[444] The Actors Equity spoke out against "yellowfacing" and the show was cancelled due to the criticism. [445] Another example of minorities working together is when the NAACP, NLMC, American Indians in Film & Television, and the Asian Pacific American Coalition gave low ratings to the networks' diversity programs to send a message of disapproval. The highest grade was a C for NBC while ABC received the lowest grade of D-.[446]

Audience activism and boycotting are effective. But, many APAs are conditioned to not complain about mistreatment and are reluctant speak about events that disgrace their family.[447] APAs must understand that the "audience must shoulder its social responsibility and demand [] movies [and] television programs cast people

437. White privilege is defined as "structural and generally invisible assumption that [W]hite people define a norm and Black people are 'other," dangerous, and inferior." *See* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 Akron L. Rev. 603, 604 (1999).

438. Allred, *supra* note 190, at 62.

439. *Critical Mass (socio dynamics)*, Wikipedia, https://en.wikipedia.org/wiki/Critical_mass_(sociodynamics) (last visited Jan. 15, 2016).

440. *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: Apr. 1, 2010 to Jul. 1, 2014*, United States Census Bureau, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Jan. 15, 2016).

441. *See* Greg Braxton, *NAACP Will Fight Network TV Lineups*, L.A. Times (July 12, 1999), http://articles.latimes.com/1999/jul/12/news/mn-55184; *see also* Sinckler, *supra* note 10, at 884.

442. Baynes, *supra* note 12, at 294-95.

443. Sinckler, *supra* note 10, at 884.

444. Krieger, *supra* note 25, at 843.

445. *Id.*

446. Baynes, *supra* note 12, at 297.

447. Wei, *supra* note 2, at 803.

of color [by refusing] to watch or frequent the [shows where] the director fails."[448] Asians, Latinos, Blacks, Native Americans, and other minority groups share political commonalities that should unite and not divide them.[449] There is tremendous strength in numbers.

De-biasing the Courts, Decision Makers, and Classrooms

Colorblind pitches and working with other minorities are possible solutions, but unworkable if our lawmakers remain biased. Jerry Kang and Kristin Lane propose debiasing the courtroom to move towards behavioral colorblindness.[450] Kang and Lane advocate for more juror and judge education programs about implicit bias to raise awareness. For example, the National Center for State Courts posts answers to frequently asked questions about implicit bias to help courts better address the unconscious prejudices within our legal system.[451]

Similarly, educational programs on implicit bias should be required at all levels of the entertainment industry, especially among the leadership (directors, producers, studio executives, writers, and casting directors). White males should learn how implicit bias impacts their creative decisions and limits opportunities available to minorities. As Lois Krieger suggested, Hollywood must bring all individuals involved in the creative process together to explore new and innovative means to provide access to minorities in front and behind the camera.[452]

Even if debiasing our nation's leaders resolves short-term problems, discrimination will persist if Hollywood continues to influence America's children with negative minority stereotypes. Studies show educators play an important role in the development of implicit bias and prejudices because "teachers' unconscious beliefs about racial and ethnic differences can affect their relationships with students."[453] In fact, children as young as four years old understand biases and develop in-group biases.[454] Society must take control and ensure that people grow up culturally aware and capable of distinguishing a media's stereotype from real world experiences. Therefore, eliminating discrimination in the long term requires implementing implicit bias education at earlier ages and not only for judges or Hollywood's leaders. Implicit bias education has a place in classrooms starting as early as grade school.[455]

The major challenge associated with implicit bias education is expecting society to self-regulate, which is rejected by some people that believe there is nothing

448. Kim, *supra* note 53, at 417.

449. *Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Sterotypes*, 4 Asian Pac. Am. L.J. 1, 47-48 (1996).

450. Kang & Lane, *supra* note 167, at 500.

451. *Helping Courts Address Implicit Bias*, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx (last visited Oct. 26, 2015).

452. Krieger, *supra* note 25, at 844.

453. Schubert Center for Child Studies, *Play, Implicit Bias, and Discrimination in Early Childhood: Implications for Child Development* 2, Nov. 2014, http://schubert.case.edu/files/2014/11/Play-and-Implicit-Bias-Brief.pdf.

454. *Id.* at 3.

455. Kang & Lane, *supra* note 167, at 500.

society can change because implicit biases come from years of natural selection; bias are hardwired, biological, evolutionary, and genetically limiting.[456] The hardwired bias defense fails because it suggests humans are not adaptive, contradictory to the idea of evolution. The adaptive nature of humans, evidence by millions years of social and biological evolution,[457] indicates that Hollywood, the courts, and society can adapt to the new environment of an increasing minority population.

On a policy level, the hardwired defense also fails because, even though implicit biases may not be obvious, individuals must be held accountable for their discriminatory actions. Implicit biases may never be eliminated, but the causal link between the biases and behavior can be disrupted through the procedural and structural reforms suggested above.[458] As Chief Judge Alex Kozinski stated, "Your personal feelings towards minorities don't matter; what matters is that you intentionally [take] actions calculated to keep them out of your neighborhood."[459]

IV. Conclusion

The environment strongly determines how and whether implicit biases translate into discriminatory behavior.[460] The industry might resist debiasing because they believe it is rational to act, cast, and write characters based on stereotypes and believe their decisions and portrayals accurately reflect reality.[461] However, this article and many others before it have proven this rational justification to be false. APAs can speak English, use forks, do not all practice kung fu, and much more.

The lack of APAs and other minorities in film is an important societal problem. APAs experience heightened implicit bias as the model minority, which causes APAs to be underrepresented in films and at odds with other minorities. §1981 and Title VII provide artificial legal protection because its numerous exceptions create loopholes that allow entertainment leaders to justify racial discrimination. Moreover, the implicit bias of America's judiciary makes overcoming these exceptions difficult when lawmakers do not fully understand the minority experience. Judge Thomas Edwards acknowledges that judges talk about assumptions and stereotypes in their educational workshops and conferences, but "[he has] yet to hear anybody who has a definite . . . solution, other than to simply raise the consciousness of judges the best we are capable of doing."[462] Hollywood's casting structure also makes it difficult to identify the liable parties and prove intentional discrimination because implicit bias is invisible. As a result, APAs rarely sue because victory is uncommon.

456. *Id.* at 510.

457. Nathanael Massey, *Humans May Be the Most Adaptive Species: Constant Climate Change May Have Given Homo Sapiens Their Flexibility*, Sept. 25, 2013, Scientific American, http://www.scientificamerican.com/article/humans-may-be-most-adaptive-species/.

458. Kang & Lane, *supra* note 167, at 511.

459. *Garza v. Cnty of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

460. Kang & Lane, *supra* note 167, at 486.

461. Kang & Lane, *supra* note 167, at 512.

462. Judge Thomas Edwards, *Is The System Racially Biased?,* Frontline, KQED, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html (last visited Jan. 15, 2016).

However, APAs have proven successful in the past and can do it again. President Ronald Reagan, a former actor and past president of the Screen Actors Guild, noted that APAs "never stopped striving for excellence, despite times not long ago when [Asians] experienced terrible discrimination." Although Reagan perpetuates the model minority stereotype, he also suggested that the APA community can break the bamboo ceiling and achieve equality in film. APAs have a driven culture and can overcome oppression even if the current reality suggests an uphill battle. It is possible that the entertainment industry and judiciary will reject colorblind pitching, self-regulation, more funding and diversity programs, and debiasing education. It is also possible that APAs will not enter careers in arts, break the insular Hollywood culture, or battle discrimination other minority groups. But, APAs must still try because change takes perseverance and time. In fact, it is probable that the only way the entertainment industry may rapidly change is if Congress intervenes with legislative action. But, that is a subject for my next article.