AFFIRMATIVE ACTING:
THE ROLE OF LAW IN CASTING MORE
ACTORS WITH DISABILITIES
(A NOTE IN FIVE ACTS)

KIRA PATTERSON*

TABLE OF CONTENTS

SETTING THE STAGE: INTRODUCTION ........................................ 484
ACT I. HISTORY OF DISABILITY IN PERFORMANCE ..................... 487
ACT II. LEGAL BACKGROUND .................................................. 489
  SCENE 1: THE AMERICANS WITH DISABILITIES ACT ................. 489
  SCENE 2: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 .......... 491
  SCENE 3: THRESHOLD QUESTION—EMPLOYEE OR
  INDEPENDENT CONTRACTOR? ........................................... 494
ACT III. LEGAL REMEDY NO. 1: CREATING A NEW BFOQ ............. 495
  SCENE 1: CREATING A RACE OR COLOR BFOQ ....................... 495
  SCENE 2: CREATING A DISABILITY BFOQ ............................. 496
ACT IV. LEGAL REMEDY NO. 2: AFFIRMATIVE ACTION ............. 497
  SCENE 1: BACKGROUND .................................................. 497
  SCENE 2: STATUTORY INTERPRETATION ............................... 499
  SCENE 3: APPLICATION .................................................. 500
ACT V. A LOOK AT POTENTIAL QUASI-LEGAL AND
  NONLEGAL REMEDIES ................................................... 502
  SCENE 1: SOCIETAL SHIFTS—EFFECTS OF THE COVID-19
  PANDEMIC ................................................................. 502

* Senior Editor, Southern California Law Review, Volume 96; J.D. Candidate 2023, University of Southern California Gould School of Law; B.A. Drama and Psychology 2015, Tufts University. Thank you to my supportive, loving, wonderful friends and family for having my back throughout law school. Special thanks to my advisor, Dr. Orly Rachmilovitz, for her guidance during the note-writing process, and a final thank you to my mentors (also known as my parents), Barbara and Patrick Patterson, for inspiring me every day. This Note is dedicated to the memory of colleague and friend Jenny Lin.
“Always find your light.” This is a common piece of advice given to theater artists, encouraging them to make sure they can be seen on stage.1 But who gets the chance to grace the stage in the first place? Our society has recently begun to actively ask new questions about equity and visibility. In the context of theater, we have largely focused not on who is on the stage, but on how theater productions can be enjoyed equitably. To answer these questions, we have turned to effectuating and enforcing the standards set forth in the Americans with Disabilities Act (“ADA”).2

Over the thirty years since the ADA was passed, and even more concertedly following the Act’s 2008 amendments,3 theaters have begun to reserve sections of the house4 for patrons with wheelchairs and to renovate facilities to create ADA-compliant restrooms for audience members.5 However, while the ADA has prompted great strides in improving theatergoers’ ability to access productions, figuring out how to apply the ADA to the people on the stage is another question altogether.6

While audience accessibility is a tremendous step forward in ensuring that enjoyment of theater productions does not exclude people who cannot easily access and navigate unwelcoming spaces, the time has come to turn the spotlight back towards the stage. We need to turn our attention to creating and nurturing structures allowing for equal access for theater performers—specifically, for the purposes of this Note, those with disabilities. Pushes in the theater world to pinpoint and remedy gender and racial inequities have

3. See id.
4. In the theater world, “house” refers to the auditorium or audience. See Theatre Terms, AM. ASS’N OF CMTY. THEATRE, https://aact.org/theatre-terms-view/h [https://perma.cc/4X6H-YY9F]. Here, the term is used to refer to the former.
6. Id.
become much more prevalent in recent years, and rightfully so, but we must not leave those with disabilities out of the discussion. As it is, “disability is too often an afterthought, if it is thought of at all.”

Indeed, Actors’ Equity Association (“AEA”), the union for actors and other theater makers, even reported that barely 1% of contracts they issued from 2016 to 2019 went to artists who self-reported living with a disability. AEA also estimated that about a quarter of Americans live with at least one disability. If you compare these statistics (about 25% of Americans have disabilities, but only about 1% of theater jobs offered over the course of three years went to artists who reported living with disabilities), the problem should begin to crystallize: Why are we not seeing representation of people with disabilities on stage at the same rates as in society?

While data on disability representation on stage is scarce, we can look to data collected in theater’s more closely studied sister entertainment industries of television and film to get a sense of what levels of representation in the theater might look like. For instance, in the sphere of network television in 2018, only 22% of characters with disabilities were actually portrayed by an actor with the same disability; for streaming services, this number decreased to 20%. The unfortunate result gleaned from this study and studies like it is that the overwhelming majority of characters with disabilities—at least in the context of film and television—continue to be portrayed by actors without disabilities. The first time an Emmy was awarded to a show starring people with disabilities was not until 2016, and the number of actors with disabilities who have ever won an Oscar can be counted on one hand. These statistics truly pull back the

---

11. Id.
curtain on an entertainment industry that does not tend to value actors with disabilities.

There is reason to believe the statistics are just as grim in the theater. For instance, it was not until 2019 that an actor in a wheelchair (Ali Stroker) first won a Tony award (for her tremendous performance in a revival of the classic Broadway hit Oklahoma!). This lack of representation begs the question of why, as society finally begins to converse more openly about equity, “disability” is still so often excluded from the discussion.

This Note will attempt to answer that question—and explore what role law could play in arriving at a solution—through a variety of lenses, including the ADA and employment discrimination law. It will set the proverbial stage by laying out the history of disability discrimination in theater and entertainment, after which it will discuss relevant federal and state sources of disability and employment law. The Note will then make the case—by looking at potential legal remedies—that in the subjective world of theater, the way to increase representation of actors with disabilities on stage is not a simple legal fix; instead, it will likely take a combination of changes—attitudinal, legal, and otherwise—working in tandem in the theater industry to get more actors with disabilities on stage. And while making these moves in the direction of inclusion and equity on stages across the country would certainly advantage actors with disabilities, it would also benefit society at large: theater that reflects our tapestried reality “is simply better, richer, [and] more rewarding when it is by, for, and about all of us.”

---

17. Or, as Ryan O’Connell, an actor with cerebral palsy, puts it: “Why, in this woke-ass culture that we live in, . . . do people with disabilities still largely go ignored?” See Harris, supra note 13 (quoting Ryan O’Connell).
ACT I. HISTORY OF DISABILITY IN PERFORMANCE

All too often, actors with disabilities are excluded from the audition room; much—if not most—of the time, actors with disabilities do not get invited to audition at all, regardless of the disability status of the role in question. And if the actor has made it into the audition room? That is only the first part of the journey. Next comes the actual casting of the role, where no matter how many talented actors have made it into the room to audition for a single part, only one person leaves with the job. Even once actors with disabilities make it through the door to get seen by the director, the odds are against them in terms of actually landing a role.

Recent Broadway shows that have main characters who have disabilities provide a good look into the regularity with which actors with disabilities get passed over for roles, while actors without disabilities gain more access to those roles. Broadway productions of relatively well-known shows that fit this description are not hard to find. The Curious Incident of the Dog in the Night-Time tells the story of a young man on the autism spectrum, and yet the 2015 Broadway production nonetheless cast an actor “without autism or any other disabilities” for the role. Wicked, over its yearslong and wildly popular Broadway run, never once filled the role of Nessarose, who uses a wheelchair, with an actress with physical disabilities. Likewise, all of the lead roles in recent productions of The Miracle Worker and Richard III, both of which focus on main characters with physical disabilities, were portrayed by actors without physical disabilities.

This practice of casting actors without disabilities in the roles of characters with disabilities has come to be known, in some circles, as “disability drag.” In fact, a whole microcosm of scholarship has developed around this idea of disability drag, which also takes to task the various tropes that seem to be intertwined in the writing of most, if not all, characters with

---


22. Id.

23. Id.

disabilities currently on stage and screen.\textsuperscript{25} This area of academic investigation and rumination asks us to reframe the way we think about characters and people with disabilities: “What if their disability weren’t the thing to overcome but merely one element of one’s identity?”\textsuperscript{26} Nonetheless, on the whole, society appears to turn away from asking itself such introspective questions, especially when the alternative involves making money by casting big-name actors.

None of this means that the world of creating theater is not making some strides on its own. For instance, Deaf West Theatre’s 2015 Broadway production of the musical \textit{Spring Awakening} was produced and performed in both English and American Sign Language,\textsuperscript{27} with a cast comprised of “25 deaf, hard of hearing and hearing actors and musicians.”\textsuperscript{28} The show was met with great success and earned multiple Tony Award nominations, including one for the highly regarded Best Revival of a Musical,\textsuperscript{29} even though it was a production of a type that Broadway had never seen before.

There are also smaller theater companies popping up that have been created with the explicit goal of promoting the work of artists with disabilities. For instance, the mission of the Phamaly Theatre Company in Denver, Colorado, is “to be a creative home for theatre artists with disabilities” as well as to “model a disability-affirmative theatrical process.”\textsuperscript{30} Alie B. Gorrie, an actress with low vision, describes her reaction to attending a production “filled with disabled artists, singing, dancing, and actively defying disability tropes” at the Phamaly Theatre Company as the first instance where she felt like she truly belonged in the theater.\textsuperscript{31} The experience, however, left Gorrie with a lingering question: Why had it taken two decades of working in the theater industry for her to feel this sense of

\begin{itemize}
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Marc J. Franklin, \textit{Look Back at Deaf West Theatre’s Spring Awakening on Broadway}, \textit{Playbill} (Sept. 27, 2020), \url{https://www.playbill.com/article/celebrate-deaf-west-theatres-2015-spring-awakening-broadway-revival} [https://perma.cc/J9WP-JVG6].
  \item \textsuperscript{29} Franklin, \textit{supra} note 27. Coincidentally, the author of this Note was lucky enough to attend a performance of this revamped Broadway hit, the experience of which led, in part, to the creation of this Note.
  \item \textsuperscript{30} \textit{About Phamaly Theatre Company}, \textit{Phamaly Theatre Co.}, \url{https://phamaly.org/about-phamaly-theatre-company-2} [https://perma.cc/S4SY-3DNS].
\end{itemize}
belonging? Which begs the broader question: How many people who dream of working in the theater industry have already been discouraged and turned away by the lack of access and opportunities?

Despite these steps forwards, it is apparent that sidelining actors who have disabilities deprives society of a wealth of talent. We have seen how powerful performances by actors with disabilities can be and how rewarding it can be to see them in the spotlight, as evidenced in a number of recent television shows. Consider RJ Mitte, an actor with cerebral palsy playing a character with the same disability on the hit AMC show *Breaking Bad*. More recently, think of Lily D. Moore, an actress born with Down syndrome playing a fan-favorite character with the same diagnosis in Mindy Kaling’s Netflix series *Never Have I Ever*. Therefore, the question we must now be asking is what legal solutions can be utilized to ensure that Mitte and Moore are not the “token” actors with disabilities, but instead just *actors*. And are those legal solutions alone *enough*?

**ACT II. LEGAL BACKGROUND**

**SCENE 1: THE AMERICANS WITH DISABILITIES ACT**

One lens through which to approach the problem returns our attention to the ADA. Signed into law in 1990, and amended in 2008 to provide broader protections for people with disabilities, the ADA provides for protection of individuals with “a physical or mental impairment that substantially limits one or more major life activities.” The ADA has seen much success over the years: it has empowered people with disabilities to become their own best advocates and has modernized our built environment to promote physical accessibility. Specifically relevant here,
though, is Title I of the ADA, which concerns employment discrimination.\textsuperscript{40}

Title I of the ADA prohibits employers (including theaters)\textsuperscript{41} from “discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\textsuperscript{42} Thus, discrimination against people with disabilities in the workplace is already prohibited by law in many circumstances, according to the ADA. There are, however, two distinct points that illustrate how far we have left to go and how far short the ADA has fallen in getting us there.

First, although the ADA requires an employer to make “reasonable accommodations” for employees with disabilities,\textsuperscript{43} Congress did not give a clear-cut definition of what exactly counts as a “reasonable accommodation.”\textsuperscript{44} Instead, Congress provided examples of accommodations that could be implemented to enable “qualified individual[s]” with disabilities to perform the “essential functions” of their jobs.\textsuperscript{45} There are no statutory limitations—financial, quantitative, or otherwise—on what constitutes a “reasonable accommodation,” other than that an accommodation that would cause an employer’s business “undue hardship” is not “reasonable.”\textsuperscript{46} Similarly, Congress did not provide further instruction on how to determine what constitutes “undue hardship.”

This lack of guidance from Congress means that implementing the ADA can easily “become a checklist of what is or isn’t provided.”\textsuperscript{47} In other words, it can become the “absolute minimum you can do to avoid looking like a jerk”\textsuperscript{48} or exposing yourself to liability. Sure, you may have a wheelchair ramp in place, but does that really work to make the actors in need of the accommodation feel welcome and unburdened in their artistic journey?

This Note argues that a wheelchair ramp here and there is not enough. Instead, for actors to truly feel welcomed into the space and able to practice their craft uninhibited, the theater must ask itself questions such as, “Are we
putting an extra burden on our artists with disabilities by requiring them to perform while simultaneously navigating a world that is not built for them?” and “How are we ensuring that we are hiring actors with disabilities in the first place?”

Second, while enforcing the ADA may help to ease the strain disproportionately placed on the small group of actors with disabilities who have already made their way into the rehearsal hall, what about those who have yet to be cast? Able-bodied actors are routinely cast in roles portraying people with disabilities,49 which diminishes the number of roles available for actors with those disabilities. Further, it often “simply never occur[s]” to casting directors “to cast, or even consider, actors with disabilities in roles that don’t specify whether a character is disabled or not.”50

Even though we are taking steps towards creating a more inclusive culture, it does appear as though we are nonetheless collectively excluding people with disabilities from that equity-driven vision of our society—even with the assistance of the ADA. So, if the ADA as it currently operates does not seem fit to truly improve diversity onstage, are there other potential legal routes?

SCENE 2: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

When it comes to the world of preventing discrimination in employment, Title VII of the Civil Rights Act of 196451 is undoubtedly the star of the show. Since the ADA may not, on its own, provide a way to ensure that more actors with disabilities get onstage, it is worth exploring another relevant legal avenue: employment discrimination law governed by Title VII. Congress formulated this broad new civil rights bill in 1963 and took final steps towards securing the bill’s passage in 1964.52 Title VII notably included language banning employment discrimination because of a person’s “race, color, religion, sex, or national origin.”53 While Title VII does not apply to disability discrimination, it provides some guidance as to how the ADA might be amended to address the issues discussed here.

The basic structure of a case alleging individual disparate treatment

50. Harris, supra note 13.
(also known as intentional discrimination) in one of the above categories has been crafted over time through case law by the Supreme Court. The so-called “burden-shifting” structure that has been created is set forth in the pivotal case of McDonnell Douglas Corp. v. Green. 54 First, a plaintiff who alleges disparate treatment under section 703(a)(1) of Title VII “because of such individual’s race, color, religion, sex, or national origin” 55 must prove their prima facie case that (1) they do indeed fall into one of those categories, (2) they applied for a job and were qualified, and (3) they were rejected by the employer. 56 Next, the employer has the chance to bring to light any “legitimate, nondiscriminatory reason” for having rejected the employee. 57 If the employer can do so, the burden shifts back to the plaintiff, who has an opportunity to prove that the “legitimate, nondiscriminatory reason” given by the employer was “pretext” for what in truth amounts to discriminatory animus. 58

Integral to this Note, however, is the language highlighted in section 703(e) of Title VII that an employer may protect itself from liability by presenting a particular affirmative defense. 59 The essence of this defense is that the employer asserts that it rightfully, and therefore legally, discriminated against this job applicant. The employer can do this by showing that it discriminated because of “religion, sex, or national origin” 60 if it can also show that “religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.” 61

This exception to the general rule, which is known as a “bona fide occupational qualification” (typically referred to as a “BFOQ”), 62 can sometimes be used by employers to legally justify certain discrimination in hiring practices if that discrimination is based on religion, sex, or national origin. For example, in Dothard v. Rawlinson, an all-male prison asserted that it would be unsafe for women to become guards in their prisons. 63 Female job applicants hoping to become guards then sued the prison, claiming that they were not hired because of their sex. 64 The Supreme Court

57. Id.
58. Id. at 802, 804.
60. Id. § 2000e-2(a)(1).
61. Id. § 2000e-2(e) (emphasis added).
62. Id.
64. Id. at 324.
took the side of the prison, holding that while the applicants’ sex was the reason they were not hired, this discrimination was legal due to the BFOQ exception. In other words, the prison was allowed to reject female applicants because of their sex due to the fact that having male guards was “reasonably necessary to the normal operation of that particular business.”

Conversely, in *UAW v. Johnson Controls, Inc.*, the Supreme Court refused to grant an employer the use of a BFOQ. Johnson Controls stated that it would not allow women to work in certain jobs at its manufacturing plant that involved lead exposure, citing an interest in preserving the women’s fertility. In essence, Johnson Controls was asserting that being a man was a BFOQ that was required in order to get the job. Here, the Supreme Court interpreted the BFOQ exception narrowly by ruling that the amorphous danger of harm to female employees’ fertility is not an appropriate use of the exception and that female employees who were qualified for the job could not be turned away simply on the basis of their sex.

As seen in *Johnson Controls* above, the BFOQ is not a free pass to discriminate against job applicants however an employer sees fit; Congress created the BFOQ exception to be used narrowly and “the courts have construed it as such.” It is not unreasonable, however, to imagine a scenario in which this affirmative defense could actually be used to benefit a particular group of job applicants. Consider a scenario in which an employer wants to have only Senegalese chefs work at a Senegalese restaurant, with the stated goal of “authenticity.” Here, the employer could use a national origin BFOQ to justify this hiring practice, with the end result being that a minority group (Senegalese chefs) gains greater access to job opportunities they otherwise may not have had. While perhaps counterintuitive, this Note will propose the use of a BFOQ not simply as a way to shield an employer from liability, but also as a way to encourage diversity in the hiring process.

65. *Id.* at 336–37.
68. *Id.* at 198.
69. *Id.* at 202.
70. *See id.* at 204.
SCENE 3: THRESHOLD QUESTION—EMPLOYEE OR INDEPENDENT CONTRACTOR?

It must be noted going forward that applying the ADA and Title VII to workers hinges on the workers’ classification as “employees,” as opposed to “independent contractors,” because the ADA and Title VII do not cover independent contractors. So what is the difference? The ADA and Title VII both provide the following definition of “employee”: “[A]n individual employed by an employer.” Since that definition is not particularly elucidating, courts have often looked to the common law of agency for a less circular definition. Among other factors, the Restatement (Second) of Agency defines an employee as the “servant” of an employer (the “master”). This relationship is said to be formed when the master gains control over the servant’s performance of a service, and, in particular, when the master gains the right to control the “physical conduct” of the servant. Conversely, then, an independent contractor is a worker whose physical conduct and general performance are not under the complete control of the master.

Many theaters officially classify the actors they hire as independent contractors, often primarily in order to take advantage of related tax benefits and to circumvent paying minimum wages, overtime, and workers’ compensation. The argument theaters provide for this practice is that actors are temporary workers, typically only hired to perform in one show at a time, and that therefore being an actor is more akin to being a part of the “gig economy” than being a part of a typical workplace. Theaters in this camp tend to paint a picture of their actors not as their so-called “servants” whose physical conduct they control, but instead as transient workers whose job is simply to put on a performance.

In reality, however, there is so much more to an actor’s responsibilities.

75. Restatement (Second) of Agency § 2(2) (Am. L. Inst. 1958).
76. Id.
77. Id. § 2(3).
and interactions with a director. While actors may have moments of free decision-making throughout the process of preparing (“blocking”) a play, almost everything comes down to what the artistic director envisions. This is really an employee-employer relationship where the employer has full control over not only when and where rehearsals are held, but ultimately full control concerning when, where, and how an actor portrays their part.

Though employee classification is crucial for actors—as well as employees writ large—to achieve better legal protections, a deeper exploration of the distinction between employees and independent contractors and the implications of this divide for employment equity, particularly in the context of theater, is beyond the scope of this Note. 80 Thus, the remainder of this Note will assume for the sake of argument that actors are classified as employees, not as independent contractors. This classification allows for their protection by the ADA and Title VII.

ACT III. LEGAL REMEDY NO. 1: CREATING A NEW BFOQ

SCENE 1: CREATING A RACE OR COLOR BFOQ

Notably missing from the list of categories that can be used to assert a BFOQ defense81 are race, color, and disability. Over the past few decades, the bulk of relevant scholarship has focused on reasons Congress specifically did not include race or color as possible BFOQs.82 Relatedly, scholars have started to ask whether Congress erred in this omission, and some even go so far as to champion adding a race or color BFOQ.83

More specifically, this question about a race or color BFOQ has recently been explored in the context of entertainment.84 Do historically marginalized actors lack opportunities as a “result of illegal discrimination by the theater industry,”85 or is it instead a product of artistic freedom and sound business decisions? Should the issue be relegated to the realm of First Amendment jurisprudence?86

Legal scholars have often approached this question by looking at

81. See 42 U.S.C. § 2000e-2(e) (listing “religion, sex, [and] national origin” as the only categories from which to create BFOQs).
82. See, e.g., Frank, supra note 71, at 496–97.
83. Id. at 501.
85. Sheppard, supra note 84, at 271.
86. Id. at 279–82.
language used by the Equal Employment Opportunity Commission ("EEOC")\(^87\) The EEOC’s regulations\(^88\) mention that a gender BFOQ could theoretically exist for hiring actors if deemed necessary for a play’s authenticity: “Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a *bona fide occupational qualification*, e.g., an actor or actress.”\(^89\) The EEOC has thus explicitly “recognized that the entertainment industry is one place where discrimination might be necessary.”\(^90\)

The fact that use of a BFOQ has been considered by the EEOC as potentially useful (and lawful) in an entertainment context gives credence to the idea that it is permissible to legally discriminate, through the use of a BFOQ, in order to preserve a play’s primary functions of storytelling and authenticity.\(^91\) Therefore, “it seems reasonable to assume that where the characters are race-specific, race is a job requirement, and hence, should be a BFOQ exception.”\(^92\)

**SCENE 2: CREATING A DISABILITY BFOQ**

So, could a disability BFOQ similarly be added to the ADA? The idea is not without precedent, at least in the realm of some states’ local laws. For instance, the Administrative Rules of Montana state that an employer may use a BFOQ “where the reasonable demands of a position require a distinction based on . . . physical or mental disability.”\(^93\)

But the question remains: Is the addition of a disability BFOQ really enough to make a difference? Or would it just perpetuate the status quo of allowing employers/artistic directors to keep employees/actors with disabilities off the stage? According to the University of Southern California Annenberg Inclusion Initiative, only 2.7% of characters with speaking roles in a survey of 900 popular movies from 2007 to 2016 were characters portrayed with a disability.\(^94\) Assuming the trend holds true across the sister industries of stage and screen, these statistics show that a disability BFOQ

\(^88\) The Supreme Court has held that the EEOC’s interpretation of the laws it enforces is “entitled to great deference,” Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (citing *Griggs*).
\(^89\) 29 C.F.R. § 1604.2(a)(2) (2022) (emphasis added).
\(^90\) Frank, *supra* note 71, at 495.
\(^91\) Id. at 493.
\(^92\) Sheppard, *supra* note 84, at 276.
\(^93\) MONT. ADMIN. R. 2.21.4005(3) (2022).
probably could not effectuate all that much change. If only around 2–3% of characters are written to have disabilities, even if a majority of directors cast those roles with actors who have disabilities, we would have at most a 3% increase in the number of actors with disabilities getting cast. And there is no guarantee that any directors would even opt to utilize the disability BFOQ. Thus, the most progress a disability BFOQ could make would likely be marginal at best.

Furthermore, creating a disability BFOQ opens the door to possible misuse and abuse by employers. Indeed, use of a BFOQ, though it can be co-opted for the benefit of a group of employees, is usually seen as an employer-friendly tactic. For example, an employer who does not want to hire actors with disabilities could use the BFOQ as a shield, asserting that such an actor with a disability could not serve “essential functions”\(^{95}\) (such as deft movement across the stage) required of the job.

Scholarship at the forefront of this conversation seems to overwhelmingly come to the same conclusion: “[T]he fear that employers could misuse a generally applicable... BFOQ to shield invidious... discrimination is too great to warrant the enactment of such a provision.”\(^{96}\) Given these potential setbacks, it becomes necessary to look at what other remedial legal options remain.

ACT IV. LEGAL REMEDY NO. 2: AFFIRMATIVE ACTION

SCENE I: BACKGROUND

The concept of affirmative action, created during the civil rights movement in the United States, derives from a “paradox,” namely that “[o]nce we amended the Constitution and passed laws to protect people of color from being treated differently in ways that were harmful to them, the government had trouble enacting programs that treat people of color differently in ways that might be beneficial.”\(^{97}\) We face a similar problem with regard to disabilities, in that in employment discrimination law’s noble effort to level the playing field, we must fight to create ways to treat people with disabilities that “might be beneficial”\(^{98}\) as well.

From a statistical standpoint, affirmative action for race actually resulted in some of its intended effect; the years between 1974 and 1980 saw

\(^{95}\) 42 U.S.C. § 12111(8).

\(^{96}\) Frank, supra note 71, at 525.


\(^{98}\) Id.
a 20% increase in the rate of minority employment in businesses relying on affirmative action (as compared to an increase of only 12% in companies without affirmative action plans in place). 99 Furthermore, there is still room for the affirmative action model to change over time, as “[t]here is no Brown v. Board of Education . . . for affirmative action, no well-established precedent.” 100 Thus, the door is left ajar for a new movement in which we use affirmative action tactics to make sure that more actors with disabilities are not only getting into the audition room, but also getting cast.

While decades of proof show that affirmative action has led to success, specifically in the context of school desegregation, 101 the concept also comes with quite a bit of baggage. 102 Scholars and laypeople alike have been arguing for years over whether “affirmative action for racial minorities disadvantages white people by virtue of their race.” 103 It is likely that this same argument would surface regarding whether affirmative action in the context of casting actors with disabilities disadvantages able-bodied actors. To this point, however, although there may be winners and losers in affirmative action, it has been determined that the practice is occasionally justified nevertheless. 104

In United Steelworkers v. Weber, the Supreme Court created precedent that some affirmative action regimes are, in fact, justified, and it laid out a test dictating when these regimes are constitutional. 105 While the Court’s opinion is perhaps not particularly clear in terms of where to draw that line, 106 it does provide us with a set of loose guidelines. In order for a plan to fall on the permissible side of that line, it must (1) be “designed to break down old patterns of . . . segregation and hierarchy,” (2) “not unnecessarily trammel the interests of” other employees or applicants, and (3) be a

99. Id.
100. Id. (emphasis added).
101. See id.
102. The idea of “affirmative action” in general is in jeopardy as we await a very conservative Supreme Court’s ruling involving Harvard University’s admission practices: “After the Court’s recent overturning of Roe v. Wade and the expansion of concealed-carry gun rights, the abolition of affirmative action at elite universities is high on conservatives’ wish list.” Greg Stohr, Harvard Urges Supreme Court to Preserve Affirmative Action in College Admissions, BLOOMBERG (July 25, 2022, 2:04 PM), https://www.bloomberg.com/news/articles/2022-07-25/harvard-urges-supreme-court-to-let-affirmative-action-survive [https://perma.cc/ZY43-L33N].
104. Id.
105. United Steelworkers v. Weber, 433 U.S. 193, 208 (1979) (holding that “Title VII’s prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans”).
106. Id. (“We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans.”).
These guidelines, specifically designed to apply to affirmative action in regard to racial segregation and discrimination, could easily be adapted to apply to disability as well. One could imagine guidelines for theater companies that (1) break down existing patterns of hierarchy in terms of casting actors without disabilities; (2) do not “unnecessarily trammel” the interests of actors without disabilities, who would retain plenty of chances to be cast; and (3) only last until such time that theaters understand and realize not only that diverse casting is a noble goal, but also that it makes sound economic sense. While this raises a different question as to how these guidelines would be implemented, as discussed below, there may actually be no need to adapt these guidelines because of the differences in statutory language between Title VII and the ADA.

SCENE 2: STATUTORY INTERPRETATION

Challenges to affirmative action in the context of ending racial segregation sometimes stem from a disgruntled white student who feels that a school’s admission policies are a zero-sum game (and thus, feels that their rights are being “unnecessarily trammel[ed]”). For instance, in Fisher v. University of Texas, a white woman who was denied admission to the University of Texas sued on the grounds that the school’s admissions system was unconstitutional because it took race into account. Ultimately, Justice Anthony Kennedy authored the close opinion in favor of the University of Texas, deciding that the university’s policy of considering race as one of a number of factors in admissions “met the standard of strict scrutiny” and was thus appropriate. While the final outcome of this case comes down on the side of the affirmative action plan being implemented by the university, it also demonstrates the very live and contentious idea that there are people who tend to feel they are being injured by affirmative action schemes at large.

The Court has maintained its belief that at least some affirmative action regimes could be unconstitutional because they “unnecessarily trammel” other employees’ rights, and their authority on this matter comes from citing the text of Title VII itself: it is unlawful to “discriminate . . . because

107. Id.
108. Id.
of . . . race” when hiring employees.112 White students have long used this argument to say that they themselves were discriminated against because of their race (as a white person) when a Black student is admitted and there is an affirmative action regime in place at that university;113 the claim is one of “reverse racism.”114 Similar arguments have long been made by many white plaintiffs in the employment context: there have “recently [been] a number of headlines regarding ‘anti-white racism’ and there have been a variety of civil rights lawsuits filed by white employees . . . claiming race discrimination.”115

The language of the ADA, on the other hand, dictates only that a covered entity may not “discriminate against a qualified individual on the basis of disability.”116 The ADA itself provides limited guidance on whether an employer may or may not, for instance, discriminate in favor of a qualified individual on the basis of disability.117 In light of this difference in statutory language, it is possible that an affirmative action plan in the context of disability under the ADA may not even need to pass muster under the three-part Weber118 test described above. Further analysis of this distinction in language, although beyond the scope of this Note, is required to determine if theater companies would be within their rights to implement affirmative action regimes regarding hiring actors with disabilities.

**SCENE 3: APPLICATION**

Given the analysis above, this Note proposes that theaters could help remedy the imbalance in casting practices by beginning to use an affirmative action model to bring more inclusivity into the casting room and onto the stage. If future analysis supports the above interpretation of the statutory text,

---

115. Id.
116. 42 U.S.C. § 12112(a) (emphasis added).
117. In fact, the EEOC itself has weighed in on the matter, stating that “[t]he ADA does not protect an individual who is denied an employment opportunity . . . because she does not have a disability.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2011-1, QUESTIONS AND ANSWERS ON THE FINAL RULE IMPLEMENTING THE ADA AMENDMENTS ACT OF 2008 (2011); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2017-4, QUESTIONS & ANSWERS: THE EEOC’S FINAL RULE ON AFFIRMATIVE ACTION FOR PEOPLE WITH DISABILITIES IN FEDERAL EMPLOYMENT (2017) (mentioning that “[a]ffirmative action for people with disabilities is not illegal. An employer is allowed to hire someone because he or she has a disability, and a rejected applicant cannot sue an employer for discrimination based on the fact that he or she does not have a disability”).
this model does not have to live up to the Weber standards. Each theater company is unique, with its own set of structures and hierarchies already in place, so the most effective way for each individual theater company to utilize an affirmative action model would likely be best judged by the company itself. The 2020s appear to have ushered in a hunger for an increase in overall diversity, and it is possible that some theaters would jump at the chance to create a scheme through which they could improve the diversity on their stages—if only because it would reflect well on the theater.

Perhaps one answer is a required training for theater companies throughout the country (likely in an online format) through which they could gain a better understanding of the necessities and risks associated with creating and implementing an affirmative action plan. Then, each theater company could come up with a plan that best fits its specific needs and goals. Implementation of these plans would likely require the creation of an organization to oversee these plans and establish accountability, as well as conduct periodic check-ins with each theater company to assess follow-through and commitment going forward. While this suggestion would involve significant resources (time, money, and otherwise), this Note has demonstrated how crucial it is to take affirmative steps in this arena to enact true change. Investing these resources would be a necessary first step.

However, clearly the nebulous idea of “using affirmative action in casting actors with disabilities” leaves a lot of details to be desired. Who would ensure that theaters truly implemented affirmative action measures? How would relevant statistics be tracked, given that each theater and, more granularly, each show has a completely different set of needs? What kind of penalties would be imposed if theaters chose not to follow their affirmative action plans? All of this is not to say that legal remedies would not move theater in the right direction, but given these difficult questions with no immediate answers, it seems clear that this proposed legal remedy is not enough on its own either. So, what options remain?

119. Id.
ACT V. A LOOK AT POTENTIAL QUASI-LEGAL AND NONLEGAL REMEDIES

SCENE I: SOCIETAL SHIFTS—EFFECTS OF THE COVID-19 PANDEMIC

One force that has the potential to shift the way we as a society see entertainment and theater, and therefore theater creators, is the COVID-19 pandemic.122 Our society’s transition to the use of Zoom and other online platforms has greatly increased theater’s accessibility in a number of ways,123 perhaps most notably in terms of the internet’s ability to transcend physical barriers and allow people from all around the world to watch a performance.124

Additionally, many virtual productions are simply more affordable125—both for audiences who no longer need to worry about issues such as transportation to and from the theater, costly parking, and the allure of overpriced theater snacks and drinks, and for theater companies that suddenly find themselves without the need for large, elaborate sets, accessible theaters, or a whole team of spotlight operators.

This shift has the possibility to push access for actors with disabilities in the right direction and could provide the movement with enough momentum to continue to embrace inclusivity and accessibility once we (presumably) reenter a less digital world. However, Deaf126 theater artist Elbert Joseph has his doubts: “Once we go back to being in person, are people going to be willing to continue [making theater accessible]? Because there is no more excuse.”127 And he is right: we have now seen a digital landscape in which disability has proven to be much less of a barrier in the bid for access.128

124. Id.  
125. Id.  
126. “The word ‘deaf’ with a lowercase ‘d’ refers to the audiological lack of the sense of hearing, . . . ‘Deaf’ with a capitalized ‘D’ refers to Deaf people who share the same culture and language, American Sign Language.” Id.  
127. Id. (quoting Elbert Joseph).  
128. See Past Productions, DEAF BROADWAY, https://www.deafbroadway.com/past-productions.html (providing a list of productions put on by a theater company that has been consistently creating virtual theater throughout the COVID-19 pandemic); About, DEAF BROADWAY, https://www.deafbroadway.com/about.html (describing how their shows are “[f]ilmed in real time via webcam with diverse Deaf talent” and that they “provide[] full and complete American Sign Language (ASL) access to beloved selections from the Broadway catalog”).
Writer and performer Katie Hae Leo, while acknowledging the importance of the ADA as it stands, believes that the COVID-19 pandemic has reminded society of the vulnerabilities associated with being a person with disabilities. She adds that, although the pandemic may have established a precedent of creating more access for artists with disabilities, it will all be for naught unless we “codify some of those changes, and make sure that they become part of, at the very least[,] best practices and at the best, law.”

Now that we have seen, by way of the pandemic, that many accessibility measures are in reality quite easy to implement, the above legal proposals of adding a disability BFOQ to the ADA and implementing an affirmative action regime for casting actors with disabilities could come into play. When utilized in tandem with the lessons we have learned from being thrust into the virtual world during the pandemic, these legal solutions could help to create a theater landscape that is both welcoming and encouraging to theater artists with disabilities.

Additionally, while creating diversity onstage is a noble goal in and of itself, theater companies do have pure economic reasons to invest in increased representation. Looking back at theater’s sister industries, film and television, that exact understanding seems to be unfolding as the early 2020s progress. While statistics, as discussed above, show dismal rates of casting actors with disabilities over the years, both film and television have begun to make great strides in their bid for inclusivity on screen. Take, for instance, the critically acclaimed 2021 film CODA, which centers on a family with deaf adults and their hearing child. The deaf characters are all played by deaf actors, and the story puts deafness at the heart of the viewer’s experience. The film even led to the first acting Oscar nomination (and win) ever for a deaf man, Troy Kotsur. Kotsur told the New York Times via a sign language interpreter that the success of this film marks a wider understanding that we should no longer “think of deaf actors from a
perspective of limitations.” As film and television make these moves forward, and as theaters begin to grapple with the fact that more diverse casts could lead to more money and acclaim, hopefully theaters will begin to follow in the footsteps of their sister industries.

SCENE 2: BUILDING UPON ONGOING DIVERSITY, EQUITY, AND INCLUSION WORK

Since it appears that no one solution, legal or otherwise, is sufficient to meaningfully increase opportunities for actors with disabilities on stage, it is worth looking to other work that is already being done in the arena for inspiration. The initiatives currently taking shape, in theater and beyond, are known as Diversity, Equity, and Inclusion ("DEI") initiatives. DEI work, according to the International Labour Organization, can be responsible for an increase in innovation of up to 59% and an increase in understanding and assessment of consumer demand of up to 37%.

This wave of DEI work in workplaces around the country and beyond focuses on the tenets of “diversity” (the ways in which people differ from one another), “equity” (fair treatment and opportunity regardless of identity), and “inclusion” (providing a variety of people with power and decision-making authority). However progressive a DEI mindset in a workplace might be, though, underrepresentation “remains a very real problem.”

A 2020 review of workplace diversity, for example, found that around 85% of top executives in the United States are white, with similar statistics showing that the majority of top executives do not report having a disability.

---

135. Id. (quoting Troy Kotsur).


139. Id.; see also Pippa Stevens, Companies Are Making Bold Promises About Greater Diversity, but There’s a Long Way to Go, CNBC (June 15, 2020, 10:02 AM), https://www.cnbc.com/2020/06/11/companies-are-making-bold-promises-about-greater-diversity-theres-a-long-way-to-go.html [https://perma.cc/9Z9T-Y8JL] (“Inequality and a lack of diversity in the workplace are certainly not new topics, but the recent protests have prompted companies to speak out, condemning racism, and recommitting to doing better when it comes to fostering inclusive work environments.”).

140. Stevens, supra note 139 (quoting a report by Barclays analysts) (“Companies’ consideration of diversity & inclusion is not only important on the basis of values; it also has a material impact on their long-term performance.”).

Even so, companies, including theaters, are now actively considering DEI initiatives; these initiatives tend to center on anti-racism and racial equity.\footnote{See, e.g., The Huntington’s Equity & Anti-Racism Update, HUNTINGTON, https://www.huntingtontheatre.org/accessibility/anti-racism [https://perma.cc/FFW4-ATDT]; Our Values, CENT. SQUARE THEATER, https://www.centralsquaretheater.org/about/our-values [https://perma.cc/27U9-3X3Y]; Equity, Diversity & Inclusion Institute, THEATRE COMM’NS GRP., https://www.tcg.org/Default.aspx?TabID=1550 [https://perma.cc/SS2U-5N2Z].} Many theater websites boast initiatives to combat racism within their internal structures.\footnote{See sources cited supra note 142.} In addition to actively increasing representation of people of color in the workplace, these initiatives are shining a spotlight on the destructive effects of racism on the workplace. Imagine if this push for equity in terms of race could be harnessed and used through the lens of disability as well. This would bring awareness to the trials and tribulations of actors with disabilities, as this Note has detailed, and could help to create a society in which anti-ableism becomes central to the workplace.

The NTCP, as a part of its advocacy work, identified a few distinct types of nontraditional casting meant to act as “jumping-off points for the imagination,”\footnote{See Harry Newman, Casting a Doubt: The Legal Issues of Nontraditional Casting, 19 J. ARTS MGMT. & L., Summer 1989, at 55, 56.} such as “societal casting,”\footnote{Id. at 57.} “cross-cultural casting,”\footnote{Id. (noting that “ethnic, female, and disabled artists are cast in roles they perform in society, such as clerks, judges, scientists, and salespersons”).} and “conceptual casting.”\footnote{Id. (describing how “a play is transposed to an entirely different cultural world”).} These various categories are meant to serve as tools for creating opportunities for actors who may otherwise be passed over.

One further category to be addressed is “blind casting,” in which “actors internally known as being a person with a disability.”).  

\begin{itemize}
\item Even so, companies, including theaters, are now actively considering DEI initiatives; these initiatives tend to center on anti-racism and racial equity.\footnote{See, e.g., The Huntington’s Equity & Anti-Racism Update, HUNTINGTON, https://www.huntingtontheatre.org/accessibility/anti-racism [https://perma.cc/FFW4-ATDT]; Our Values, CENT. SQUARE THEATER, https://www.centralsquaretheater.org/about/our-values [https://perma.cc/27U9-3X3Y]; Equity, Diversity & Inclusion Institute, THEATRE COMM’NS GRP., https://www.tcg.org/Default.aspx?TabID=1550 [https://perma.cc/SS2U-5N2Z].} Many theater websites boast initiatives to combat racism within their internal structures.\footnote{See sources cited supra note 142.} In addition to actively increasing representation of people of color in the workplace, these initiatives are shining a spotlight on the destructive effects of racism on the workplace. Imagine if this push for equity in terms of race could be harnessed and used through the lens of disability as well. This would bring awareness to the trials and tribulations of actors with disabilities, as this Note has detailed, and could help to create a society in which anti-ableism becomes central to the workplace.

\textbf{Scene 3: Exploring Nontraditional Casting}

Another potential route to getting more actors with disabilities on stage would be to follow the dictates of “nontraditional casting.”\footnote{See Harry Newman, Casting a Doubt: The Legal Issues of Nontraditional Casting, 19 J. ARTS MGMT. & L., Summer 1989, at 55, 56.} Under the regime of nontraditional casting, in order to expand opportunities for oft-overlooked actors, artists are cast in roles in which certain categories (such as gender, ethnicity, disability, and race) are not “germane to the character’s or the play’s development.”\footnote{Id. at 57.} The attempts at kickstarting nontraditional casting have been widespread; multiple major theater organizations banded together in the late 1980s to create a not-for-profit organization called the Non-Traditional Casting Project (“NTCP”).\footnote{Id. (noting that “ethnic, female, and disabled artists are cast in roles they perform in society, such as clerks, judges, scientists, and salespersons”).}

The NTCP, as a part of its advocacy work, identified a few distinct types of nontraditional casting meant to act as “jumping-off points for the imagination,”\footnote{Id. (describing how “a play is transposed to an entirely different cultural world”).} such as “societal casting,”\footnote{Id. (noting that “an ethnic, female, or disabled actor is cast in a role in order to bring an extra dimension to that part”).} “cross-cultural casting,”\footnote{Id. (noting that “an ethnic, female, or disabled actor is cast in a role in order to bring an extra dimension to that part”).} and “conceptual casting.”\footnote{Id. (noting that “an ethnic, female, or disabled actor is cast in a role in order to bring an extra dimension to that part”).} These various categories are meant to serve as tools for creating opportunities for actors who may otherwise be passed over.
are cast on the basis of their talent without regard to their physical attributes [and abilities or disabilities].”\textsuperscript{151} While the idea of blind casting may appear innocuous on the surface, and perhaps even look like a good solution, academic scholarship points us to the conclusion that even casting that is nondiscriminatory on its face leads to the same disparities on stage after all is said and done.\textsuperscript{152} Furthermore, in the past, directors have gone so far as to use the idea of blind casting to do things such as cast white actors as characters of color, using the explanation that the white actors just happened to be best for the role.\textsuperscript{153}

Because of the potential harms of blind casting, scholars urge directors to consider “conscious casting” instead, where attributes and abilities/disabilities are taken into account to the extent that they interact with the plot lines and characters and affect the meaning of a play or movie.\textsuperscript{154} Utilizing conscious casting from the nontraditional casting canon may prove another useful tool in the casting toolbox. However, the distinction between casting “blindly” and “consciously” is not always straightforward and still allows for a well-meaning director to make a blunder by casting actors in a way that sets forth an unintentional message.\textsuperscript{155}

Even so, conscious casting can and should be used in the context of casting actors with disabilities. Conscious casting could even be combined with the affirmative action plan discussed above; this could open the door to actors with disabilities not only playing characters with disabilities, but able-bodied characters as well. Not only would this provide more job opportunities to actors with disabilities, but it would also allow directors to make purposeful statements through their casting about how our society views, and should or should not view, people with disabilities.

Making conscious casting an industry standard would signal to artistic and casting directors alike that diversity on stage could be a meaningful enhancement to their repertoire and the messages conveyed, and, as such, should be taken into account. It is true that some baggage might come along with this approach: it could require extra auditions to be held, extra outreach

\begin{footnotes}
\item[151.] Id.
\item[152.] Micha Frazer-Carroll, ‘It’s Dangerous Not to See Race’: Is Colour-Blind Casting All It’s Cracked Up to Be?, GUARDIAN (Aug. 11, 2020, 4:22 AM), https://www.theguardian.com/tv-and-radio/2020/aug/11/its-dangerous-not-to-see-race-is-colour-blind-casting-all-its-cracked-up-to-be [https://perma.cc/Z38H-GEWR] (quoting Diep Tran, an arts journalist specializing in diversity) (“Colour-blind casting is dangerous . . . [because] [i]t negates the very real structural hindrances that block actors of colour from the same opportunities as white actors—like low pay in the theatre industry, a lack of roles that are ethnically specific that actors of colour can play, and unconscious bias on the part of white theatres and casting directors.”).
\item[153.] Id.
\item[154.] Id.
\item[155.] See id.
\end{footnotes}
into various underrepresented communities, and extra thought put into how casting each actor affects how the play comes across to the audience. Given the dramatic loss of talent caused by excluding actors with disabilities, however, this Note argues that the potential for positive outcomes far outweighs the baggage.

CURTAIN CALL: CONCLUSION

At the end of the day, representation on stage can (and should) inspire new generations of both activists and actors, but it appears as though there is no single legal solution that will be able to ensure or enforce that representation. Instead, if we hope that “[o]ne day, every American theatre will be a safe, equitable, and inclusive workplace filled with arts practitioners who represent and reflect the wonderful diversity of the human tapestry,” we will need to source solutions from within the legal field as well as beyond.

This Note does not, by any means, cover the breadth of issues and possibilities left to be discovered and discussed in terms of getting better representation on theater stages. For instance, studies that have thus far been done about disability in film and television should be replicated for the stage in order to give us a more accurate picture of the issue as it applies to stage actors. Also, further research beyond the scope of this Note may yield other creative and effective legal and nonlegal tactics that can be used to not only increase diversity onstage, but also to maintain it.

It is hopefully clear by now that there is a problem in the theater world that needs to be addressed. Not enough actors with disabilities are getting employed—or even getting the chance to prove that they should be employed. This issue has negative effects all around. Of course, it impacts actors with disabilities by lessening their opportunities to practice their craft. But it also affects society at large in a number of ways; representation of disabilities on stage can lead to a feeling of “belonging” for many people who have so often felt sidelined, and the art that gets created becomes more inclusive and authentic overall.

It should also be clear by now that there is not yet a simple solution to the above problem, in the law or in society. This cannot dissuade us, however, from fighting to ensure that actors with disabilities have the

156. *Id.* (quoting Diep Tran) (noting that “[t]his approach isn’t always simple, . . . but neither is addressing the entrenched structural racism in television, film and theatre”).


158. For example, what percentage of stage actors with disabilities who audition for shows actually end up getting cast? What percentage end up getting turned away?
opportunity to perform on stage. It appears as though it will take a conglomeration of methods: the creation of a disability BFOQ; affirmative action based on disability; monetary and business incentives; ongoing DEI work; and conscious casting could all be pieces of the as yet unsolved puzzle. And while we are still missing puzzle pieces, we should begin by working with the methods we already have.

This Note has presented potential legal avenues for addressing the lack of opportunities for actors with disabilities in the theater industry and has concluded that using the law as a vehicle for improving the odds for these actors is probably not enough. Either way, casting more actors with disabilities is an issue that clearly requires immediate attention. After all, when it comes to the heart of the reason that all of this research and discussion is necessary in the first place, actress Ali Stroker put it best in her Tony Award acceptance speech: “This award is for every kid watching tonight who has a disability, who has a limitation or a challenge, who has been waiting to see themselves represented in this arena,” she said.159 “You are.”160

160. Id.