

Winter 2-28-2019

## Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward

Crystal Powell

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Crystal Powell, *Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward*, 2018 BYU L. Rev. 933 (2019).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2018/iss4/7>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Bias, Employment Discrimination, and Black Women’s Hair: Another Way Forward

## CONTENTS

I. INTRODUCTION .....	933
II. HISTORY OF BLACK HAIR, IMPLICIT BIAS, AND WORKPLACE GROOMING STANDARDS.....	937
A. History of Black Hair Texture and Hairstyle: Centuries of Stereotyping .....	938
B. Clean, Neat, and Kept Versus Extreme, Eye-Catching, and Unprofessional: Workplace Grooming Policies Reflect Racial Stereotypes.....	943
III. SHOULD BLACK WOMEN GIVE UP ON TITLE VII?.....	946
A. Forty Years of Loss: Title VII, the EEOC, and Black Hair.....	946
1. Title VII and the EEOC guidelines .....	946
2. Cases and commentaries on Black hair discrimination: unequal treatment and disparate impact.....	949
B. Crafting a New Jurisprudence Based on Undue Burden.....	962
IV. STATE EMPLOYMENT DISCRIMINATION PROTECTION: TOWARD A HIGHER STANDARD .....	965
V. CONCLUSION .....	967

## I. INTRODUCTION

In 2016, the Eleventh Circuit decided that, professionally, Black women’s natural hairstyles could legally be limited to only the afro.<sup>1</sup> Black women<sup>2</sup> may change their hair texture to make it straight,

---

1. See *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016). An afro is a hairstyle where the hair is combed up and out forming a cloud or ball around the head. See *Afro*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Afro> (last visited Jan. 1, 2019). It is typically worn by African/Black women with a more tightly curled texture and generally short to medium length or very recoiled hair. *Id.*

2. In this Note, I use the term *Black women* as a preference to refer to women of African descent, whether termed *African American* or otherwise. I also use the term *Black hair* to refer to the hair of Black women as a simpler designation and not about hair color.

wear a weave, or wear a wig.<sup>3</sup> However, every other hairstyle involving Black women's natural texture (outside the afro) may be banned.<sup>4</sup> The decision was neither new nor groundbreaking. For almost forty years, federal courts have consistently ruled that when an employer chooses to hire or fire a Black woman for wearing her hair in a braid, twist, plait, cornrow, lock, or blonde, Title VII of the Civil Rights Act<sup>5</sup>—meant to protect individuals against employment discrimination on the basis of race—does not apply.<sup>6</sup>

The 2016 decision in *EEOC v. Catastrophe Management Solutions* reinforced the long precedent that the micromanagement of Black women in the workplace is quite all right.<sup>7</sup> In that case, the Equal Employment Opportunity Commission (EEOC) brought an action alleging that Catastrophe Management had engaged in race discrimination in violation of Title VII when it rescinded an offer of employment pursuant to its race-neutral grooming policy when the applicant refused to cut off her dreadlocks. The decision resulted in placing an undue burden on Black women because it allowed grooming policies to permit the disparate treatment of, as well as to have a disparate impact on, Black women. Ordinarily race-based discrimination suits are argued under either a disparate treatment or a disparate impact analysis keying in on the fundamental unfairness in opportunities to individuals who are identified as a particular race; while sex-based employment discrimination tends to focus on the undue burden that is placed on one sex (or gender) in accessing opportunities available. Because Black women do not neatly fit into the categories of race and sex, Black women have continued to fall between the cracks of civil rights as it pertains to hair grooming policies.

---

3. See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981). The court in *Rogers* discussed how the plaintiff could cover her hair with a hair piece (a wig) in order to conform to the grooming policy. Previously she had worn her hair in braids. Renee Rogers filed an action challenging a rule prohibiting employees in certain employment categories from wearing an all-braided hairstyle. Rogers worked as an airport operations agent, where she interacted heavily with passengers from issuing tickets, checking in, and helping with boarding.

4. See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

5. Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000a–2000ff (2012) (protecting against discrimination on the basis of race, color, sex, religion, and national origin).

6. *Rogers*, 527 F. Supp. at 232–33.

7. See, e.g., *id.* at 233.

*Catastrophe Management* also announced that racial discrimination had to be on characteristics that did not change and not on characteristics that are only important because of one's race. This, despite a long line of scholarship dissecting and criticizing the decades-old precedent first rolled out in *Rogers v. American Airlines*.<sup>8</sup> Indeed, prolific and accomplished legal scholars have written extensively on the fundamental error in *Rogers*, yet federal courts routinely apply the standard without regard to the fact that racism against Black women is intersectional, precisely because they do not fit neatly into one box (of either race or sex), and that this reality might warrant a more nuanced standard.<sup>9</sup> Indeed, the

---

8. See *infra* Part III.

9. See generally Dawn D. Bennett-Alexander & Linda F. Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 463 (2016) (exploring how workplace discrimination based on grooming policies disproportionately impacts Black women); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 396 (1991) (a foundational article discussing the fundamental error in the *Rogers* decision in failing to understand the ethnic significance of Black hair to Black women and the racial underpinnings in hair grooming policies that disfavor and punish Black hairstyles); Bridget J. Crawford, *The Currency of White Women's Hair in a Down Economy*, 32 WOMEN'S RTS. L. REP. 45, 55 (2010) (analyzing how a bad economy affects Black women more negatively than White women as Black women have an extra burden in grooming their hair to societal expectations); D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FLA. INT'L U. L. REV. 333, 368 (2013) (Challenging "a relatively universal judicial and societal assumption that employers' enactment and enforcement of grooming codes are inconsequential to women's access to, and inclusion in, American workplaces."); D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 430 (2011) (discussing the hypocrisy of the jurisprudence in ruling that it was not racially discriminatory for an employer to discriminate against a Black employee who dyed her hair blonde, while other White employees donned blonde hair); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 991 (2017) [hereinafter *Splitting Hairs*] (discussing how the federal courts have issued "hair splitting" in race-based grooming codes discrimination cases to highlight the extreme micromanagement of Black women in the workplace and indignity it brings to Black women); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1394 (2008) (asserting that "courts have hindered the efficacy of Title VII to achieve its mandate to ensure that individuals are not denied equal employment opportunities on the basis of race, national origin, and color"); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (analyzing how easy it is for discriminatory practices to stem not from overt racism but unconscious biases based in racist and racially discriminatory stereotypes); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1132 (2010) [hereinafter *Another Hair Piece*] (adding to the discussion of the original *Hair Piece* by examining the sociological and psychological biases in the workplace between good hair as White Hair and Black hair as bad hair and the disparate impact on Black women to achieve

jurisprudence around Black women's hair becomes unique when viewed even in the broader arena of race-based discrimination. To illustrate, while the U.S. Supreme Court has been more nuanced in its treatment of race,<sup>10</sup> lower courts have not followed suit in seeking to understand and protect against hair-based discrimination as one of the distinctive racial identifiers for Black women. Following *Catastrophe Management*, one might not be blamed for adapting a dystopian view toward the prospects for legal and social change in relation to workplace bans on Black hair. It was hoped that the Supreme Court would utilize the opportunity to address the evolution of Black hair discrimination litigation at the appellate level when *Catastrophe Management* was appealed to the Court. However, the EEOC withdrew the case and the Court disallowed Jones from intervening in the matter so she could pursue the case on her own behalf and protect her legal interests.<sup>11</sup>

This Note explores a very simple question: after forty years of failure in fighting discriminatory employment practices against Black women, why have federal courts tolerated regulation of Black hair in ways that ignore that those regulations may be pretext for discrimination against Black people in general and Black women in particular? That regulating Black hairstyles creates unequal

---

good hair that is brought about by discriminatory workplace grooming policies); Janeé T. Prince, "Can I Touch Your Hair?": Exploring Double Binds and the Black Tax in Law School, 20 U. PA. J.L. & SOC. CHANGE 29, 50 (2017) (examining how Black hair affects Black lawyers from the beginning of their legal careers in law school); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 422 (2007); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 162 (2001) [hereinafter *The Braided Uproar*] (discussing that *Rogers* was wrong because neutral policies can discriminate, and still discriminate, because the crux of the argument that Black hairstyles such as braids can be easily changed is the understanding that assimilation into predominantly White hairstyles is easy and normal).

10. See, e.g., Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1998) (discussing that the Supreme Court has moved toward treating racial status as a product of social and political institutions and has not definitely adopted nor embraced a biological conception of race).

11. See Imani Gandy, *The U.S. Supreme Court Decided to Ignore Black Hair Discrimination*, REWIRE.NEWS (May 16, 2018, 1:01 PM), <https://rewire.news/abc/2018/05/16/u-s-supreme-court-ignoring-black-hair-discrimination/>. While I do not support the allegation that the Supreme Court "ignored" Black hair discrimination, since Jones's motion to intervene was untimely—and only Jones must accept the consequences of failing to file a timely motion—this adequately sums the events leading to the end of *Catastrophe Management*.

conditions for Black employees? Or, in other words, why have the federal courts not accepted that Black hair and its attendant natural hairstyles are the very essence of a racial feature for Black women? And what is the way forward?

This Note explores this jurisprudential damn—the damning of Black women because of their Black hair. Part II explores the history of bias and stereotyping surrounding Black hair and its implicit connection to workplace grooming. Part III examines whether Black women should give up on Title VII so far as it concerns their hair. It analyzes the development of jurisprudence over the last forty years by examining the law, the critical cases, and the key scholarship. I posit that while it might seem that *Rogers* is here to stay, continued litigation challenging the standard is even more critical in light of *Catastrophe Management*. While advancing civil rights for Black hair at the federal level is important (since it begins to establish national standards), new methods of social engineering should be explored. To this end, Part IV begins to review the state level protections against discrimination based on hair and argues that lobbying at the state level could provide an alternative to fill the lapse in federal protections. Part V concludes.

## II. HISTORY OF BLACK HAIR, IMPLICIT BIAS, AND WORKPLACE GROOMING STANDARDS

*But if a woman has long hair, it is a glory to her: for her hair is given her for a covering.*<sup>12</sup>

For as old as the Bible, or as old as biblical record, hair and beauty have been inseparably linked.<sup>13</sup> A woman's hair has long been described as her crowning glory. The spiritual and social connection between women's hair and beauty and rank is not unique to Christendom. In Islam, hair is also considered an essential feature of a woman's identity, with the covering of it an act of modesty and a public equalizer between women.<sup>14</sup>

---

12. 1 *Corinthians* 11:15. See also 1 *Corinthians* 11:6 (“[I]t be a shame for a woman to be shorn or shaven . . . .”); *Proverbs* 16:31 (“The hoary head is a crown of glory . . . .”).

13. See sources cited *supra* note 12.

14. Qur'an: An-Nur: 31.

In ancient African traditions too, hair has played a vital role in a woman's beauty, wealth, marital status, religion, and rank.<sup>15</sup> Even deeper, the way the hair was worn foretold the geographical origin of the woman. "In some cultures a person's surname could be ascertained simply by examining the hair because each clan had its own unique hairstyle."<sup>16</sup> The connection of hair to identity for Black women was never "purely cosmetic."<sup>17</sup> "Its social, aesthetic, and spiritual significance has been intrinsic to their sense of self for thousands of years."<sup>18</sup>

Transatlantic slavery changed all of that. In most societies a woman's hair is her beauty; and its absence becomes her ugliness. Slavery made the Black woman's hair ugly (as it made almost everything else about the Black race undesirable). This section explores the development and pervasiveness of the social cognition that has evolved to stigmatize Black hair and its hairstyles negatively laying the foundation for the type of discrimination that Black women face in the workplace concerning their hair.

#### *A. History of Black Hair Texture and Hairstyle: Centuries of Stereotyping*

In 2016, the Perception Institute undertook a first-of-its-kind study to specifically examine implicit and explicit attitudes toward Black women's hair.<sup>19</sup> The results are not very surprising. One in five Black women noted they felt social pressure to straighten their

---

15. AYANA D. BYRD & LORI L. THARPS, *HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA* 2 (2001).

16. *Id.*

17. *Id.* at 7.

18. *Id.*

19. *The "Good Hair" Study*, PERCEPTION INST., <https://perception.org/goodhair/> (last visited Jan. 2, 2019).

The study included 4,163 participants: a national sample of 3,475 men and women, and a sample of 688 "naturalista" women from an online natural hair community.

The study included the Good Hair Survey and the Hair IAT. The survey assessed women's explicit attitudes toward black women's hair, hair anxiety, and experiences related to their own hair, and the Hair IAT assessed implicit attitudes toward black women's hair.

*Id.*

hair for work.<sup>20</sup> On average, White women deemed Black hair to be unprofessional and demonstrated an explicit bias against it, rating it as “less beautiful, less sexy/attractive, and less professional than smooth” (or straight) hair.<sup>21</sup>

Across all groups in the study (broken down into a national sample and a niche sample for the natural hair community),<sup>22</sup> there was a strong implicit bias against Black hair in its natural texture. When asked what “good hair” was, some of the responses included “hair that is acceptable to the majority of society,”<sup>23</sup> or specifically hair that was “straight, smooth, silky, soft, not frizzy, or not kinky.”<sup>24</sup> “Some women link[ed] good hair to whiteness, explaining that the ‘good hair’ standard is based on the type of hair that white women have, and is often hair that biracial women have.”<sup>25</sup> One interesting finding was that White women in the natural hair community subset still exhibited a greater bias than the national sample of Black women and White and Black Men, even though they demonstrated less bias compared to the wider White woman sample.<sup>26</sup> The Perception Institute noted that generally White attitudes toward Black hair were penalizing and negative, with the strongest stigmas held by White women. Unfortunately, this study was not an outlier. Two other contemporary studies documented similar bias against naturally textured Black hair and styles, with results showing an aversion to textured Black hair across all groups, and Black women experiencing deep anxiety because of the stigma about their hair.<sup>27</sup>

---

20. Alexis McGill Johnson et. al, *The “Good Hair” Study: Explicit and Implicit Attitudes Toward Black Women’s Hair*, PERCEPTION INST. 12 (Feb. 2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf>.

21. *Id.* at 6.

22. *Id.* The natural hair community is a social and digital community of women, predominantly Black, who support and advocate for the natural texture of Black hair and its care.

23. *Id.* at 11.

24. *Id.* *Kinky* is a descriptive term for the coiled texture of Black hair.

25. *Id.*

26. *Id.* at 14.

27. See Laurie A. Rudman & Meghan C. McLean, *The Role of Appearance Stigma in Implicit Racial Ingroup Bias*, 19 GROUP PROCESSES & INTERGROUP RELS. 374, 379–81 (2016); Susan J. Woolford et al., *No Sweat: African American Adolescent Girls’ Opinions of Hairstyle Choices and Physical Activity*, BMC OBESITY 1, 7 (July 1, 2016), <https://bmcoebes.biomedcentral.com/track/pdf/10.1186/s40608-016-0111-7> (straightened hair seen as adult hair whereas

These sentiments are not new. The explicit inferiority toward Black hair was not only one of the vestiges of slavery, it characterized a large part of the denigration and dehumanization of Black people under slavery.

One of the first things the slave traders did to their new cargo was shave their heads if they had not already been shorn by their captors. . . .

Given the importance of the hair to an African, having the head shaved was an unspeakable crime. Indeed, . . . “a shaved head can be interpreted as taking away someone’s identity.” . . . The shaved head was the first step the Europeans took to erase the slave’s culture and alter the relationship between the African and his or her hair. Separating individuals from family and community on the slave ships during the middle passage furthered their alienation from everything they had ever known. Arriving without signature hairstyles, Mandingos, Fulanis, Ibos, and Ashantis entered the New World, just as the Europeans intended, like anonymous chattel.<sup>28</sup>

But what does slavery have to do with negative stigmas toward Black hair in the present? Everything. For it was under slavery that the stereotypes regarding Black hair were created and reinforced.<sup>29</sup> To have Black hair was to have slave hair.<sup>30</sup> And like everything else about the slave’s being, the hair was controlled by the master. Frequently shaving the hair was a form of punishment, a further debasement even within the slave population.<sup>31</sup> Slavery took away the connection of the Black person to their hair in several ways. First, without the proper tools—such as a long-toothed comb—Black women could no longer care for their hair in the way that was specific to its needs.<sup>32</sup> Second, neither did they have the time. With death or dismemberment a daily threat on plantations, hair was the

---

natural hair viewed as juvenile) (“The Social norm expressed by the adolescents in all of the focus groups was a strong preference for long, straight hair. The almost unanimous belief that such hair types were most attractive and could be worn by anyone . . . .”)

28. BYRD & THARPS, *supra* note 15, at 10–11.

29. *Id.* at 17–20.

30. See Shane White & Graham White, *Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries*, 61 J.S. HIST. 45, 45 (1995).

31. *Id.* at 49.

32. *Id.* at 50.

least of a slave's concerns, causing their hair to tangle easily or to be covered in a wrap for protection.<sup>33</sup>

Third, Black hair *was* slave hair. "The hair was considered the most telling feature of negro status, more than the color of the skin."<sup>34</sup> The "negro status" was that of a sub-human with the very hair being characterized with non-human qualities such as wool or bush or cotton.<sup>35</sup> By their hair you could know them, because distinguishing a free Black from a slave was almost immediate by looking at their hair.<sup>36</sup> Fourth, "[o]nce the feminine beauty ideal was characterized as requiring 'long straight hair, with fine features,' . . . White slave owners sought to pathologize African features like dark skin and kinky hair to further demoralize the slaves, especially the women."<sup>37</sup> If hair is a woman's glory, Black women get none; and the Blacker<sup>38</sup> the woman, the less the glory. In other words, Blacks of lighter complexion were generally biracial (mixed with Whites), and with that came a texture of hair more closely aligned and more easily shaped to the hairstyles worn by White women and considered acceptable in White society.<sup>39</sup> As a result, mixed-race slaves not only were assigned less grueling (though not necessarily less cruel) jobs in closer proximity to White persons, but could more easily pass as free and held higher status than free non-mixed Black women.<sup>40</sup> For these reasons, Black women sought to straighten and contort their hair to approximate White women's hair.

White hairstyles were a means of accessing opportunities not only under slavery but especially after it was abolished.<sup>41</sup> Black hair was a badge of slavery where it reminded, and was used to remind, the now free person of her former status. In fact, it did more than

33. *See id.*

34. BYRD & THARPS, *supra* note 15, at 17-18.

35. *See id.* at 14.

36. *Id.* at 14-15. Frequently runaway slave advertisements described the slave's hair as a telling feature. *Id.* at 17-18.

37. *Id.* at 14.

38. That is, the more undiluted the racial makeup, showing in a darker skin, more-coiled hair, and stronger Afrocentric features.

39. BYRD & THARPS, *supra* note 15, at 17.

40. *Id.* at 17-20.

41. *Id.* at 21-22.

remind, as hair was used as a tool to maintain the status quo.<sup>42</sup> Jim Crow laws required both public and private separation of facilities used by Black men and women from *Plessy v. Ferguson*<sup>43</sup> in 1896 to *Brown v. Board of Education*<sup>44</sup> in 1954. The legal micromanagement and oppression of Black individuals was so distinct and severe that there were laws that made it unlawful (1) “for a negro and a white person to play together or in company with each other in any game of cards,”<sup>45</sup> (2) for any white woman to “suffer or permit herself to be got with child by a negro or mulatto,”<sup>46</sup> and (3) for a colored person to serve as a barber to white women or girls.<sup>47</sup> In a nationally sanctioned racial climate, racial identifiers such as Black hair were critical. As noted, hair was and is the primary identifier or more definitive identifier of race, even above skin color. To illustrate, a biracial woman (mixed Black/White) may have the same skin color as a White person; however, if her hair texture is not straight, the world will know she is Black. With Blackness then being gauged not just by color but also by hair texture, Black women arguably experienced a treatment even worse than Black men, both during and after slavery.

Black women were subjected to the worst situations in employment under Jim Crow laws. Between 70 and 90 percent of all Black women workers were agricultural and domestic employees without minimum wages or Social Security. Black women generally received one-third to one-half of white women’s pay, which was one-third to two-thirds of white men’s pay.<sup>48</sup>

The simple truth is that Black women have been straightening their hair for the last 150 years because it was and has continued to

---

42. *Id.* at 22.

43. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (establishing the separate but equal doctrine where racial segregation was held to be constitutional and the Civil Rights Act of 1875 was held unconstitutional).

44. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (establishing that separate but equal facilities were inherently unequal).

45. BIRMINGHAM, ALA., CODE § 597 (1930).

46. See *Separate Is Not Equal, Select Jim Crow Laws*, SMITHSONIAN NAT’L MUSEUM AM. HIST., <http://americanhistory.si.edu/brown/resources/pdfs/unit1/3-jim-crow-laws.pdf> (last visited Jan. 1, 2019) (referencing 1924 Maryland law).

47. *Id.* (referencing 1926 Atlanta, Georgia, law).

48. BLACK WOMEN IN AMERICA: AN HISTORICAL ENCYCLOPEDIA 637 (Darlene Clark Hine ed., 1993).

be a necessity for survival in the American economy. The quest for “good hair” has been so visceral that today it is a multi-billion-dollar industry. To illustrate, at the turn of the twentieth century, the first female millionaire in the United States made her fortune from the Black hair industry in products designed to straighten the texture of Black hair. Products were marketed on a philosophy of “cleanliness and loveliness[,]”<sup>49</sup> which in turn seemed to emphasize the underlying mirrored view that Blacks were unclean, unkempt, uncivilized, ignorant, unintelligent, uneducated, and infantile. For the majority of Black women, confronting this stereotype was not met with the type of resistance seen briefly during the civil rights movement with the afro puff, but through conformity and nonthreatening behavior, part of which meant getting rid of their nappy hair.<sup>50</sup>

The next section more closely examines the stereotypes surrounding Black women's hair and how they have impacted workplace grooming policies and standards.

*B. Clean, Neat, and Kept Versus Extreme, Eye-Catching, and Unprofessional: Workplace Grooming Policies Reflect Racial Stereotypes*

The problem with workplace grooming standards is not that they tend to be arbitrary, or even that they generally apply to all employees regardless of personal circumstance; rather, their arbitrariness tends to be rooted in gender and racial stereotypes that put minority women at a disadvantage. Ashleigh Rosette and Tracy Dumas call this the “hair dilemma.”<sup>51</sup> They explain that women in general are in a dilemma trying to balance how they exhibit qualities generally associated with males (such as competitiveness, ambition, and competence) with their femininity (even if a bias exists among female characteristics where “conventionally attractive women fare better . . . than less attractive women”).

49. *Madam C.J. Walker*, BIOGRAPHY (Apr. 2, 2014), <https://www.biography.com/people/madam-cj-walker-9522174>.

50. BYRD & THARPS, *supra* note 15, at 26. *Nappy* is another derogatory term for describing Black hair which suggests that the hair is uncontrollable, unkempt, naturally coarse, and tightly coiled similar to *bushy* or *wooly*.

51. Rosette & Dumas, *supra* note 9, at 407–08; see Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1183 (1994).

Minority women must add the extra burden of negotiating how to present their racial identities.<sup>52</sup> While women in general must balance femininity and attractiveness, “traditional American culture views Black women as less feminine and less attractive, as well as less intelligent, competent, and dependable in their professional positions than their White counterparts.”<sup>53</sup> “[T]he hairstyle dilemma for Black women is both uniquely racialized and gendered,”<sup>54</sup> or, the Black woman occupies an intersection between race and gender made unique by her hair. The fact is that a Black woman has hair that is different from all other races of women, so the hairstyles suited to women generally are not naturally suited to Black women.

Implicit association tests have provided strong evidence that negative racial stereotypes are frequently associated with Blacks, and the studies mentioned previously demonstrate a similar phenomenon as it pertains specifically to Black hair.<sup>55</sup> “In a society where straight, long, fine hair (compared to [B]lack hair) is viewed not only as the norm but as the ideal for women, tightly coiled [B]lack hair easily becomes categorized as unacceptable, unprofessional, deviant, and too political.”<sup>56</sup> Angela Onwuachi-Willig chronicles just how pervasive the reach of these stereotypical grooming standards are, describing instances of grooming policies in predominantly Black business schools banning Black textured hairstyles such as braids, dreadlocks, and other unusual hairstyles because in the White-dominated corporate world, Black hairstyles are not accepted.<sup>57</sup>

The rejection of Black textured hairstyles is seen in grooming policies explicitly banning braids, locks,<sup>58</sup> and unusual hairstyles,

---

52. Hamermesh & Biddle, *supra* note 51, at 1183 (women workers with below-average looks receive a pay penalty, as compared to women workers with above-average looks); Rose Weitz, *Women and Their Hair: Seeking Power Through Resistance and Accommodation*, 15 GENDER & SOC'Y 667, 673 (2001); see also Avera Martin, *The Hatred of Black Hair Goes Beyond Ignorance*, TIME (Aug. 23, 2017), <http://time.com/4909898/black-hair-discrimination-ignorance/>.

53. Rosette & Dumas, *supra* note 9, at 409.

54. *Id.* at 410.

55. See *supra* notes 21, 22, and 29.

56. *Another Hair Piece*, *supra* note 9, at 1107.

57. *Id.* at 1109.

58. *Locks or locs* is a different name for dreadlocks but is generally used to denote the hairstyle without any regard to the religious significance of dreadlocks as worn as a part of the religious observance of Rastafarianism.

or in policies that seem generic by banning unkempt, unclean, or extreme hairstyles.<sup>59</sup> The question almost seems so simple: What makes a braided or locked hairstyle extreme and unusual? The answer is equally simple. For centuries, Black women have been forcing their hair into the dominant White culture, so when they stop, it is a very unusual thing and may seem extreme to others who are not Black. Additionally, when explicit racism gives way to subtle racism, things that were once outright inhuman, degrading, and disgusting, become unusual, extreme, and unconventional.

This is how society reconciles itself in incorporating empowerment with oppression. One of the ways that contradiction is dealt with is through denial. That denial helps to maintain the stability of the society rather than root out all injustices. Most people like to believe they live in a just society that supplies adequate equal protections, but many societies tend to leave the most subtle and insidious harms just outside of change's reach.<sup>60</sup> Perhaps it is the subtlety of certain types of discrimination that precludes meaningful change. So it is with Black hair. The societal discrimination against Black hair is one of those insidious harms (though it is certainly not subtle nor is the impact on Black women minor).

---

59. See, e.g., DEP'T OF THE ARMY, AR 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA 3-2(d) (2014), <https://www.army.mil/e2/c/downloads/337951.pdf> ("Examples of hairstyles considered to be faddish or exaggerated and thus not authorized for wear while in uniform, or in civilian clothes on duty, include, but are not limited to, locks and twists (not including French rolls/twists or corn rows); hair sculpting (eccentric directional flow, twists, texture, or spiking); buns or braids with loose hair extending at the end; multiple braids not braided in a straight line; hair styles with severe angles; and loose unsecured hair (not to include bangs) when medium and long hair are worn up."); see also EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (grooming policy prohibiting "excessive hairstyles"); Hollins v. Atl. Co., 188 F.3d 652 (6th Cir. 1999) (hairstyle not to be too "eye-catching" or "different"); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (employees must cover hairstyles that are "unconventional"); Helene Cooper, *Army's Ban on Some Popular Hairstyles Raises Ire of Black Female Soldiers*, N.Y. TIMES (April 20, 2014), <https://www.nytimes.com/2014/04/21/us/politics/armys-ban-on-some-popular-hair-styles-raises-ire-of-black-female-soldiers.html?mcubz=0> (U.S. Army policy banning braids and locks as extreme (although later revised after significant public outcry)); Breanna Edwards, *U.S. Navy Ends Ban on Dreadlocks for Women*, ROOT (July 13, 2018, 9:24 AM) [https://www.theroot.com/u-s-navy-ends-ban-on-dreadlocks-for-women-1827571585?utm\\_medium=socialflow&utm\\_source=theroot\\_twitter](https://www.theroot.com/u-s-navy-ends-ban-on-dreadlocks-for-women-1827571585?utm_medium=socialflow&utm_source=theroot_twitter); Christopher Mele, *Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html>.

60. AMERICAN DENIAL: THE TRUTH IS DEEPER THAN BLACK AND WHITE (Vital Pictures 2015), <http://byu.kanopystreaming.com/video/american-denial>.

While society may have incorporated its longstanding bias against Black hair as almost normal, it is the law that is expected to act as a check against societal bias and make opportunities, particularly in employment, equal. Paulette Caldwell said it best when she said “Hair seems to be such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy.”<sup>61</sup> Title VII has failed to achieve that mandate for Black women.

### III. SHOULD BLACK WOMEN GIVE UP ON TITLE VII?

This Part proceeds by first outlining the protections and promises of Title VII as well as the Equal Employment Opportunity Commission (EEOC) guidelines on workplace grooming policies. It then tracks the jurisprudence on civil rights protections relating to Black women’s hair. This is presented in a mixed chronological fashion, exploring not only the major cases but also the scholastic commentary and development in light of those cases. Finally, a reimagining of jurisprudence on Black hair is suggested based on the analysis of undue burden.

#### *A. Forty Years of Loss: Title VII, the EEOC, and Black Hair*

##### *1. Title VII and the EEOC guidelines*

Black women seeking a remedy for workplace discrimination based on their hairstyle have turned to Title VII of the Civil Rights Act of 1964. Title VII provides in relevant part that it is unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

---

61. Caldwell, *supra* note 9, at 370.

adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>62</sup>

Additionally, a claim may be brought under § 1981 of the Civil Rights Act, which generally protects persons' equal rights in making and enforcing contracts.<sup>63</sup>

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>64</sup>

A 1991 amendment made it clear that § 1981 prohibits discrimination not only in the formation of contracts but also in the contractual relationship in employment. While there is no definition for race given in the statute,<sup>65</sup> the EEOC's *Compliance Manual* notes that Title VII's prohibition of race discrimination generally encompasses, among other things, (1) a person's physical characteristics or "[e]mployment discrimination based on a person's physical characteristics associated with race, such as a person's color, hair, facial features, height and weight";<sup>66</sup> and (2) culture or

62. 42 U.S.C. § 2000e-2(a)(1)-(2) (2012).

63. *Id.* § 1981(a).

64. *Id.*

65. Neither Title VII nor the EEOC contain a definition of *race*. However, the Office of Management and Budget (OMB) provides five racial categories: (1) American Indian or Alaska Native; (2) Asian; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White; and one ethnicity category, Hispanic (or Latino).

66. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Section 15: Race & Color Discrimination*, in EEOC COMPLIANCE MANUAL (Apr. 19, 2006) [hereinafter EEOC COMPLIANCE MANUAL], <https://www.eeoc.gov/policy/docs/race-color.html#VIIA>. Other bases for racial discrimination expressly prohibited in Section 15-II of the *Compliance Manual* include (1) ancestry employment, meaning that "[d]iscrimination against a person because of his or her ancestry can violate Title VII's prohibition against race discrimination"; (2) discrimination based on race-linked illnesses, "[f]or example, sickle cell anemia is a genetically-transmitted disease that affects primarily persons of African descent"; (3) "[p]erception: [e]mployment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself"; (4) "[e]mployment discrimination against an individual because of his/her association with someone of a particular race"; (5) "discrimination against a subgroup of persons in a racial group because they have certain attributes in addition to their race. Thus, for example, it

employment discrimination because of cultural characteristics related to race or ethnicity.<sup>67</sup> Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech.<sup>68</sup>

The EEOC notes that "[a]pppearance standards generally must be neutral, adopted for nondiscriminatory reasons, consistently applied to persons of all racial and ethnic groups, and, if the standard has a disparate impact, it must be job-related and consistent with business necessity."<sup>69</sup> Specifically with hair, while employers' grooming policies can mandate clean, neat, and well-groomed hairstyles, those rules should respect racial differences in hair textures and should be applied in such a way that they do not disparately impact Black women from wearing hairstyles that are natural to their hair textures. Two key prohibitions include (1) policies that prevent Black women from wearing their hair in an afro style<sup>70</sup> and (2) employers applying neutral rules more restrictively to hairstyles worn by Black women.<sup>71</sup>

Outside of these two limited prohibitions, however, the federal courts have routinely disagreed with the EEOC and have consistently denied that Black women have a claim for racial discrimination when they have been terminated or lost out on a job opportunity because of wearing their hair in a hairstyle suitable to their natural texture.

---

would violate Title VII for an employer to reject Black women with preschool age children, while not rejecting other women with preschool age children." *Id.*

67. *Id.*

68. See *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005) ("Names are often a proxy for race and ethnicity.").

69. EEOC COMPLIANCE MANUAL, *supra* note 66.

70. See *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 166-67 (7th Cir. 1976) (recognizing a valid Title VII claim where plaintiff alleged that her employer fired her because of her afro hairstyle).

71. See *Hollins v. Atl. Co.*, 188 F.3d 652, 661 (6th Cir. 1999) (holding that a reasonable jury could find Title VII violation where company prevented Black female from wearing hair in a "finger waves" hairstyle and in other hairstyles deemed "too eye-catching," while not subjecting White women to such standards, even though the company admitted Plaintiff's hairstyles complied with company policy that hairstyles be neat, well-groomed, and safe).

## 2. Cases and commentaries on Black hair discrimination: unequal treatment and disparate impact

Following the civil rights movement and the passage of the Civil Rights Act, many Black women began embracing their natural hair and wearing textured hairstyles.<sup>72</sup> When their employers pushed back on these hairstyles, Black women sought refuge in the law. Instead, they realized that federal courts would do very little to offer any protection.

Plaintiffs can either bring a claim based on a disparate treatment analysis or a disparate impact analysis. This essentially means that the employer either deliberately treated members of the protected class differently compared to others and that this difference in treatment was because of an intent to discriminate,<sup>73</sup> or they execute policies that seem neutrally applied on the face but have an effect that is felt more harshly by the protected group.<sup>74</sup> Typically plaintiffs have brought disparate impact cases because the grooming policies have been facially neutral or categorically prohibit Black-textured hairstyles despite who might be attempting to wear them.

The most prominent case is perhaps *Rogers v. American Airlines*, decided in 1981, where the court essentially ruled that American Airlines could legally have grooming policies that were discriminatory to Black hair.<sup>75</sup> Renee Rogers was an airport operations agent for American Airlines. American Airlines had a policy prohibiting women from wearing all-braided hairstyles.<sup>76</sup> Rogers

---

72. See, e.g., Chime Edwards, *The Impact of the 'Fro in the Civil Rights Movement*, ESSENCE (Feb. 10, 2015), <https://www.essence.com/holidays/black-history-month/impact-fro-civil-rights-movement/>.

73. This is the standard developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), which outlined a prima facie case for discrimination under Title VII that has been more broadly applied to most discrimination cases. The Court stated that a plaintiff must show four elements: (1) "that [s]he belongs to a racial minority"; (2) "that [s]he applied and was qualified for a job for which the employer was seeking applicants"; (3) "that, despite [her] qualifications, [s]he was rejected"; and (4) "that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*

74. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971) (holding that an employment test, though facially neutral, had a disproportionate effect in blocking the advancement of Black persons working there who were previously only allowed certain jobs).

75. *Rogers v. Am. Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

76. *Id.*

sued, claiming that the policy discriminated against her on the basis of her sex and race, because cornrows were of historical importance to Black women's expression of identity.<sup>77</sup>

Previously, it had been inferred in *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.* that a woman fired for changing her hairstyle to an afro might have a valid Title VII claim.<sup>78</sup> The *Rogers* court broached the topic in dicta and steered clear of pronouncing that the afro was, in fact, a protected hairstyle. Disappointingly, the afro was only discussed as a means to unequivocally pronounce that other Black textured hairstyles like the braid could be disallowed without any regard to the effect or burden it might have on Black women. The court simply saw no burden:

Plaintiff may be correct that an employer's policy prohibiting the "Afro/bush" style might offend Title VII and section 1981. But if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics . . . an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice. An all-braided hairstyle is an "easily changed characteristic," and, even if socio-culturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.<sup>79</sup>

Furthermore, the court callously noted that even if it were racial discrimination, it was not so big a deal.<sup>80</sup>

I agree with the many articles that have analyzed and condemned the *Rogers* decision. Some outright indict it,<sup>81</sup> showing how steeped it was in blindness and bias.<sup>82</sup> The court's usage of the word

---

77. *Id.* at 232.

78. *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976). One "might" have a valid Title VII claim because, though not a plaintiff specifically, she filed a class suit seeking to represent all women, and Black women cannot represent White women.

79. *Rogers*, 527 F. Supp. at 232 (internal citations omitted).

80. *Id.* at 232–33.

81. *The Braided Uproar*, *supra* note 9, at 129–47 (a fulsome discussion on why *Rogers* is wrong, noting, among other things, that neutral policies can be discriminatory and that hair was of legal concern to equal opportunities).

82. Caldwell, *supra* note 9, at 369. ("[B]y legitimizing the notion that the wearing of any and all braided hairstyles in the workplace is unbusinesslike, *Rogers* delegitimized me and my professionalism.")

“bush”<sup>83</sup> in describing the afro style serves as proof of the implicit bias that permeates the opinion.

In truth, antidiscrimination law should contemplate and attack the negative associations that are behind behavioral manifestations of policies that deem Black textured hairstyles as extreme and unprofessional. Undoubtedly, hair grooming policies that would prohibit all women from wearing straight hair, but that would rather require all women to wear a braid, for example, would not be seen as trivial when most women do not have the racial hair qualities that support easily wearing hairstyles such as a braid.

There has been no shortage of scholarly analysis and advice since *Rogers* on how to frame and legally combat workplace discrimination against Black hair. The next few paragraphs provide only a sampling of the scholarly literature in response to the *Rogers* decision. Michelle Turner suggested an expansion of Title VII to accommodate that a mix category (sex with race) produces unique discriminatory vulnerabilities that must be accounted for.<sup>84</sup> Angela Onwuachi-Willig argues that the court simply has incorrect assumptions about Black women's hair, and but for these assumptions, Black women “would already be protected from employers' prohibitions of braided, locked, and twisted hairstyles, just as Black men (as well as Black women) are protected from certain employer restrictions on Afro hairstyles.”<sup>85</sup> Onwuachi-Willig continued to say that the courts' decision is because of a lack of thought and consideration for the nature of Black women hair. If they only thought carefully of the historical and contemporary bias and oppression against women because of the texture of their hair, “they would view employer bans on natural hairstyles to be just as discriminatory as employer bans on brown skin, another proxy for race and another proxy that can be altered with money, time, effort, and damage to the psyche.”<sup>86</sup>

---

83. *Rogers*, 527 F. Supp. at 232.

84. *The Braided Uproar*, *supra* note 9, at 156. (“Congress should amend the language of Title VII to include the phrase ‘or any combination thereof’ to the text of the statute to make the law more inclusive. This approach would explicitly allow cases that allege discrimination based upon multiple categories to proceed without having to choose among the group statuses proscribed by the statute.”)

85. *Another Hair Piece*, *supra* note 9, at 1104.

86. *Id.*

Onwuachi-Willig argued that even if braided hair is not immutable, it is still rooted in the biological makeup of Black women, and grooming policies banning braids required Black women to make a biological change.<sup>87</sup> Finally, she argued that

Lawyers need to explain and courts need to recognize the implicit demands for changes in hair structure and texture that currently exist in employers' prohibitions of black women's natural hairstyles. Moreover, the law needs to move beyond viewing these required changes to black women's hair structure and texture as reasonable.<sup>88</sup>

Paulette Caldwell asserted that the court did see Black women's hair in exclusively biological of terms. Drawing a strict immutability line—between biology (the afro) and cultural artifice (braids, etc.)—allowed the court to avoid the “basic elements of antidiscrimination analysis” such as group history, the oppressed position of the group over time, current position in relation to others, and if employment practices are perpetuating the subordination.<sup>89</sup>

Turner was basically prophesying when she wrote that Black women would not be able to reach successful verdicts until society in general, and judges in particular, discontinue holding “unenlightened views on cultural issues.”<sup>90</sup> She argued that discriminatory hair policies seem neutral because those policies expect all to assimilate to the dominant hair culture and hairstyles of White individuals.<sup>91</sup> She further argued that judges in turn have seen these claims as trivial because they too have approached the issue with an assimilationist perspective.<sup>92</sup>

Since *Rogers*, federal courts have consistently denied claims from Black women when argued under a disparate impact analysis, essentially ignoring the scholarly contributions published in its wake. The next few cases are testament.

In *McBride v. Lawsaf, Inc.*, decided in 1996, a recruitment officer was prohibited from referring qualified applicants with braided

---

87. *Id.*

88. *Id.*

89. Caldwell, *supra* note 9, at 377.

90. *The Braided Uproar*, *supra* note 9, at 119.

91. *Id.* at 129–30.

92. *Id.* at 119.

hairstyles to their clients.<sup>93</sup> After repeated contestation of the policy, she notified her managers that she would file a complaint with the EEOC.<sup>94</sup> She was terminated the same day for inappropriate and unprofessional conduct.<sup>95</sup> The court dismissed the case, noting that the “underlying charge of discrimination is revealed to be not only meritless but also unreasonable.”<sup>96</sup> The opinion stated that “[a]s a matter of law, an employer’s grooming policy prohibiting a braided hair style is not ‘an unlawful employment practice.’”<sup>97</sup> The court did not even seem to really consider the fact that the employer in the case was merely an employment referral agency and the weeded-out applicants would not actually be working for them. The agency had no legitimate reason to refuse to refer qualified candidates with braided hairstyles. In other words, the weeding of applicants based on ethnic hairstyles was a direct result of the agency’s racial bias.

In another case, *Pitts v. Wild Adventures, Inc.*, Patricia Pitts’s 2008 claim was dismissed on summary judgment – not even making it to trial.<sup>98</sup> In her ordeal, her White female supervisor disapproved of her cornrows, telling her to get her hair done in a “pretty style”<sup>99</sup> – meaning her cornrows were *ugly* (emphasis added). At first she complied to avoid any trouble by putting in extensions (fake hair) and twisting her hair so that it would hang loosely down.<sup>100</sup> Again, her supervisor disapproved, noting that it looked too much like dreadlocks.<sup>101</sup> Pitts refused to change her hair after this second reproach because the company had no written policy on hairstyle grooming.<sup>102</sup> The company then issued an official hair policy that banned “dreadlocks, cornrows, beads, and shells.”<sup>103</sup> The plaintiff

---

93. *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*1 (N.D. Ga. Sept. 19, 1996).

94. *Id.*

95. *Id.*

96. *Id.* at \*2.

97. *Id.*

98. *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*1 (M.D. Ga. Apr. 25, 2008).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

did not comply with the grooming policy and was later terminated for not complying with her supervisor's request, and for other negligence on the job.<sup>104</sup> The court ruled that she had no claim under Title VII because she had not filed a report with the EEOC and thus she had not exhausted her administrative remedies.<sup>105</sup> The court did however consider her claim under § 1981. Categorically, the court stated that “[g]rooming policies are typically outside the scope of federal employment discrimination statutes because they do not discriminate on the basis of immutable characteristics.”<sup>106</sup> Or, that despite the history of Black hairstyles and the nature itself of Black hair being natural for textured styles, the bottom line was that a braid or lock could be straightened or pulled out and so was changeable to adhere to the policy.

But federal antidiscrimination statutes were not drafted on the basis of mutable (changeable) and immutable (unchangeable) characteristics of a group, but rather because of the historical oppression of certain groups based on characteristics unique to those groups. This is evident given that religion is a protected class and is in no way immutable. In fact, individuals are not born as any religion, though parents may raise them in one that they may come to adopt. Nevertheless, people convert and change religions. So too it may be argued that sex is not an immutable characteristic—even without factoring in transgendered individuals, the hermaphrodite phenomenon is not uncommon.<sup>107</sup> Skin color is also not immutable or unchangeable and can be darkened or lightened with ease.<sup>108</sup> White women tan to shades that are similar to those of some Black women, and Black and Brown<sup>109</sup> women lighten (whiten or bleach) their skin to achieve the complexion of White women. Interestingly, as noted earlier, the distinguishing racial feature between a White

---

104. *Id.* at \*3.

105. *Id.* at \*4.

106. *Id.* at \*5.

107. For example, there are individuals who are born biologically as one sex on the inside and another on the outside, or who were not assigned the proper or predominant sex at birth.

108. See generally, Maya Allen, *The Reality of Skin Bleaching and the History Behind It*, BYRDIE (May 4, 2018), <https://www.byrdie.com/skin-bleaching> (discussing the phenomenon of changing skin color from darker to lighter; particularly its rise in post-colonial predominantly Black nations).

109. *Brown* is a term referring to women of color not of African descent, for example, East Indian women.

woman who tans and a Black woman who bleaches, is the difference in their hair texture. For this reason, when Rachel Dolezal—a White civil rights activist—began identifying as Black, her transition was not complete without manipulating her hair texture to approximate a Black coiled hair texture.<sup>110</sup>

Five years after *Pitts*, in *Campbell v. Alabama Department of Corrections*, Campbell's employer had a grooming policy that did not allow women to wear dreadlocks, even though it allowed men to wear dreadlocks.<sup>111</sup> Andrea Campbell brought both a gender and racial discrimination claim.<sup>112</sup> The court dismissed the case, noting that "[n]ot all conduct by an employer that negatively affects an employee should be deemed an adverse employment action. The action must be more than 'some de minimis inconvenience. . .'"<sup>113</sup> Contrast that with Michelle Turner's 2001 article referring to the grooming policies against Black hair as "spirit murder."<sup>114</sup>

While appearance choices may seem to be trivial "micro-discrimination," the cumulative impact of such small incidents of discrimination amounts to "spirit murder." . . .

Workplace prohibitions against braids are not the only, and perhaps not even the most substantial, incidents of racism and sexism that a Black woman can and often does experience. Instead, such policies contribute to an overall sense that Black women do not deserve the same respect and opportunity that Whites and men are given.

Policies which have the effect of excluding Black women from the workplace contribute to other acts of racism and sexism that combine to assault the psyche of Black women.<sup>115</sup>

One outlier that raised a valid Title VII claim was the 1999 *Hollins v. Atlantic Co.* case, where Eunice Hollins sued her employer for its

110. Scott Stump, *Rachel Dolezal: 'I Don't Identify as African-American, I Identify as Black,'* TODAY (Mar. 27, 2017, 8:01 AM), <https://www.today.com/news/rachel-dolezal-i-don-t-identify-african-american-i-identify-t109654>.

111. *Campbell v. Ala., Dep't of Corrs.*, No. 2:13-CV-00106-RDP, 2013 WL 2248086, at \*1 (N.D. Ala. May 20, 2013).

112. *Id.*

113. *Id.* at \*2 (quoting *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441, 1452 (11th Cir. 1998)).

114. *The Braided Uproar*, *supra* note 9, at 145.

115. *Id.* at 145–46 (quoting Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987)).

extreme micromanagement of her hairstyles.<sup>116</sup> Her ordeal is worth highlighting to illustrate just how significant Black hair is. It certainly was not insignificant to her Atlantic Co. supervisors. The company's grooming policy noted that "[w]omen should have a neat and well groomed hair style."<sup>117</sup> When Hollins came to work in finger waves (a short wavy hairstyle lying neatly on the head), her supervisor noted that even though the style was neat, well groomed, and safe, it was unacceptable because it was "too different" and "eye catching."<sup>118</sup>

Hollins resisted and re-wore the hairstyle but was informed that if she did not like the policy, she should work elsewhere.<sup>119</sup> She changed her hairstyle. Later she was told that she had to have any hairstyle she wore preapproved by presenting pictures.<sup>120</sup> When she showed her supervisors a picture of a braided style, they said no.<sup>121</sup> She did this for over a year until she went to work in a ponytail—a style that many White women under the same supervisor routinely wore. She was told that the ponytail was "too drastic."<sup>122</sup> Multiple work performance reviews noted that she had failed to wear appropriate hair styles.<sup>123</sup> She finally filed a complaint with the EEOC and at some point after was told that if her hair was "that important" to her, she should work somewhere else.<sup>124</sup> Supervisors also lowered her performance evaluation solely on the basis of her hairstyle.<sup>125</sup>

Surprisingly, even after asserting a disparate treatment case, the district court dismissed the case on summary judgment.<sup>126</sup> The Sixth Circuit heard her appeal and held that a reasonable jury could find a Title VII violation where a company prevented a Black female from wearing hair in a finger waves hairstyle and in other

---

116. *Hollins v. Atl. Co.*, 188 F.3d 652, 661 (6th Cir. 1999).

117. *Id.* at 655.

118. *Id.* For an example of finger wave hairstyles see Image Search of Finger Wave Hairstyles, GOOGLE, <https://www.google.com> (search "finger wave hairstyle black women").

119. *Hollins*, 188 F.3d at 655.

120. *Id.* at 656.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 657.

125. *Id.*

126. *Id.*

hairstyles deemed “too eye catching,” while not subjecting White women to those standards—that is, White women were never reprimanded for wearing the same hairstyle Hollins wore and never had to seek preapproval for any of their hairstyles that could have been deemed eye catching.<sup>127</sup>

Not one year later, in 2000, a district court in Louisiana ruled in *Santee v. Windsor Court Hotel Ltd. Partnership* that it was not racially discriminatory to prohibit Black women from wearing blonde hair, while White women were allowed to wear blonde hair.<sup>128</sup> That might have seemed to be textbook disparate treatment, but the court reasoned that the case was about hair color, a mutable characteristic, so information on the individual (that is, of what race) who could wear blonde hair was immaterial to the case.<sup>129</sup> The simple truth that the court chose to ignore is that the only difference between a Black woman wearing blonde hair and a White woman wearing blonde hair is the race of the two women.

Combining all the failure, lessons, and wisdom of the past forty years, *EEOC v. Catastrophe Management Solutions* in 2014 again challenged the persistent refusal to acknowledge the racial discrimination in grooming policies that targeted Black-textured hairstyles.<sup>130</sup> This time the EEOC itself sued. Chastity Jones had applied for a job at a call center and, after she passed the initial interview and was offered a job, one of the human resource officers asked her if she was wearing dreadlocks. She said she was, and the officer noted that even though *hers* were neat, locks had a tendency to look untidy. The company had a grooming policy which provided that “[a]ll personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image . . . . [H]airstyles should reflect a business/professional image. No excessive hairstyles . . . .”<sup>131</sup> This they interpreted to ban dreadlocks.

In a press release, the EEOC stated that Catastrophe’s prohibition on Jones’ locks and the broader imposition of its grooming

127. *Id.* at 660.

128. *Santee v. Windsor Court Hotel Ltd. P’ship*, No. Civ.A.99-3891, 2000 WL 1610775, at \*3 (E.D. La. Oct. 26, 2000).

129. *Id.* at \*4.

130. *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139 (S.D. Ala. 2014).

131. *Id.* at 1140.

policies to target hairstyles more traditionally associated with Black women and men “discriminated against African Americans based on physical and/or cultural characteristics.”<sup>132</sup> The EEOC further explained that in its view

[The] litigation is not about policies that require employees to maintain their hair in a professional, neat, clean, or conservative manner . . . . It focuses on the racial bias that may occur when specific hair constructs and styles are singled out for different treatment because they do not confirm to normative standards for other races. . . .

. . . Generally there are racial distinctions in the natural texture of [B]lack and non-[B]lack hair. The EEOC will not tolerate employment discrimination against African-American employees because they choose to wear and display the natural texture of their hair, manage and style their hair in a manner amenable to it, or manage and style their hair in a manner differently from non-[B]lacks.<sup>133</sup>

The court noted that

the outcome . . . is clear. . . . Title VII prohibits discrimination on the basis of immutable characteristics, such as race, sex, color, or national origin. A hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic. Therefore, the complaint fails to state a plausible claims [sic] for relief.<sup>134</sup>

It is telling that the court, in its analysis that Title VII was only meant to protect against characteristics that are immutable, conveniently omitted religion from the list of protected classes for which Title VII offers protection against discrimination.

The EEOC made a mixed biological and cultural argument that even if hair is immutable, dreadlocks were a natural outgrowth of Black hair that was “a reasonable and natural method of managing the physiological construct of Black hair[.]”<sup>135</sup> Or in other words, while dreadlocks (or a twist or braid as less-permanent styles) can

---

132. Press Release, U.S. Equal Emp. Opportunity Commission, Mobile Catastrophic Insurance Claims Company Sued by EEOC for Race Discrimination over Hair Policy (Sept. 30, 2013), <https://www1.eeoc.gov/eeoc/newsroom/release/9-30-13j.cfm> (internal quotation marks omitted).

133. *Id.* (quoting C. Emanuel Smith and Delner Franklin-Thomas).

134. *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1143.

135. *Id.* at 1144.

be changed – by cutting them off and allowing the hair to regrow – a dreadlock is a type of hairstyle that naturally comes because of the nature of Black hair. It is the sort of hairstyle that follows the natural growth of the hair because it is prone to interlock on itself because of the tight curls.

To that the court responded that “[n]o amount of expert testimony can change the fact that dreadlocks is [sic] a hairstyle” even if it “is a reasonable result of hair texture.”<sup>136</sup> With this complete dismissal, the court essentially pronounced that the only solution a Black woman could hope for was if she wore her natural hair without it being combed or styled, or if she styled it in an afro (which has the appearance of being not styled). Only the afro is protected. The decision that the afro is not a hairstyle but the only immutable, and therefore protected, way to wear Black hair further showed the blindness of the federal courts to the nature of Black hair. To illustrate, the hair must be teased in a way that gives it an afro style. Black women do not naturally grow afros.

Further, at what point does the afro become too visible/distracting? Where is the line for the professional afro to be drawn? Should it be a small afro or a much larger afro? And how large can a Black woman go before she is disciplined for wearing the only natural hairstyle that is legally protected? If the plaintiff in *Rogers* had worked as a flight attendant with a shorter afro, would the outcome have been different?<sup>137</sup>

In fact, Black hair is more prone to lock than it is to become an afro when left without the grooming that is required to produce a hairstyle. The natural clumping of Black hair produces locks after a while, and this is precisely why locks are seen as truly natural to those who take on that type of grooming.<sup>138</sup>

Further the hair might be worn out in tight curls resembling dreadlocks, such as a twist out. Such a hairstyle allows the hair to

---

136. *Id.*

137. See, e.g., Image Search of Small Afro Hairstyles, GOOGLE, <https://www.google.com/search?q=small+afro>”; Image Search of Large Afro Hairstyles, GOOGLE, <https://www.google.com/search?q=large+afro>”.

138. An afro is teased out, compared to a wash-and-go hairstyle that generally involves no combing or manipulation of the hair. For examples of wash-and-go hairstyles see Image Search of Wash-and-Go Hairstyles, GOOGLE, <https://www.google.com/search?q=wash+and+go+styles>”.

clump to together without forming locks.<sup>139</sup> The reality is that it is only Black women who have had to endure this level of micro-management of a characteristic that is unique to their race. As Wendy Greene laments, the Eleventh Circuit literally split the hair of Black women in order to uphold racial bias prevalent in society.<sup>140</sup> And by doing so completely missed the heart of the argument at the foundation of Black hair discrimination. She notes, “in determining whether to dispense statutory protection,” the query should shift “from ‘whether a person *could* change a particular characteristic’ to ‘whether the characteristic is something that the person *should be required* to change[.]’”<sup>141</sup>

Title VII might seem useless in helping Black women defend themselves against hair discrimination. It is clear that the current jurisprudence will hardly tolerate either a disparate treatment or disparate impact analysis. But should Black women give up on Title VII when it comes to their hair? No. When Title VII was passed in 1964, there were many forms of discrimination that were not contemplated but that courts have since pronounced to fall within the statute’s protections. For example, gender stereotyping was not originally considered sex discrimination, but the reach of Title VII was expanded in the 1989 Supreme Court case *Price Waterhouse v. Hopkins* to include discrimination based on expected gender roles.<sup>142</sup> Justice O’Connor’s concurrence in that case added that the analysis under *Price Waterhouse* would serve as a supplement to the disparate treatment analysis outlined in *McDonnell Douglas Corporation v. Green*.<sup>143</sup>

Further, the EEOC has successfully litigated claims of transgender discrimination under sex discrimination jurisprudence.<sup>144</sup>

---

139. A twist out is when the hair is done in two strand twists, and then the twists are pulled out without being combed out, leaving more definition in the curl pattern. For an example of a twist out see My Natural Sistas, *How to Achieve the Perfect Twist Out Every Time!!!*, YOUTUBE (Apr. 23, 2017), <https://www.youtube.com/watch?v=ZleuXzxXqYE>.

140. *Splitting Hairs*, *supra* note 9, at 992, 1023.

141. *Id.* at 1034 (quoting *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wisc. 2014)).

142. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

143. *Id.* at 261 (O’Connor, J., concurring).

144. *See, e.g.*, *EEOC v. Deluxe Fin. Serv. Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled Jan. 20, 2016); *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 8, 2016), [https://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm) (“The EEOC sued Deluxe

So, too, has sexual harassment been brought under federal civil rights protections.<sup>145</sup> In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court explicitly stated that the language of Title VII was not limited to tangible discrimination, but that Congress intended to “strike at the *entire spectrum* of disparate treatment of men and women.”<sup>146</sup>

Further, intra-sex discrimination only became a part of sex discrimination jurisprudence in 1998 when the Supreme Court ruled that Title VII prohibited discrimination against men by men.<sup>147</sup> In that case, Justice Scalia wrote in the majority opinion that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . .”<sup>148</sup> A reasonably comparable evil to race discrimination is discrimination on the basis of hair texture and textured hairstyles.

Perhaps highlighting the advancements in the jurisprudence of other types of discrimination protected under federal law (for example sex discrimination)—in comparison to the stagnation in

---

Financial Services Corporation, a check-printing and financial services corporation, alleging that after charging party, Britney Austin, began to present at work as a woman and informed her supervisors that she was transgender, Deluxe refused to let her use the women's restroom in violation of Title VII. The Commission further alleged that supervisors and coworkers subjected her to a hostile work environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her. As part of a settlement agreement, Deluxe agreed to pay \$115,000 in damages. Furthermore, a three-year consent decree provides that Deluxe will not make exclusions in their healthcare benefits plan for medically necessary care based on transgender status, will revise employment policies including a commitment to preventing unlawful sex discrimination, and will provide employee training explaining that unlawful sex discrimination includes discrimination based on sex-stereotypes, gender-identity, and transgender status.”). *But see*, Laura Jarrett, *Sessions Says Civil Rights Law Doesn't Protect Transgender Workers*, CNN POLITICS (Oct. 5, 2017, 11:58 AM) <http://www.cnn.com/2017/10/05/politics/jeff-sessions-transgender-title-vii/index.html> (noting that Attorney General Sessions issued a memo on behalf of the Justice Department, in which they determined that Title VII does not protect transgendered persons from employment discrimination). At last update (July 2016), the EEOC had four LGBT-related discrimination cases pending; it will be interesting to see if federal courts abandon their trajectory toward protecting LGBT persons under sex discrimination law in light of this. U.S. EQUAL EMP. OPPORTUNITY COMMISSION, *supra*.

145. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (resolving whether the Civil Rights Act prohibited the creation of a “hostile work environment” or if it was limited to tangible economic discrimination in the workplace).

146. *Id.* (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added).

147. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

148. *Id.* at 79.

Black hair discrimination—only reinforces the point that the harms to Black women as a group remain largely invisible. What is clear, however, is that the same arguments are unlikely to produce the desired results. The courts are not convinced. They may never be. But perhaps it is time to look beyond unequal treatment and disparate impact analysis and begin to push an unequal burden analysis typical of sex and sex-plus discrimination cases.

*B. Crafting a New Jurisprudence Based on Undue Burden*

There is nothing in the drafting of Title VII or § 1981 that demands that race, color, sex, religion, or national origin be mutually exclusive. It is telling that when it comes to Black women's hair, federal jurisprudence has rejected that a Black woman might have a combined claim based on both her race and sex. In *Lam v. University of Hawaii*, the Ninth Circuit held that the lower court erred when it treated the claim of an Asian woman in terms of either race *or* sex.<sup>149</sup> They further held that the lower court should have considered whether discrimination occurred because of the plaintiff's race *and* sex combined.<sup>150</sup> A combined consideration of both sex and race might help to highlight the difference in treatment and impact that Black women face in presenting a *professional* look at work.

Even beyond *unequal treatment* and *disparate impact*, argumentation should push toward a greater emphasis on an *unequal burden* analysis, which more appropriately combines intersections in discrimination analysis. This might be applied as between Black women and women of other races such as in sex-plus cases where a pregnant woman might have a different burden, or even unequal treatment, compared to non-pregnant women. Additionally, it might be applied as between Black women and men.

To illustrate, in *Jespersen v. Harrah's Operating Company, Inc.*, a White female plaintiff sued her employer for its grooming policy, which required women to wear makeup and wear their hair down. The court ruled that it would not take notice of the burden the woman faced in complying with the policy because she had not

---

149. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561-62 (9th Cir. 1994).

150. *Id.*

presented the necessary statistics to back up her claim, that following the grooming policy was significantly harder or unreasonable for her.<sup>151</sup> The court reasoned that it was not unreasonable for her to wear her hair down or to wear makeup.

But what if Jespersen were a Black woman being asked to comply with a policy that mandated her hair always be worn down? We have already established that Black hair does not naturally grow downward because the curl pattern creates a density that makes the hair go outward and upward. Weighing the hair down involves styling it in braids, dreadlocks, twists, or significantly altering the natural curl pattern through straightening with heat and chemicals. All of this is at no insignificant burden in time and cost. While personal grooming for women tends to be more than for men, the cost of hair grooming for women to comply with a "hair down" policy is significantly higher for Black women than for other races of women.<sup>152</sup> "Black women, in particular, spend an estimated \$7.5 billion annually on beauty products, shelling out 80% more on cosmetics and twice as much on skin care as their non-Black counterparts."<sup>153</sup> Even the cost at individual hair salons is more with one woman noting that she pays twenty dollars more than non-Black women to get her hair done, a practice generally known as the *black tax*.<sup>154</sup> A prominent Black female blog notes:

Some of our favorite styles are some of our costliest.— hundreds, if not thousands of dollars annually. Take a minute to crunch the numbers and when you do, consider the following:

For Weaves and Braids

- > the number of packs of hair you will need for your head
- > the type of hair you want (synthetic vs. human)
- > how often you want the weave or braids redone
- > the labor that your stylist charges you

---

151. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109–12 (9th Cir. 2006).

152. Taylor Bryant, *How the Beauty Industry Has Failed Black Women*, REFINERY29, (Feb. 27, 2016, 4:00 PM), <http://www.refinery29.com/2016/02/103964/black-hair-care-makeup-business>.

153. *Id.*

154. Ashley Weatherford, *Why Do My Salon Visits Cost More Because I'm Black?*, THE CUT (Nov. 19, 2014), <https://www.thecut.com/2014/10/why-do-my-haircuts-cost-more-because-im-black.html>.

## For Perms

- > the cost and frequency of a retouch (for perms)
- > the cost and frequency of a wash & set (for perms)

## For Locs

- > the cost of one-time fee for beginning locs
- > the cost and frequency of streaming, deep conditioning, and styling

Don't forget to tack on the cost of hair products, accessories, tip, food, transportation and childcare!<sup>155</sup>

All of this amounts to a burden that is beyond comprehension. As the dissent in *Jespersen* noted:

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.

Alternatively, Jespersen did introduce evidence that she finds it burdensome to *wear* makeup because doing so is inconsistent with her self-image and interferes with her job performance. My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden. This presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. Makeup, moreover, touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort, sometimes even allergic reactions, for someone unaccustomed to wearing it.<sup>156</sup>

What is more, Black women tend to be criticized and ostracized for not adjusting to societal norms and expectations and expending the great costs in maintaining hairstyles that are appropriate. Rosette and Dumas chronicle the extraordinary burden that

---

155. Kara Stevens, *Split Ends: Black Women, Money, and the Cost of Hair Care*, FOR HARRIET (Nov. 9, 2012), <http://www.forharriet.com/2012/11/split-ends-black-women-money-and-cost.html#ixzz51rCDL2B7>.

156. *Jespersen*, 444 F.3d at 1117 (internal citation omitted).

conforming to straight hairstyles places on Black women. They note that most Black women straighten their hair at a cost of approximately \$50 million a year on chemical straighteners.<sup>157</sup> All of this comes at a huge emotional cost from forcing their being into an unnatural state and takes no account for the texture or socio-cultural relevance of hair to Black identity and to a feeling of Black empowerment in a world that is geared toward Black sociocultural subordination.

Even more than the cost, the risk of damage to Black hair is astounding and severe. Chemical and heat damage can produce balding and burns on the scalp.<sup>158</sup> The fact that the *Jespersen* court did not even consider the burden on Black women as a part of the class of women is telling about the innate invisibility of the hardships that the bias and stereotypes against Black hair cause to Black women. Nevertheless, as research is growing on the costs, risks, and burdens in maintaining straightened styles, Black women might be able to prove the discriminatory nature of policies that force them to straighten their hair.

Another avenue that should be explored is seeking to raise the bar at the state level. The next Part briefly analyzes state-level protections for Black hair and advocates for social change at this level.

#### IV. STATE EMPLOYMENT DISCRIMINATION PROTECTION: TOWARD A HIGHER STANDARD

While federal laws provide the baseline of protections available, many states have offered protections that go beyond Federal Civil Rights Acts, as well as expanded the list of protected classes. No state has offered protections for Black textured hairstyles beyond what is already contained in federal law, but this does not mean that doing so is impossible. Rather, the absence might highlight the lack of awareness and focus at the state level—if not shared complacency. Minority interests have usually been best protected at the federal level with the highest form of civil engineering being

---

157. Rossette & Dumas, *supra* note 9, at 411.

158. See GoodHairMovie, *Good Hair ft. Chris Rock—HD Official Trailer*, YOUTUBE (July 31, 2009), <https://www.youtube.com/watch?v=1m-4qxz08So>.

getting a case brought up to the level of the Supreme Court where a positive decision becomes the law of the land. The famous legal civil rights activists routinely attempted to get cases appealed up to the Supreme Court.<sup>159</sup> The zeitgeist might be making this type of legal activism more difficult, as civil rights activism becomes more diametrically opposed and as judicial views at the highest level lean toward conservatism.<sup>160</sup>

Smaller safe spaces may be carved out at the local political level rather than the federal judiciary. This is not unheard of, although it would require a coordinated and persistent campaign. There are many areas in which protections have been extended. For example, as of 2016, twenty states explicitly offered protections against discrimination based on sexual orientation and gender identity.<sup>161</sup> Twenty-one states offered protections against discrimination based on marital status.<sup>162</sup> Minnesota and North Dakota protect against discrimination based on public assistance status.<sup>163</sup> Minnesota also provides protections for medical marijuana usage and creed in addition to religion.<sup>164</sup> New Mexico offers protections for ancestry in addition to national origin.<sup>165</sup> North Carolina offers protection for persons with the sickle-cell trait or hemoglobin C.<sup>166</sup> Oklahoma has protections based on genetic information.<sup>167</sup> Oregon has a host

---

159. E.g., the education desegregation legal battles.

160. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Currently, the Supreme Court has a majority of justices with conservative views.

161. *Employment Discrimination Law in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Employment\\_discrimination\\_law\\_in\\_the\\_United\\_States#State\\_law](https://en.wikipedia.org/wiki/Employment_discrimination_law_in_the_United_States#State_law) (last visited Jan. 1, 2019) (States and territories include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Utah, Vermont, Washington, Guam, and Puerto Rico); see, e.g., *Employees and Job Applicants Are Protected from Bias*, CAL. DEP'T FAIR EMP. & HOUSING, <https://www.dfeh.ca.gov/Employment/> (last visited Jan. 1, 2019) (including gender identity and sexual orientation as classes protected from discrimination).

162. *Employment Discrimination Law in the United States*, *supra* note 161 (States include Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Washington, and Wisconsin, with the District of Columbia.).

163. MINN. STAT. § 363A.08(1) (2012); N.D. CENT. CODE § 14-02.4-01 (2017).

164. MINN. STAT. § 363A.08(1) (2012).

165. *State Laws on Employment-Related Discrimination*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx> (last visited Jan. 1, 2019).

166. *Id.*

167. *Id.*

of factors upon which employment discrimination is prohibited including, among others, breathalyzer tests, degrees in theology and religious occupations, victims of domestic violence or sexual crimes, and credit history.<sup>168</sup> Michigan disallows discrimination based on height, weight, and marital status.<sup>169</sup> Federal legislation was never meant to be the pinnacle of protections that may be applied but rather is a baseline. It was contemplated that states in their autonomy could offer protections well above the federal fundamentals.

In state legislatures, passing laws that protect against racial discrimination based on hair is more feasible given the ability to assert more targeted pressure. State-level protections have proven to provide protection against discrimination across a wider cross section of subgroups; protections for Black hair is ripe for more localized social engineering; and doors for change may very well open to the legislature and not to the judiciary.

## V. CONCLUSION

Racial discrimination against Black women is real and based on deep-rooted and long-standing racial biases and implicit stereotypes. Moving forward requires understanding this history and its contemporary effects on the status of Black women in employment. While federal antidiscrimination law prohibits discrimination on the basis of race, federal courts have routinely denied that these protections extend to the vast majority of Black textured hairstyles — with the only potential exception being the afro.

Antidiscrimination suits against workplace grooming policies that outright ban dreadlocks, twists, braids, and cornrows, or policies that require neat, clean, kept, and professional styles (that are then interpreted to exclude dreadlocks, twists, braids, and cornrows), have largely been unsuccessful. There have been essentially forty years of failure with no change of pattern in sight. This does not mean that Title VII itself is problematic or that Black women should give up on it. Instead, new ways of arguing must be engendered that reshape the jurisprudence of Title VII. Arguments closer to sex discrimination jurisprudence might make some

---

168. *Id.*

169. *See* MICH. COMP. LAWS § 37.2202(1)(a) (2013).

headway in securing protections. Additionally, Black women and allies should put more focus on state protections and lobby at the state legislative level to carve out safe spaces and provide examples that might then be argued at the federal level to end the indignity and discrimination that Black women face daily in the workplace.

*Crystal Powell\**

---

\* J.D., April 2018, J. Reuben Clark Law School, Brigham Young University. Thank you to Professor Michalyn Steele for supervising this Note, providing value insights, and encouraging my growth in civil rights law. Thank you to my friends and family for their support and especially my wonderful son, Reuben Jude Alexander Britton.