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ESSAY

BLACK WOMEN'S HAIR AND NATURAL HAIRSTYLES IN THE WORKPLACE: EXPANDING THE DEFINITION OF RACE UNDER TITLE VII

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Despite the Equal Employment Opportunity Commission's ("EEOC") interpretation of Title VII as including cultural characteristics often associated with race or ethnicity, Black women have not successfully litigated the freedom to wear their hair in natural hairstyles in the workplace. Courts have held that racial discrimination in the workplace must be based on immutable characteristics to trigger Title VII. Black women who deviate from the norm face significant barriers in the workplace. The bias against Black women's hair, which has been perceived as unprofessional, adds additional burdens on Black women leading to pressure to conform to Eurocentric beauty standards. This pressure has had significant detrimental financial, health, and professional implications for Black women. This Essay contributes to debates on employment discrimination by arguing for the expansion of the definition of Title VII's racial discrimination to include natural hair and natural hairstyle discrimination following the Supreme Court's reasoning in Title VII sex discrimination cases. This Essay outlines the

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history of Black hair, its meaning in Black culture, and how implicit bias against Black hair has negatively affected Black women in the workplace. This Essay also provides a description of seminal cases on Black Women's hair in the workplace and the immutability standard's flaws. Lastly, this Essay makes a case for expanding Title VII's definition of racial discrimination, drawing on the principle of reasonably comparable evils.

INTRODUCTION

Upon entering the professional world, students are often told to be themselves because interviews are a way for firms to determine whether they will fit into the firms' culture. Implicit or unconscious bias plays a role in determining how they will be judged in the workplace context. They are encouraged to be themselves but do not understand that this "self" will be judged based on proximity to the accepted norm—straight white men. Deviating from the norm can be a liability in the workplace. In order to penetrate influential networks and take advantage of promotion opportunities, a person has to be perceived as "fitting in" with the dominant firm culture.[1] Additionally, how others view them has implications on how their non-visual qualities are assessed, including their ability to do the work assigned to them or how professional they look.

For Black women, who differ from this norm because of their skin color and gender, being themselves includes bringing their natural hair to these firms.[2] Black women's hairstyle choices can exacerbate the perceptions of dissimilarity or deviation from the norm.[3] Many Black women know that the more different they appear to be, the more

[1] 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, 412 (2007) (explaining that socio-psychology research has provided strong evidence showing that being viewed as different can be a liability in the workplace); Steven Reidy & Meher Kanigiri, How Are Ethnic Hairstyles Really Viewed in the Workplace?, Cornell Univ. ILR School (2016) (explaining that the more someone is perceived as "fitting in" with the firm culture "the better their workplace outcomes, and the greater the degree of deviation from the group the worse the outcome," and thus workers whose identity differs from the dominant firm culture face two choices: assimilating to the dominant firm culture or being excluded).

[2] Ra'Mon Jones, What the Hair: Employment Discrimination Against Black People Based on Hairstyles, 36 Harv. BlackLetter L.J. 27, 29 (2020) (defining natural hair "as hair that has not been altered by chemical straighteners, including relaxers and texturizers").

[3] See Rosette & Dumas, supra note 1, at 413.

"uncomfortable" their white colleagues will be with them, and the harder it will be for them to achieve full acceptance at work.[4] Hence, Black women are routinely motivated to achieve the looks of their white counterparts.[5] Black hair texture is a physical characteristic and ethnic indicator of African descent, different from all other races' hair because of its shape and composition.[6] However, throughout history, Black hair textures and natural hairstyles have been considered "unprofessional," "unkempt," and "messy."[7]

As a young Black woman born and raised in Cameroon, a majority Black country in Africa, I had never considered my natural hair or protective hairstyles,[8] such as box braids, cornrows, and Senegalese twists, to be unprofessional, unkempt, and messy. They have always been a part of my identity. As a young girl, a lady would "cornrow" or "thread" my hair every two weeks on Saturday mornings, sometimes adding beads to the hairstyle.[9] As I grew older, I was able to get box braids and other natural hairstyles. Changing one's hair was the norm. Adorning one's hair with beads, cowries, scarves, and other accessories was not unconventional. No one would frown upon me for wearing cornrows for two weeks and then wearing my hair in braids the following weeks. Women in the workforce in Cameroon would always wear their hair in intricate hairstyles.[10] It is not until I moved to the United States that I

[4] Id. at 412.

[5] Id.; see Jena McGregor, More States Are Trying to Protect Black Employees Who Want to Wear Natural Hairstyles at Work, Wash. Post (Sept. 19, 2019), https://www.washingtonpost.com/business/2019/09/19/more-states-are-trying-protect-black-employees-who-want-wear-natural-hairstyles-work/ [https://perma.cc/S26M-ABL6] (noting that Minda Harts, founder of a career development company for women of color, stated that she wears her hair straight 99 percent of the time because she has seen how others look upon clients wearing braids and natural hairstyles in corporate America).

[6] Kim Carter, Workplace Discrimination and Eurocentric Beauty Standards, 36 GPSOLO 36, 36 (2019); Venessa Simpson, What's Going on Hair?: Untangling Societal Misconceptions that Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection, 47 Sw. L. Rev. 265, 265 (2017).

[7] See Carter, supra note 6, at 36.

[8] "Protective hairstyles" are also called natural hairstyles. They can be used interchangeably.

[9] Cornrows are also called plaits. Threading one's hair means wrapping one's hair in thread.

[10] The historian John Thornton wrote that when Europeans first came into contact with western Africa in the late fifteenth century, they remarked on the many hairstyles African wore. There were "various combinations of braids, plaits . . . shaved areas, and areas cut to different lengths . . . creating a stunning effect." See Shane White & Graham White, Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries, 61 J. Southern Hist. 45, 51 (1995).

realized that others might perceive my hair as unprofessional, unkempt, and messy.

Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination on the basis of "race, color, religion, sex or national origin."[11] Workplace discrimination based on natural hair and natural hairstyles is not one of the protected classes enumerated in Title VII. Because courts have determined that racial discrimination in the workplace must be based on immutable characteristics to trigger Title VII, a Black woman who is discriminated against because she wears her hair in a natural hairstyle is not protected under the law in most states.[12] Afros have been the only recognized "immutable" hairstyle that a Black woman can wear in the workplace.

This Essay argues that the Supreme Court should expand the definition of racial discrimination under Title VII to include natural hair and natural hairstyle discrimination, dropping the immutability standard. Part I provides a brief history of Black hair and its meaning in Black cultures and explores the prejudice against Black women's hair in the workplace. Part II provides background information on Title VII of the Civil Rights Act of 1964 and discusses prominent case precedent establishing that Title VII's protections against racial discrimination in the workplace did not extend to hair discrimination against Black women. Part II also addresses the Equal Employment Opportunity Commission's (EEOC) interpretation of racial discrimination under Title VII, the immutability standard used by courts, and objections to the standard. Lastly, Part III describes Title VII discrimination cases and the Supreme Court's expansion of the definition of Title VII's sex discrimination through a series of seminal sex discrimination cases. Additionally, Part III applies the Supreme Court's reasoning in Title VII sex discrimination cases to hair discrimination, adopting the "reasonably comparable evils" principle enunciated in these cases to argue for the expansion of the definition of racial discrimination under Title VII.

[11] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 254.
[12] See infra Section III.C.

I. BLACK HAIR: ITS MEANING IN BLACK CULTURE AND PREJUDICE AGAINST BLACK WOMEN'S HAIR IN THE WORKPLACE

A. Black Hair History and its Meaning in Black Culture

In African civilizations, hair served a broad range of purposes, including aesthetic, defining social status, class distinction and identification, enhancing self-image and esteem, and cultural and religious purposes.[13] It is the texture of African hair that allowed it to be designed and shaped in different ways.[14] As an instrument for identity, ethnic group societies in West Africa, including the Mendes and the Mandingo, would use their hair to communicate among themselves.[15] Hairstyles worn by community members helped identify a person's age, rank in the community, ethnic identity, marital status, and religion, among other things.[16] For example, powerful hunters and warriors would wear a patch of hair that would grow on a spot in the middle of their head infused with potent medicine to boost their body physically and spiritually.[17] Black hair is also associated with religion and spirituality.[18] Given its location at the highest point of the body, hair was said to be the channel for spiritual interaction with God.[19] It was held that God would set the occasions that would then primarily determine hairstyles or hair patterns.[20] In the Yoruba culture, children born with knotted hair (i.e., dreadlocks) were regarded as particularly favored with wealth.[21] The child's name would reflect that belief—"Dada-olowo eyo," which means a person who is "divinely blessed with cowries (money) to attract wealth to their family."[22] Consequently, their head would not be washed during

[13] See Sharon Adetutu Omotoso, Gender and Hair Politics: An African Philosophical Analysis, 12 J. Pan African Stud. 5, 5 (2018); Ciera Berkemeyer, New Growth: Afro-Textured Hair, Mental Health, and the Professional Workplace, 44 J. Legal Prof. 279, 284 (2020); see also Rumeana Jahangir, How Does Black Hair Reflect Black History?, BBC News (May 31, 2015), https://www.bbc.com/news/uk-england-merseyside-31438273 [https://perma.cc/XZF2-UUN2]; White & White, supra note 10, at 49; Reidy & Kanigiri, supra note 1.

[14] See White & White, supra note 10, at 50.

[15] See Omotoso, supra note 13, at 9.

[16] Id.

[17] Id. at 10.

[18] See id. at 11; Berkemeyer, supra note 13, at 284.

[19] See Jahangir, supra note 13; see also Omotoso, supra note 13, at 12.

[20] See Omotoso, supra note 13, at 11.

[21] Id.

[22] Id.

the naming ceremony because the hair had "special powers."[23] Even if the hair was washed, it would not be combed.[24]

Exposure to Western cultures through the slave trade, colonialism, neo-colonialism, and globalization have transformed the meaning of Black hair in Africa and around the world, with African cultures coming to be viewed as unconventional and uncivilized.[25] Slavery, a traumatic experience for Africans both physically and psychologically, contributed to the obliteration of Africans' culture and identity.[26] Europeans had traded and communicated with Africans for a long time and thus knew the complexity and the importance of Black hair.[27] European captors would shave African slaves' heads to rob them of their humanity and break their spirit before they boarded slave ships or upon their arrival to the Americas.[28] Nevertheless, slaves would use their hair and hairstyles, specifically braids, as a carrier of messages to communicate the number of roads leading to freedom or places of meeting to escape servitude.[29] They would also wear myriad hairstyles, engaging in the same cultural activity as their African counterparts.[30]

Eighteenth-century America viewed the physical traits of African Americans, including their hair, negatively.[31] "To have Black hair was to have slave hair," which was considered to be the quintessential trait of "negro" status.[32] Europeans did not consider Black hair to be hair at all.[33] After the abolishment of slavery in much of the world, including the United States, several Black people adjusted their hair to fit in with

[23] Id.

[24] Id.

[25] Id. at 12.

[26] See Berkemeyer, supra note 13, at 284.

[27] Tabora A. Johnson & Teiahsha Bankhead, Hair It Is: Examining the Experiences of Black Women with Natural Hair, 2 Open J. Soc. Sci. 86, 87 (2014).

[28] See Berkemeyer, supra note 13, at 284; Johnson & Bankhead, supra note 27, at 87.

[29] See Berkemeyer, supra note 13, at 284.

[30] See White & White, supra note 10, at 51 (explaining that "[d]escriptions of hair arrangements contained in eighteenth-century runaway advertisements indicate that, within the obvious limits imposed by an oppressive system, African American slaves were engaged in the same cultural activity").

[31] See White & White, supra note 10, at 58 (explaining that Black people "were not supposed to be proud of their hair, as they or their ancestors had been in Africa; any suggestion that they were would have sharply challenged complacent white cultural assumptions").

[32] Crystal Powell, Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward, 2018 BYU L. Rev. 933, 940–41 (2019) (explaining that "negro status" was the status of a "sub-human" with natural hair linked to non-human qualities, such as wool or bush).

[33] See Johnson & Bankhead, supra note 27, at 88.

mainstream white society.[34] To achieve that, Black people would smooth their hair texture, sometimes using chemical mixtures.[35] With the 1960s Civil Rights Movement in the United States and protests against racial segregation and tyranny, the afro became a "symbol of rebellion, pride and empowerment," and a prominent affirmation of African roots and Black beauty.[36] Colonialism caused a similar ambivalence toward Black hair in Africa. African men and women alike were caught in a predicament—they either had to assimilate to colonialist culture or adhere strictly to their cultural ideals.[37] In modern Africa, recent trends show a tendency towards the use of hair extensions and chemical application among women due to continued exposure to Western culture through the media and globalization and the desire to gain social acceptance.[38] Nonetheless, hair continues to serve many of its original purposes in Africa, and intricate African hairstyles continue to be seen across the continent.

Today, more than just serving its traditional purposes, African hairstyles have come to serve new purposes. Cutting one's hair, once associated with the mourning of close relatives in some ethnic groups, has now become a time-saving hairstyle.[39] Similarly, protective styles provide a way for Black women to protect their hair. Due to its texture and shape, Black hair is more susceptible to dryness and breakage than straight hair.[40] Protective styles enable Black women to maintain healthy and

[34] See Jahangir, supra note 13.

[35] See Omotoso, supra note 13, at 13–14 (noting that as of 2005, African-Americans spent $81.6 million per annum on chemical products (especially relaxers)); Chante Griffin, How Natural Black Hair at Work Became a Civil Rights Issue, JSTOR Daily (July 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/ [https://perma.cc/H9P4-6J79] (explaining that Madam C.J. Walker, a Black woman, invented the hot comb used to straighten Black hair, providing Black women an "avenue for increased societal acceptance in an era when minstrel songs mocked" African Americans' hair texture).

[36] Jahangir, supra note 13; see also Reidy & Kanigiri, supra note 1.

[37] See Omotoso, supra note 13, at 12.

[38] See id. at 6.

[39] See id. at 13.

[40] See Berkemeyer, supra note 13, at 281 (explaining that "when follicles curve sebum is not able to travel the length of the hair. Because moisture is harder to retain in [curly and kinky] textures, the natural hair community often turns to protective styling to maintain healthy, moisturized hair" because it reduces continuous manipulation of hair, promotes growth retention, and protects the ends of the hair).

moisturized hair.[41] They also allow Black women to reduce daily manipulation of their hair, which helps to prevent breakage.[42]

However, biases, implicit or explicit, toward African attributes continue to persist today, especially in the United States, resulting in Black people seeking to conform to European beauty standards by "straitening—or removing the kink from—[their] Black hair."[43] Some people still consider Black hair to be "unacceptable, unprofessional and even ugly."[44] Despite the Civil Rights Act of 1964, which ended segregation in public areas and prohibited employment discrimination, the social pressure to mimic European hair has persisted in the United States, affecting Black women's hair-grooming decisions.[45]

B. How Implicit Bias Against Black Hair Has Affected Black Women in the Workplace

While not all employers have grooming policies that expressly address Black hair and protective hairstyles in the workplace, there remains a perception that Black hair is unprofessional and unkempt.[46] Multiple studies have documented implicit bias against Black hair.[47] While a person's unconscious beliefs may not always align with their conscious

[41] See id. at 281.

[42] See Simpson, supra note 6, at 266.

[43] Carter, supra note 6, at 36.

[44] Reidy & Kanigiri, supra note 1; see also Rosette & Dumas, supra note 1, at 407.

[45] See Griffin, supra note 35 (noting that the Act created the EEOC, which operates "as the lead enforcement agency in the area of workplace discrimination" and explaining that when the EEOC was introduced, the federal government's main concern was to ensure that individuals be granted equal access to public workplaces—it did not envisage that Black hair would require equal access as well); Kalen Kennedy, My Natural Hair Is Unprofessional: The Impact of Black Hairstyles on Perceived Employment-Related Characteristics 8 (2020) (Master's Thesis, Marquette University), https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1580&context=theses_open [https://perma.cc/D9EN-H43Q](explaining that Black women are aware of the general public's perceptions of their hair and go to great lengths to avoid being perceived negatively because of their hair and hairstyle. This includes "spending hours preparing their hair for work . . . spending large amounts of money on hair supplies, avoiding physical activity, or avoiding going outdoors when it is raining").

[46] See Berkemeyer, supra note 13, at 282 (stating that even where grooming policies do not specifically target Black women's hair, implicit bias may play a significant role in crafting grooming policies that seem to be racially neutral but that adversely affect Black professionals and Black employees); Kennedy, supra note 45, at 8.

[47] All the studies that I found related to implicit bias against Black hair. It would be rare for someone to make overtly racist comments about Black women's hair in the workplace since that could open the door to liability in some states. Depending on whether the style is the Afro, it could also be a Title VII violation.

beliefs,[48] when it comes to Black women's hair, the result remains the same—pressure on Black women to style their hair in a way that conforms to Eurocentric hair standards. Participants in a study were asked to link a hairstyle to different traits.[49] They associated straightened hair with "clean, professional, feminine, and pretty," afro with "wild, radical, and solidarity," and dreadlocks with "drug use, ghetto, nasty, and gross."[50]

The Perception Institute's "Good Hair" study examined the explicit and implicit views about Black women's hairstyles.[51] The study comprised of a national sample of 4,163 women and men who were asked about their opinions concerning textured hair—"hairstyles that exhibit a prototypically Black hair texture"—and smooth hair.[52] The research's findings revealed that participants viewed Black women's textured hair as "less beautiful, sexy, attractive, and professional than smooth hair."[53] Women participants describe "good hair" as "straight, smooth, silky, and soft, not frizzy or 'kinky.'"[54] Black women perceived their textured hair as socially stigmatized, a view which is confirmed by white women's devaluation of textured hair.[55] Some women went as far as linking 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."[56] Both Black and white women thought that afros are considered

[48] See Laura McLaughlin, Self-Sabotaging: How Implicit Bias May Be Contributing to your "Can't Find Any Women or Diverse Associates" Hiring Problem, ABA (Mar. 31, 2016), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2016/self-sabotaging-how-implicit-bias-may-be-contributing-cant-find-any-women-diverse-associates-hiring-problem/ [https://perma.cc/77XL-23YF]; Melissa Little, Implicit Bias: Be an Advocate for Change, ABA, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/implicit-bias-be-an-advocate-for-change/ [https://perma.cc/WW7H-93PL] (last visited Nov. 18, 2020).

[49] See Kennedy, supra note 45.

[50] Id. at 17.

[51] See Alexis McGill Johnson et al., Perception Inst., The "Good Hair" Study: Explicit and Implicit Attitudes Toward Black Women's Hair (2017), https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf [https://perma.cc/592M-J8KE].

[52] Id. at 4; Kennedy, supra note 45, at 9.

[53] Id.

[54] Johnson et al., supra note 51, at 11.

[55] See Kennedy, supra note 45, at 10; Johnson et al., supra note 51, at 6; see Rosette & Dumas, supra note 1, at 415–16 (Black women "are highly aware that their hairstyles may highlight the fact that they are different and thereby invite negative stereotypes about Black women . . . [and have had to] 'shift so that their hair doesn't blind their employers to their talent'" (citation omitted)).

[56] Johnson et al., supra note 51, at 11.

unprofessional in the United States, indicating a common understanding across races of the innate bias in the United States' conceptualization of professionalism.[57] Black women are also more likely to be sent home from the workplace because of their hair.[58] Similarly, the Hair Implicit Association Test's findings indicated that while most participants, regardless of race, show an implicit bias against textured hair, white men and women displayed stronger levels of implicit bias against textured hair.[59]

II. SEMINAL CASES ON THE ISSUE OF BLACK WOMEN'S HAIR IN THE WORKPLACE AND THE IMMUTABILITY REQUIREMENT

A. Black Women's Inability to Successfully Litigate the Freedom to Wear Their Hair in Natural Hairstyles

Title VII of the Civil Rights Act of 1964 bans employment discrimination based on "race, color, religion, sex and national origin" in making hiring decisions, granting or denying promotions, or determining a person's pay or benefits.[60] In its manual interpreting Title VII, the EEOC, the federal agency responsible for enforcing Title VII, prohibits employment discrimination against a person based on an immutable characteristic associated with race, such as hair texture or certain facial features.[61] The EEOC's interpretation of Title VII also includes "cultural characteristics often linked to race or ethnicity," such as grooming habits provided that "the cultural practice or characteristic does not materially interfere with the ability to perform job duties."[62]

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[57] See Kennedy, supra note 45, at 10.

[58] The CROWN Act, The Official Campaign of the CROWN Act Led by the CROWN Coalition, https://www.thecrownact.com [https://perma.cc/UE6K-XA2X] (last visited May 8, 2021).

[59] See Kennedy, supra note 45, at 10 (hairstyles were categorized as either textured (afro, dreadlocks, twist-out, braids) or smooth (straight, long curls, short curls, and pixie cut)); see also Johnson et al., supra note 51, at 13.

[60] See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 254.

[61] See Facts About Race/Color Discrimination, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/laws/guidance/facts-about-racecolor-discrimination [https://perma.cc/MX5A-VGQQ] (last visited May 8, 2021).

[62] See id.; see also Equal Emp't Opportunity Comm'n, Notice Concerning the Supreme Court's Decision in Vance v. Ball State University, 133 S. Ct. 2434 (2013), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination [https://perma.cc/7CFV-BXSG] (last visited May 8, 2021).

Because of courts' definition of race under Title VII as including immutable characteristics only and their rejection of cultural practices or characteristics arguments, Black women have not successfully litigated the freedom to wear their hair in natural hairstyles in the workplace.[63] In *Rogers v. American Airlines*, Renee Rogers, a Black woman and long-term employee of American Airlines, filed a discrimination lawsuit under Title VII.[64] She maintained that the airline discriminated against her as a Black woman because of its grooming policy that prohibited employees in certain positions from wearing an all-braided hairstyle. The United States District Court for the Southern District of New York held that a neutral employer policy that prohibited an all-braided hairstyle did not constitute racial discrimination. The court suggested that a racially neutral employer's policy would violate Title VII in two circumstances: (1) the policy has a disparate impact on Black women and was not related to the job or consistent with a business necessity or (2) the policy is applied in a discriminatory fashion.[65] The court distinguished American Airlines' policy from policies prohibiting afros because an all-braided is not an immutable characteristic but rather "the product…of artifice" and is an "easily changed characteristic."[66] Lastly, the court rejected Rogers' cultural argument stating that even if the all-braided hairstyle is associated with a particular race or nationality, it is not an impermissible basis for distinctions in applying an employer's policy.

In *EEOC v. Catastrophe Management Solutions*, the Eleventh Circuit affirmed the dismissal of a lawsuit filed by the EEOC on behalf of Chasity Jones, a Black woman who wore dreadlocks, under Title VII.[67] While Catastrophe Management Solution (CMS)'s grooming policy did not explicitly prohibit dreadlocks, CMS's human resources manager, Jeannie Wilson, rescinded Jones's offer after refusing to cut her dreadlocks according to the race-neutral policy. Wilson told Jones that dreadlocks

[63] See Renee Henson, Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and its Effect on Black Women's Natural Hair in the Workplace, 1 Bus., Entrepreneurship & Tax L. Rev. 521, 523 (2017).

[64] 527 F. Supp. 229 (S.D.N.Y. 1988).

[65] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1988); Imani Gandy, Black Hair Discrimination is Real—But is it Against the Law?, Rewire News Group (Apr. 17, 2017), https://rewirenewsgroup.com/ablc/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/ [https://perma.cc/E3JT-8KCM].

[66] *Rogers*, 527 F. Supp. at 232.

[67] 852 F.3d 1018 (11th Cir. 2016).

"tend to get messy."[68] Because the EEOC indicated an intention to proceed under a disparate treatment theory but made disparate impact arguments, the court refused to address EEOC's arguments that CMS's policy disproportionately affected Black employees.[69] The court held that even though dreadlocks were a common way of wearing hair for Black people and suitable for Black hair texture, they were not an immutable characteristic of Black people; hence, there was no violation of Title VII.

These cases suggest that wearing the afro is the only natural hairstyle that a Black woman could legally wear in the workplace.[70] Every other natural hairstyle, including braids, dreadlocks, and cornrows, can be prohibited.[71] As mentioned before, afros have been perceived negatively, which means that Black women's only option is to alter their hair texture to make it straight,[72] imposing significant burdens on Black women.[73]

B. The Case for Dropping the Immutability Requirement

While the EEOC is responsible for enforcing Title VII, courts ultimately have the authority to interpret Title VII's statutory language. The Supreme Court explained that Congress in Title VII did not grant the EEOC the power to promulgate substantive regulations.[74] Hence, the EEOC's manual interpreting Title VII's race as including cultural characteristics often linked to race or ethnicity has not been accorded the same deference as rules that Congress has proclaimed as carrying the force of law.[75] As a result, despite the EEOC's more expansive definition

[68] See *Catastrophe Mgmt. Solutions*, 852 F.3d at 1021.

[69] See id. at 1024 (explaining that a disparate treatment claim requires a plaintiff to show that an employer intentionally discriminated against the plaintiff based on their race, while a disparate impact claim only requires proof that an employment practice has an actual adverse impact on a protected group); 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, 441 (2016) (explaining that a plaintiff can bring either a disparate treatment or disparate impact claim); see Ricci v. DeStefano, 557 U.S. 557, 581 (2009).

[70] See Powell, supra note 32, at 933–34.

[71] Id.

[72] Id.

[73] See infra Section III.B. for a description of the burdens imposed on Black women.

[74] James J. Brudney, Chevron and Skidmore in the Workplace: Unhappy Together, 83 Fordham L. Rev. 497, 505 (2014).

[75] See id.; Theodore W. Wern, Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency, 60 Ohio State Law J. 1533, 1549–50 (1999) (explaining that between 1964 and 1998, the Supreme Court

of "race," courts have historically interpreted race as falling into one of two categories of immutability.

First, the Supreme Court has defined immutable characteristics as those characteristics that their "possessors are powerless to escape or set aside."[76] The Supreme Court considered such traits as suspect, and a legislative classification that is based on such a trait deserves heightened scrutiny by the courts.[77] In *Frontiero v. Richardson*, the Supreme Court defined sex, race, and national origin, as immutable characteristics that are determined "solely by the accident of birth."[78] Similarly, the Eleventh Circuit in *Catastrophe Management Solutions* concluded that immutable traits are defined as physical characteristics that a group of people shares and transmit to the next generations over time.[79] The court considered such characteristics as a matter of birth and not culture.[80]

Courts have also defined immutable characteristics as traits that are "so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[81] The characteristic does not have to be completely fixed to be considered immutable.[82] This notion of immutability has been associated with ideas about privacy and liberty,[83] finding inspiration in Justice Blackmun's dissent in *Bowers v. Hardwick*.[84] Justice Blackmun objected to anti-sodomy laws by drawing on cases protecting the right to privacy. He argued that rights associated with the family are protected, not because of their direct effects on the general public welfare but "because they form so central a part of an individual's life" and are "significant" ways "that individuals define themselves."[85] *Kerrigan v. Commissioner of Public Health* cemented the idea of immutability as an argument about choice—"a person's

deferred to the EEOC's position approximately 54 percent compared to the baseline figure of 72 percent for other administrative agencies).

[76] Jessica A. Clarke, Against Immutability, 125 Yale L.J. 2, 14 (2015).

[77] See id. at 13–14; see Sharona Hoffman, The Importance of Immutability in Employment Discrimination Law, 52 Wm. & Mary L. Rev. 1483, 1510 (2011).

[78] 411 U.S. 677, 686 (1973).

[79] EEOC v. Catastrophe Mgmt. Solutions, 852 F.3d 1018, 1027 (11th Cir. 2016).

[80] See id.

[81] Hoffman, supra note 77, at 1512.

[82] Id.

[83] See Clarke, supra note 76, at 26.

[84] 478 U.S. 186 (1986).

[85] *Bowers*, 478 U.S. at 204–05 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

fundamental right to self-determination."[86] In *Kerrigan*, the Connecticut Supreme Court held that sexual orientation is immutable because the Constitution protects the right of "homosexual adults to engage in intimate, consensual conduct" as an "integral part of human freedom."[87]

However, the *Rogers* court did not find that an all-braided hairstyle was so fundamental to Black women's identities that Black women should not be required to change it.[88] Instead, the court ruled that Rogers's braided hairstyle could easily be changed, and as such, her employer's policy did not constitute a Title VII violation. The court's ruling would then run counter to the Constitution's protection of the right to privacy because it would assume that the Constitution would not protect Rogers's right to choose to wear an all-braided hairstyle. Although *Rogers* implicates Title VII and not the Equal Protection Clause, the notion of immutability from the equal protection context plays a role in employment discrimination law.[89] While the term "immutability" is not mentioned in any employment discrimination statute, including Title VII, courts have adopted its concept from the equal protection context to interpret the scope of statutory prohibitions on discrimination.[90] Beyond the courtrooms, immutability-based ideas have influenced discourses about which characteristics should be prohibited bases for discrimination.[91]

Courts should dismiss both definitions of immutability because they are fundamentally flawed. By defining immutable traits as accidents of birth in natural hair and hairstyles discrimination cases, the Eleventh Circuit ignored "basic elements of antidiscrimination analysis."[92] Such elements include the group's history, patterns of oppression of the group that may help define its social and economic position, the group's current position relative to that of other groups in society, and whether

[86] See Clarke, supra note 76, at 26–27 (citing Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 438 (Conn. 2008)) (explaining that "cases on the new immutability hold that, if a trait is not innocent in the sense of being an accident of birth, it must be innocent in the sense of being an 'integral part of human freedom'").

[87] Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 438 (Conn. 2008) (citing *Lawrence*, 539 U.S. at 576–77.

[88] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1988) Rogers, an American Airlines employee whose duties consisted of extensive passenger contact, had worn an all-braided hairstyle at work against American Airlines' grooming policy.

[89] See Clarke, supra note 76, at 31.

[90] See id. at 29.

[91] See id. at 30–31.

[92] Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365, 377 (1991).

employment practices perpetuate the subordination of the individual or group.[93] The Eleventh Circuit overlooked that African Americans are descendants of slaves who were forced to come to the United States under extremely abhorrent conditions. Before their arrival to the United States and after they were in the United States, their natural hair and natural hairstyles were an integral part of their identity.[94]

The Eleventh Circuit disregarded the patterns of oppression against African Americans since their arrival in the United States and their current position relative to that of other groups. Black individuals have been discriminated against since the inception of the United States in every aspect of their lives, including in the healthcare system. For example, Black women were subjected to non-consensual medical experiments during slavery.[95] Jim Crow laws restricted their civil rights, and they were not protected against rape in some states.[96] Today, Black individuals' social and economic position is no better than other racial or ethnic groups. The poverty rate for Black people is 21.2 percent, although Black individuals only represent 13.4 percent of the U.S. population.[97] On the other hand, the poverty rate for white individuals is 9 percent, and they represent 76.3 percent of the population.[98]

The Eleventh Circuit did not consider that employment practices can perpetuate the subordination of Black individuals. Several employment policy decisions are made without a Black person's input.[99] In fact, "whites hold a disproportionate share of business ownership and decision-

[93] See id.

[94] See infra Part I.

[95] Cynthia Prather et al., Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity, 2 Health Equity 249, 251–52 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6167003/ [https://perma.cc/MDJ2-NFDQ] (describing experimental reproductive surgeries performed on enslaved Black women during slavery).

[96] See id. at 252.

[97] See Kaiser Fam. Found., Poverty Rate by Race/Ethnicity (2019), https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/N6VP-AF8E]; U.S. Census Bureau, Quick Facts, https://www.census.gov/quickfacts/fact/table/US/IPE120219 [https://perma.cc/C357-JR7Q].

[98] See id.

[99] See Taylor Mioko Dewberry, Title VII and African American Hair: A Clash of Cultures, 54 Wash. U. J.L. & Pol'y 329, 348 (2017).

making power within corporate structures."[100] Additionally, upper management consists primarily of non-Black individuals. Black people account for only 3.2 percent of the senior leadership roles at large companies, and there are only three African American CEOs at Fortune 500 companies today.[101] Consequently, individuals to whom "racial identity is not a central life experience" have promulgated many supposedly race-neutral policies, including grooming policies.[102] And studies have shown that white men and women displayed stronger levels of implicit bias against textured hair.[103]

Courts should also reject the "fundamental to the identities" definition of immutability. Rogers and Jones would have likely succeeded under this definition of immutability because their natural hair and natural hairstyles are so fundamental to Black women's identities that they should not be required to change them. However, this definition has some flaws. First, this definition of immutability masked moralizing judgments about what is fundamental to a group, who gets to decide what is fundamental to say group, and what ought to be protected under Title VII.[104] Another issue is the notion of "fundamental" itself. Why is it that a trait or characteristic must be viewed as fundamental before finding that it is protected under Title VII? Anti-discrimination law's underlying predicate is that people should be judged on the basis of their qualifications and not based on extraneous identity traits, such as race, disability, and sex.[105] Lastly, another problem with this definition of immutability is that it does not incorporate any limiting principle, which could make it difficult for judges and the public to accept arguments based on it.[106] Unlike the definition of immutability that is restricted to traits that are accidents of

[100] See Barbara Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 Yale L.J. 2009, 2036 (1995).

[101] See Khristopher J. Brooks, Why So Many Black Business Professionals Are Missing from the C-Suite, CBS (Dec. 10, 2019, 9:14AM), https://www.cbsnews.com/news/black-professionals-hold-only-3-percent-of-executive-jobs-1-percent-of-ceo-jobs-at-fortune-500-firms-new-report-says/ [https://perma.cc/T6HS-V98T].

[102] See Dewberry, supra note 99, at 348.

[103] See Kennedy, supra note 45, at 10; Johnson et al., supra note 51, at 13.

[104] See Clarke, supra note 76, at 33–35.

[105] See Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 Calif. L. Rev. 1, 11-16 (2000) (discussing the concept of blindness in antidiscrimination law).

[106] See Clarke, supra note 76, at 45.

birth, this definition does not have any apparent limits on which traits are fundamental to a group.[107]

III. EXPANDING TITLE VII'S DEFINITION OF RACIAL DISCRIMINATION TO INCLUDE NATURAL HAIR AND NATURAL HAIR DISCRIMINATION AS A FORM OF RACIAL DISCRIMINATION

A. The Supreme Court's Extension of the Definition of Title VII's Sex Discrimination over the Years

Title VII prohibits an employer from treating an employee unfavorably because of their sex.[108] The EEOC has interpreted Title VII's sex discrimination as discrimination based on sexual harassment, sexual orientation, and gender identity.[109] The Supreme Court's expanded view of sex discrimination aligned with the EEOC's interpretation after the Court overruled *Willingham v. Macon Telegraph Publishing Co*.

In *Willingham*, the Fifth Circuit held that a plaintiff must show sex discrimination based on an immutable trait. The employer's grooming policy required employees, men and women, who came into contact with the public to be neatly dressed and groomed following the standards traditionally accepted in the business community.[110] The plaintiff was denied employment solely because he did not have a short haircut as required of male employees. The plaintiff argued that since "short hair is stereotypically male, requiring it of all male applicants" violated Title VII.[111] The Court stated that though the legislative history is inconclusive, it is unlikely that Congress intended for its prohibition of sexual discrimination to have "significant and sweeping implications."[112] The Court then concluded that congressional action was required to read Title VII as barring discrimination based on sexual stereotypes.

However, in *Price Waterhouse v. Hopkins*, the Supreme Court ruled that Congress intended for its prohibition of sexual discrimination to have significant and sweeping implications and held that employment

[107] See id.

[108] See Sex-Based Discrimination, Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/sex-based-discrimination [https://perma.cc/7CZ7-8NS2] (last visited Jan. 21, 2021).

[109] Id.

[110] See Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1087 (5th Cir. 1975).

[111] Id. at 1089.

[112] Id. at 1090.

discrimination based on sex stereotypes is illegal sex discrimination under Title VII. The Court indicated that Title VII's prohibition against discrimination based on a statutorily protected class is not limited to protecting only those characteristics of the class that may be viewed as immutable.[113] The employee, Ann Hopkins, alleged that her employer, the accounting firm Price Waterhouse, denied her a promotion to the partnership because her gender presentation defied the firm's view of how a woman should look and act. For instance, one partner told Hopkins that she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[114] While the characteristics that Price Waterhouse identified as reasons for not promoting Hopkins were mutable, the Court ruled that discrimination based on these characteristics, which Hopkins could have changed but did not, constituted sex discrimination. The Court noted that Congress intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[115] The court found that in asking Hopkins to make herself more feminine, her employer required her to conform to the stereotype associated with sex. The Court also opined that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute"[116] and that any "employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[117]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Court expanded Title II's definition of sex discrimination to include same-sex harassment. The Court ruled that a plaintiff could bring a male-on-male sexual harassment claim under Title VII, regardless of whether the drafters of Title VII had contemplated it at the time it was enacted.[118] Joseph Oncale was employed on an oil platform by Sundowner Offshore Services when he was forcibly subjected to sex-related, humiliating actions, physical assault, and rape threats by his supervisors. The Court stated that "statutory prohibitions often go beyond the principal evil [they were passed to fight] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our

[113] See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[114] Id. at 235.
[115] Id. at 251.
[116] Id. at 239.
[117] Id. at 250.
[118] See Oncale v. Sundowner Offshore Services., Inc., 523 U.S. 75, 79–82 (1998).

legislators by which we are governed."[119] *Oncale* established that Title VII prohibits discrimination because of sex in the terms or conditions of employment, with the critical issue being "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[120]

In *Bostock v. Clayton County*, the Court extended Title VII protections to sexual orientation and gender identity. In each of the cases presented before the Court, an employer allegedly fired a long-time employee for being homosexual or transgender. The Court noted that it is unlikely that when Congress passed Title VII, it intended it to cover gay and transgender people. Similarly, drafters of Title VII "[l]ikely…weren't thinking about many of the Act's consequences that have become apparent over the years," including the protections against discrimination based on sexual harassment.[121] The Court explained that "the limits of the drafters' imagination supply no reason to ignore the law's demands."[122] The Court focused its decision on the "ordinary public meaning" of the terms used in Title VII when it was enacted.[123] Accordingly, the Court found that "sex" as used in 1964 referred to "status as either male or female [as] determined by reproductive biology."[124] The Court applied this definition of "sex" to Title VII's "but for" causation standard. The Court then established the legal test as follows: whether a "particular outcome would not have happened 'but for' the purported cause."[125] According to the Court, with a but-for test, a court must change one thing at a time and see if the outcome changes. If the outcome does change, there is a but-for cause.[126] The Court explained that while there may be other causes of a particular outcome, in Title VII cases, an employer cannot avoid liability by citing another factor that contributed to its challenged employment action or decision. As long as the plaintiff's sex was one but-for cause of the employer's action or decision, Title VII is triggered.[127]

[119] Id. at 79.
[120] Id. at 80.
[121] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).
[122] Id.
[123] Id. at 1738.
[124] Id. at 1739.
[125] Id. at 1739.
[126] Id.
[127] Id. at 1745.

B. The Case for Extending the Definition of Title VII's Prohibition of Racial Discrimination to Include Hair Discrimination

Even though Title VII does not define "race" or "sex," *Rogers*, *Catastrophe Management Solutions*, and *Willingham* have interpreted it to mean that a plaintiff must show racial or sex discrimination based on an immutable trait or characteristic. The *Willingham*'s court explained its decision by stating that Congress did not intend for its prohibition of sexual discrimination to have significant and sweeping implications.

However, the Supreme Court in *Price Waterhouse* indicated that it was precisely Congress' intent for its prohibition of sexual discrimination to have significant and sweeping implications, noting that Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from stereotypes. In *Oncale*, the Court explained that "statutory prohibitions often go beyond the principal evil [they were passed to fight] to cover reasonably comparable evils."[128] In *Bostock*, the Supreme Court noted that the drafters of Title VII likely did not think about many of the Act's consequences that have become apparent over the years.

The pressure on Black women to change their hair to adapt it to the mainstream standard imposes significant burdens on Black women, which Congress almost certainly did not contemplate at the time Title VII was enacted. Wearing smooth or straight hairstyles to fit in means that Black women have to change their hair texture.[129] This can be achieved by using chemical treatments, commonly known as relaxers, that have the effect of altering the texture of Black hair to straight and can impose an important financial burden on Black women.[130] To maintain straight hair, Black women spend a lot of money on relaxers and other hair straightener products. The sales of relaxers were valued at $131.8 million in 2014 in the United States.[131]

Resorting to chemical treatments also has profound health implications for Black women. Black women can experience balding, burns on the

[128] See *Oncale*, 523 U.S. at 79.

[129] See Carter, supra note 6, at 36–37.

[130] See Powell, supra note 32, at 963.

[131] Nana Sidibe, This Hair Trend Is Shaking up the Beauty Biz, CNBC (July 1, 2015), https://www.cnbc.com/2015/07/01/african-americans-changing-hair-care-needs.html [https://perma.cc/BTQ5-5T4Z].

scalp, and other scalp diseases due to chemical use and heat damage.[132] In addition, a study has shown that Black women exercise less than any other group, and hair presents a critical barrier to exercise for many Black women in that the "time and economic constraints involved in preserving a hairstyle postexercise frames physical activity as prohibitive, or perhaps a luxury."[133] The hairstyles that Black women referenced in the study for accommodating exercise generally involve the least amount of maintenance—ponytails, braids, cornrows, and natural hairstyles[134]—some of the same styles that are not considered to be professional. Another study determined that the use of hair relaxers or chemical hair straighteners increased Black's women exposure to deleterious tumor-causing hormones.[135] The study found that Black women were two to three times more likely than white women to develop uterine fibroids.[136] Although uterine fibroids are benign, they can cause gynecologic morbidity and are the leading indication of hysterectomy in the United States.[137] Even if a Black woman does not experience explicit racism in the workplace, microaggressions, such as hair practices and comments about one's appearance, is a form of discrimination that can lead to mental health problems, including anxiety, depression, and stress.[138] The Good Hair study showed that "Black women suffer more anxiety around hair issues than their white peers" because of the pressure to conform to Eurocentric standards of beauty and professionalism.[139]

Black women who choose to wear their natural hair and natural hairstyles and who, as a result, do not conform to their employers'

[132] See Powell, supra note 32, at 965; Fuqua Insights, Research Suggests Bias Against Natural Hair Limits Job Opportunities for Black Women (Aug. 12, 2020), https://www.fuqua.duke.edu/duke-fuqua-insights/ashleigh-rosette-research-suggests-bias-against-natural-hair-limits-job [https://perma.cc/C56J-RMEL].

[133] H. Shellae Versey, Centering Perspectives on Black Women, Hair Politics, and Physical Activity, 104 Am. J. Public Health 810, 813 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3987595/pdf/AJPH.2013.301675.pdf [https://perma.cc/MM8G-MNA7] (out of 123 Black women aged 21 to 60, 38% of women surveyed "cited avoiding exercise because of their hair").

[134] Id.

[135] See Carter, supra note 6, at 39.

[136] Id.

[137] Id.; see Lauren A. Wise, et al., Hair Relaxer Use and Risk of Uterine Leiomyomata in African-American Women, 175 Am. J. of Epidemiology 432, 432 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3282879/pdf/kwr351.pdf [https://perma.cc/Z87T-QKQ6].

[138] See Berkemeyer, supra note 13, at 285.

[139] Id. at 287.

grooming standards, have faced discrimination in the form of lack of employment or promotion opportunities, and termination.[140] Brittany Noble, a news anchor, faced criticism for her natural hair and was eventually terminated for wearing a natural hairstyle while on air in 2019.[141] A recent experiment shows that bias against natural hair often starts during the hiring process. During the study, participants from various backgrounds assumed the role of recruiters and had to assess fictitious job applicants.[142] The participants were more likely to rate Black women with straight hair and white women with either curly or straight hairstyles as more professional than Black women with natural hairstyles, who were deemed less professional and less competent.[143] The participants were, thus, less likely to recommend Black women with natural hairstyles for interviews.[144] In another instance of the same study, two groups of participants had to evaluate the same Black woman candidate: one group saw a photo of the candidate with natural hair, and the other group saw the candidate with straight hair.[145] The latter group rated the candidate higher for professionalism and strongly recommended her for an interview.[146] In that study, discrimination against natural hairstyles was for fictitious jobs in consultancy, an industry with more conservative dress norms.[147]

The burdens that Black women face when it comes to their hair and natural hairstyles could be described as "reasonably comparable evils" similar to the principal evil—race discrimination—that Title VII was passed to combat. Afros or natural hairstyles have historically and culturally been associated with the Black race.[148] They are part of a Black person's identity and a physical manifestation of their blackness. The pressures that Black women face in the workplace to assimilate to

[140] See Carter, supra note 6, at 37.

[141] Id. at 39.

[142] See Fuqua Insights, supra note 132.

[143] Id.

[144] Id.; see Chelsea Stein, MSU Research Exposes Discrimination Against Black Women with Natural Hair, Broad College of Business (Sept. 18, 2020), https://broad.msu.edu/news/msu-research-exposes-discrimination-against-black-women-with-natural-hair/ [https://perma.cc/D73C-HSYA].

[145] See Fuqua Insights, supra note 132.

[146] Id.

[147] See id. (explaining that candidate's hair texture did not influence perceptions of professionalism in the ad industry perhaps because advertising is viewed as a more creative industry than consulting).

[148] See Part I for the history and meaning of Black hair.

Eurocentric standards of professionalism come at a great cost to their finances, health, and professional growth. The fact that a Black woman can be fired, passed over for promotion, or simply not hired because of her hair is a form of racial discrimination. This is especially the case because none of the employer's practice or grooming policies in *Catastrophe Management Solutions* or *Rogers* were related to job performance. Jones was hired before her offer was rescinded when she refused to cut her dreadlocks. Jones' hiring showed that Jones had the required qualifications to get the job done. However, her natural hairstyle of choice became an impediment to her career advancement. Likewise, Rogers was a long-term employee of American Airlines. Nothing in the fact of the case suggests that her job performance was subpar. Similarly, her hairstyle of choice became an impediment to her career development.

Moreover, hair discrimination is similar to the sex stereotype discrimination that Hopkins faced when Price Waterhouse declined to promote her. Similar to the characteristics that Price Waterhouse identified as reasons for not promoting Hopkins, the characteristic that Wilson identified as a reason for rescinding Jones' offer, is mutable. However, this did not deter the Court in *Price Waterhouse* in finding that requiring an employee to conform to a stereotype associated with sex constituted a violation of Title VII. Unlike Hopkins, who was required to conform to a stereotype, Jones was asked to "deviate" from a stereotype that associated dreadlocks—a hairstyle historically and culturally associated with Black individuals—with messiness and unprofessionalism. The result in both cases is the same. Just as Hopkins' ability to get promoted depended on her willingness to conform to a stereotype requiring her to become more feminine, Jones' ability to keep her offer was based on her willingness to deviate from a widely-held belief in professional environments that dreadlocks are unprofessional.

The terms or conditions that the Court in *Oncale* determined could trigger Title VII are like the terms or conditions placed on Jones and Rogers. Jones had to cut her dreadlocks before being hired for a position, and in *Rogers*, some employees could not hold certain positions if they wore their hair in an all-braided hairstyle. In *Catastrophe Management Solutions* and *Rogers*, Rogers and Jones, members of one race, were exposed to disadvantageous terms or conditions of employment to which members of other races were not exposed. In order for Rogers to have access to certain positions, she had to avoid wearing an all-braided hairstyle, and Jones had to cut her dreadlocks to be hired. Conditions like

the ones presented to Jones and Rogers do not factor into the equation when hiring or promoting women of other races for the simple fact that it is rare, if not impossible, to see women professionals of other races with an all-braided hairstyle or dreadlocks. Similarly, a Black woman is 80 percent more likely to change her hair to meet social norms or expectations at work than a white woman is,[149] showing that these terms or conditions disproportionately affect Black women.

Lastly, applying *Bostock*'s legal test to *Catastrophe Management Solutions* and *Rogers* would provide a different result than what the courts held in both cases. Had the employer's grooming practice or policy in each case not prohibited Jones or Rogers from wearing a natural hairstyle, Jones would have been hired, and Rogers would have been able to keep her all-braided hairstyle. Bostock's legal test is whether a particular outcome would not have happened but for the purported cause. In both instances, the plaintiff was intentionally penalized for wearing their hair in natural hairstyles. They would not have been penalized but for the fact that they wore their hair in natural hairstyles. And as mentioned before, it is rare, if not impossible, to find women professionals of other races wearing a hairstyle historically and culturally associated with Black individuals in the workplace. It is because the hairstyle is historically and culturally associated with Black individuals that it is viewed unfavorably. As described before, African cultures were seen as unconventional and uncivilized when they came to be viewed through Europeans' lenses. There was no other factor that could explain the decision to rescind Jones' offer as Wilson clearly stated that Jones had a choice between cutting her dreadlocks and working at CMS or refusing to do so and not working at CMS. Likewise, Rogers had to change her all-braided hairstyle. And even assuming that there was another factor that contributed to Jones and Rogers being penalized because of their choice of hairstyle, their employers would not be able to avoid liability under Title VII by citing that the other factor contributed to their employer's decision under *Bostock*.

[149] See Cache McClay, Why Women Are Fighting Back Against Hair Oppression, BBC News (Dec. 13, 2019), https://www.bbc.com/news/world-us-canada-50786370 [https://perma.cc/9E62-6XS2].

C. Addressing Dissenting Viewpoints on the Expansion of Title VII's Prohibition of Racial Discrimination to Include Hair Discrimination

People who do not believe that natural hair and hairstyle discrimination is a form of racial discrimination may disagree with expanding the definition of racial discrimination following the sex discrimination example. Many individuals, both Black women and non-Black individuals, may argue that there is no bias against natural hair and natural hairstyles in the workplace. However, the data shows that many Black women have been discriminated against because of their hair and natural hairstyles. And Jones's and Rogers's stories are great illustrations of the consequences of the bias and discrimination that Black women experience in the workplace.

Opponents of the expansion may also argue that employers have the right, as private companies, to adopt rules regarding professional code of conduct and grooming policies. However, if a practice or grooming policy disproportionately affects Black women because of their racial identity, the law should protect them. In *Rogers*, American Airlines asserted that its "policy was adopted in order to help American project a conservative and business-like image."[150] This implies that Black women's hair and natural hairstyles are not conservative and business-like and refers back to the perception that natural hair and natural hairstyles are not professional. Giving employers the broad authority to adopt the policies that would govern their businesses "leaves room for decisions informed by implicit bias" against Black women.[151]

Opponents of expanding the definition of Title VII racial discrimination to include natural hair and natural hairstyle discrimination may argue that employers' grooming policies did not explicitly target Black women and their natural hairstyles. The well-documented history of prejudice and discrimination against Black individuals in the United States has shown otherwise. Discriminatory hair policies may seem neutral, but they may appear to be so simply because the expectation is that all employees have to assimilate to the dominant hair culture and hairstyles of white individuals.[152] Additionally, racial discrimination that was characterized by overt discriminatory acts has now been transformed

[150] *Rogers*, 527 F. Supp. at 233.

[151] See Dewberry, supra note 99, at 352.

[152] See 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, 129–30 (2001).

into more subtle and indirect discriminatory practices.[153] By extending the definition of racial discrimination to include natural hair and natural hairstyle discrimination, employers would be more mindful of the type of grooming policies they promulgate or practices that they perpetuate. Similarly, it would force them to confront their implicit bias because, otherwise, they open the door to potential liability.

Further, critics may oppose extending Title VII protections to natural hairstyles because of the possibility that other characteristics would be deemed Title VII violations. It is unlikely that expanding Title VII in such a way would lead to a chain reaction whereby other things would be viewed as violations of Title VII. In the sex discrimination cases, the Supreme Court has incorporated a limiting principle based on "reasonably comparable evils." The Court did not create newly protected categories under Title VII. The Court has determined that sexual stereotypes, sexual harassment, and sexual orientation, and gender identity discrimination are reasonably comparable evils to the principal evil—sex discrimination. Similarly, natural hair and hairstyle discrimination is a reasonably comparable evil to the principal evil—racial discrimination. In both instances, the reasonably comparable evils are derived from the principal evil.

Lastly, the judiciary may refuse to expand the definition of Title VII's racial discrimination to include natural hair and natural hairstyle discrimination, positing that legislatures, as elected bodies, have the authority to legislate. Recent legislative developments have aimed at protecting Black individuals from discrimination based on natural hair and natural hairstyles. However, they are recent, local, and not broadly implemented. The CROWN (Creating a Respectful and Open Workforce for Natural Hair) Act became effective in California in January 2020 and bans employment discrimination against employees who choose to wear natural hairstyles.[154] Its definition of "race" includes traits historically associated with race, such as hair texture and protective hairstyles.[155] It

[153] See Dewberry, supra note 99, at 345.

[154] See Senate Bill No. 188, 2019-2020 Reg. Sess. ch. 58 (Cal. 2019) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188 [https://perma.cc/R2P5-PW3E]; Natasha L. Domek and Lauren J. Blaes, A Heads up on the CROWN Act: Employees' Natural Hairstyles now Protected, 9 Nat'l L. Rev. (2019) (explaining that Senate Bill 188 is also known as the Creating a Respectful and Open Workplace for Natural Hair (CROWN) Act, which revises the California Education Code and the Fair Employment and Housing Act's definition of race).

[155] Senate Bill No. 188, 2019-2020 Reg. Sess., ch. 58, § 2(a)(1) (Cal. 2019).

acknowledges that U.S. history is "riddled with laws and societal norms that equated 'blackness,' and [the associated] physical traits," such as "dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment."[156] Similarly, the CROWN Act became law in Montgomery County, Maryland, in February 2020.[157] The Virginia legislature passed a bill that became effective in July 2020, amending its Human Rights Act to extend the definition of "because of race" or "on the basis of race" to include traits historically associated with race, including hair texture, type, and style.[158] In many states, where natural hair and natural hairstyle discrimination is not prohibited, Black women have no recourse against discrimination. And the U.S. Congress has yet to pass a law banning race-based hair discrimination.[159]

CONCLUSION

Black women who deviate from the norm of straight hair face significant barriers in the workplace. Implicit bias surrounding Black women's hair, which has been perceived as unprofessional and associated with less competence, adds additional burdens on Black women leading to pressure to conform to the norm. This pressure has several detrimental financial, health, and professional implications for Black women. A Black woman's decision to straighten her hair should be based on "a personal preference, not a burden to conform to a set of criteria,"[160] written or

[156] Senate Bill No. 188, 2019-2020 Reg. Sess., ch. 58, § 1(a) (Cal. 2019).

[157] See Press Release, Montgomery County Council, CROWN Act Becomes Law in Montgomery County, (Feb. 6, 2020), https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=23850&Dept=1 [https://perma.cc/7XEF-NPYM].

[158] See Katherine P. Sandberg et al., Natural Hair Movement Spurs Nationwide Legislative Response to Prevent Hairstyle Discrimination, 48 ABA J. Lab. & Emp. Law 1, 6 (2020). For more examples of similar initiatives, see also NYC Commission on Human Rights, Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [https://perma.cc/A5GY-KPMT] (The New York City's Commission on Human rights' guidelines to protect "rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities," including "the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state").

[159] CROWN ACT of 2019, S. 3167, 116th Congress (2020). The U.S. House of Representatives passed the CROWN Act in September 2020. The Act moved to the U.S. Senate, which did not vote on it before the end of the 116th Congress in January 2021.

[160] Fuqua Insights, supra note 132 (citing Ashleigh Shelby Rosette, a management professor and a senior associate dean at the Fuqua School of Business at Duke University).

otherwise. While braids, twists, and dreadlocks are the main hairstyle choices that would not fit these criteria, they would release Black women from the burdens of hair straightening. However, these natural hairstyles are not protected under the law because they are not viewed as immutable characteristics of the Black race. The only legally permissible hairstyle that Black women can wear in the workplace, and that is protected under Title VII is the afro, which has also been perceived negatively.

Over the decades, the Supreme Court has demonstrated by its decisions in sex discrimination cases that Title VII could be expanded to account for injustices that were not contemplated when Title VII was originally passed. Likewise, it is unlikely that Congress considered the burdens that Black women would face in the workplace because of the negative perceptions around Black hair and natural hairstyles. Consequently, Title VII's drafters did not consider prohibitions on natural hair and natural hairstyles to constitute racial discrimination when it passed Title VII. By its extension of the definition of sex discrimination under Title VII, the Supreme Court has shown its willingness to go beyond the original understating of Title VII sex discrimination "to accommodate new understandings of the nature and expression of sex discrimination."[161] Expanding the definition of Title VII's racial discrimination to include hair discrimination would ensure that Black women no longer face pressures to continually choose between retaining their own identity at the expense of their career goals or abandoning their cultural heritage to conform with the dominant culture.[162]

[161] Charlie Birkel, "Comparable Evils": How to Read Sexual Orientation into Title VII's Evolving Protections, Harv. C.R.-C.L. L. Rev. (2017), https://harvardcrcl.org/comparable-evils-how-to-read-sexual-orientation-into-title-viis-evolving-protections/ [https://perma.cc/E3AX-DGJE].

[162] See Reidy & Kanigiri, supra note 1.