PROTECTING THE BLACK CROWNING GLORY: WHY LEGISLATION IS NEEDED TO MAKE UP FOR FEDERAL DISCRIMINATION STATUTES' FAILURE TO PROTECT BLACK HAIR

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ABSTRACT

The employment process is stressful, requiring applications with multiple essays and interviews where applicants work hard to impress the employers. However, this process is even more stressful for Black people who have to worry about whether their hair will be a barrier to opportunities. This Note analyzes avenues to protect Black people from racial discrimination based on their hair in the workplace. Although Title VII and Section 1981 are meant to provide this protection, courts have become more restrictive as to what constitutes race, ultimately creating a standard that race is akin to biology or only those traits that cannot be changed or altered. This immutability standard is based on America's racist past and directly contradicts case law that says Title VII is meant to protect characteristics based on stereotypes that are commonly associated with certain protected classes. Since pre-enslavement times, European colonizers have singled out Black people based on their hair, making hair a clear indication of race, and therefore a hardened barrier when racism is allowed to persist. This Note suggests that courts adopt a definition of race that includes mutable characteristics like hair. This Note also advocates for state and federal legislation to make up for the lack of protection afforded by the courts.

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INTRODUCTION

It is Alexis's first year of law school and she will be the first lawyer in her family.[1] Alexis is delighted to see that so many of her Black classmates wear their hair naturally in afros, locs, braids, and short cuts. She feels comfortable, welcomed, and supported. However, a few months into her first year, panic and dread start to set in as she hears friends talk about changing their hair for summer internship interviews. One girl says she

1. Though a fictional character, Alexis's story is based on the author's personal experiences in her first year of law school.

will wear a wig for her interviews. Another says she will wear braids but then reconsiders and asks peers like Alexis if braids seem "too Black." When she asks this, Alexis is not quite sure how to answer. Alexis considers that it might be jarring for an employer to see a white woman wearing braids, since, unlike Black women, white women historically have not worn their hair in braids.[2] However, employers should not be surprised to see a Black woman in braids. She responds by explaining that braids are definitely appropriate. Braids have versatility—they can be worn in buns, straight down, or in a ponytail, and they often stay neat for longer periods of time than other hairstyles. Plus, they are easier to manage than an afro. After further consideration, Alexis, who prefers wearing her hair in an afro, is now conflicted as to whether she should change her hair, too, so that employers will not question the professionality of her hairstyle.

When Alexis tells her friends that she is thinking of wearing an afro, they tell her it is better to be safe than sorry and that she should wear a more straightened hairstyle instead. Alexis struggles with this advice because she believes her strong work ethic, good grades, and well-roundedness make her a qualified candidate for many jobs. She believes that wearing her hair in a natural hairstyle, like locs,[3] braids,[4] twists,[5] or an afro, should not be a factor that weighs against her qualifications. She

2. *See* Siraad Dirshe, *Respect Our Roots: A Brief History of Our Braids*, ESSENCE (June 27, 2018), https://www.essence.com/hair/respect-our-roots-brief-history-our-braids-cultural-appropriation/ ("They are an integral part of Black culture—past, present and future.").

3. "Locs," also known as "dreadlocks," or "locks," are rope-like sections of hair that lock together after not being combed or brushed. Arshiya Syeda, *What Are Dreadlocks? How to Make Dreadlocks, Maintenance, and Tips*, STYLECRAZE (Apr. 12, 2018), https://www.stylecraze.com/articles/how-to-make-and-maintain-dreadlocks/. They can be formed through intertwining strands of hair, rolling or coiling parts of the hair, or by letting the hair naturally form together. *Id.*

4. "Braids," also known as "plaits," and which can take the form of "cornrows," are three sections of hair interwoven to create one piece of hair. Diane Goettel, *What Are Braids?*, WISEGEEK, https://www.wisegeek.com/what-are-braids.htm (Oct. 28, 2020).

5. "Twists" are two sections of hair interwoven to create one piece of hair. Del Sandeen, *All About Two-Strand Twist Hairstyles*, BYRDIE, https://www.byrdie.com/all-about-twists-or-two-strand-twists-hairstyles-400274 (Aug. 15, 2020).

believes this should be the case, especially considering that choosing to wear another hairstyle, like a wig or a straightened (i.e., chemically or heat-altered) hairstyle, not only costs more money but may also damage her hair in the process. She wonders how many people chose the route that was "too Black" and lost out on a job as a result?

Alexis's internal struggle is common within the Black community because Black hair is, and continues to be, a determining factor in employment decisions.[6] The stigmatism surrounding Black hair has become prevalent in American society; it is at times even newsworthy when a Black professional chooses to wear a natural hairstyle.[7] Marcus Shute's story recently drew media attention for this very reason.[8] Shute is a Black lawyer who started growing his locs in 2002 and was told multiple times throughout his career that he would not be successful, not because of his skillset or ability, but because of the hair that naturally grew on top of his head.[9] Luckily, Shute continues to be employed, but unfortunately some Black people have lost their jobs after taking a stand against employer policies averse to natural hairstyles.[10]

Title VII of the 1964 Civil Rights Act was created to remedy racial discrimination in the workplace, therefore it would seem to be common sense that discrimination against natural hairstyles would constitute race discrimination.[11] However, when it comes to the intersection of race and hair, courts have

6. *See, e.g.*, Jena McGregor, *More States Are Trying to Protect Black Employees Who Want to Wear Natural Hairstyles at Work*, WASH. POST (Sept. 19, 2019, 7:00 AM), https://www.washingtonpost.com/business/2019/09/19/more-states-are-trying-protect-black-employees-who-want-wear-natural-hairstyles-work/ ("Black hair has a long history of being politicized and stigmatized in the workplace—for men as well as women . . . .").

7. *See id.*

8. *See Meet the Black Lawyer Who Refuses to Cut His Locks to Make His Colleagues Feel Better*, BLACK BUS. (Aug. 6, 2019), https://www.blackbusiness.com/2019/08/marcus-shute-black-lawyer-refuses-cut-make-colleagues-feel-better.html.

9. *Id.*

10. *See infra* Section II.B for a discussion of the experiences of Chastity Jones and Renee Rodgers.

11. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination on the basis of race, color, national origin, sex, and religion).

interpreted Black hair as completely separate from race.[12] Consequently, discrimination against Black hair usually is not protected under Title VII.[13] To date, with the exception of afros,[14] neither federal legislation nor federal courts have restricted employers from hiring, firing, or preventing the promotion of Black people simply because they wear natural hairstyles.[15] Employers sometimes consider natural hairstyles, worn by Black people for centuries, to be unattractive or unprofessional.[16] Those views are born out of deeply rooted systemic racism and stereotypes.[17] Black people deserve effective legal recourse to get protection from racial discrimination in the workplace because the current legal framework is insufficient.

This Note addresses the problematic history in America of employers who deny Black people jobs because of their hair. Part I outlines the history of Black hair pre- and post-slavery and explains how white people, who once admired the intricacies of Black hair, created a negative stigma around Black hair in order to keep Black people in a lower social class. Part I further shows how this plan evolved into hatred and violence against Black people that has remained hundreds of years later.

12. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (holding that locs were not an immutable characteristic and therefore a grooming policy prohibiting locs was not racial discrimination); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981) (holding that a grooming policy prohibiting braids was not racial discrimination); Campbell v. State Dep't of Corr., No. 2:13-CV-00106-RDP, 2013 U.S. Dist. LEXIS 70923, at *5 (N.D. Ala. May 20, 2013) ("A dreadlock hairstyle, like hair length, is not an immutable characteristic."); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 261–67 (S.D.N.Y. 2002) (holding that an employer's policy prohibiting "unconventional" hairstyles, including dreadlocks, braids, and cornrows, was not racially discriminatory in violation of Title VII); McBride v. Lawstaf, Inc., No. 1:96-CV-0196-CC, 1996 U.S. Dist. LEXIS 16190, at *7–8 (N.D. Ga. May 28, 1996) (holding that a grooming policy prohibiting braided hairstyles does not violate Title VII).

13. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1030; *see also Rogers*, 527 F. Supp. at 232; *McBride*, 1996 U.S. Dist. LEXIS 16190, at *7.

14. Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (holding that Afros were a racial characteristic protected by Title VII).

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part II.

17. AYANA BYRD & LORI THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 14 (2001).

Part II analyzes how the legal system has handled cases arising under federal law that involve employment discrimination based on the intersection of race and hair. This Note focuses on *Rogers v. American Airlines*,[18] *Pitts v. Wild Adventures*,[19] and *EEOC v. Catastrophe Management Solutions*[20]—all of which gave employers an almost uninhibited right to regulate Black people and their hair. Part II also describes how the federal courts' decisions have been detrimental to Black people and have created a need for alternate legal recourse and protection. Part III explains existing legal framework and options to provide adequate protection for Black people from hair discrimination. These options include redefining race to include characteristics attributed to race and creating separate legislation. Finally, this Note concludes by highlighting the importance of protecting Black people from racial discrimination in the workplace on the basis of their natural hairstyles by reinforcing the necessity of both state and federal legislation.

I. HISTORY OF BLACK HAIR

To be considered professional in America, Black people are forced into a Eurocentric standard, by which their vernacular must be articulate, and their style, including how they dress and the hairstyles they wear, must be presentable and neat.[21] These concepts of "presentability" and "neatness" derive from Eurocentric social norms.[22] In creating and perpetuating these ideas, society tells Black people they cannot be their true selves and to conform to an identity that is at best inconvenient, and, at worst, destructive to entire generations.[23] The latter is the case

18. *Rogers*, 527 F. Supp. at 231.

19. Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 U.S. Dist. LEXIS 34119, at *1 (M.D. Ga. Apr. 25, 2008).

20. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016).

21. *See* Maisha Z. Johnson, *10 Ways the Beauty Industry Tells You Being Beautiful Means Being White*, EVERYDAY FEMINISM (Jan. 3, 2016), https://everydayfeminism.com/2016/01/when-beauty-equals-white/.

22. *See id.*

23. *See id.*

when it comes to Black hair.[24] Hair has served as a racial marker since pre-enslavement.[25] During enslavement, this racial marker put Black people in a difficult position as Eurocentric norms of beauty were promulgated, forcing Black people to assimilate and make their hair more acceptable to the white eye.[26]

The push to assimilate largely occurred post-emancipation, which is also when the hair styling tools to do so became more accessible.[27] Previously, Black people were forced to wear their hair in its most natural state (unstyled) or covered because they did not have the time or tools to do anything differently.[28] Styling hair was a luxury.[29] To assimilate to white culture and practices and to have a fighting chance at surviving in America, some Black people chose to alter their physical characteristics in ways that were detrimental to them, both physically and mentally.[30] Other Black people chose to stick with their natural hair, resulting in a hostile living situation while being Black in America.[31]

A. *The Stigmatization of Black Hair During Slavery and the After Effects*

When European colonizers first arrived to the western coast of Africa in the mid-fifteenth century, they were fascinated with Black hair.[32] They noted the intricacies in their diaries and

24. *See id.*

25. Sasha Turner, *Dismantling Whiteness as the Beauty Standard*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSP. (Dec. 9, 2017), https://www.aaihs.org/dismantling-whiteness-as-the-beauty-standard/.

26. Chanté 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/.

27. *See id.*; Angela M. Neal & Midge L. Wilson, *The Role of Skin Color and Features in the Black Community: Implications for Black Women and Therapy*, 9 CLINICAL PSYCH. REV. 323, 329–30 (1989).

28. *See* BYRD & THARPS, *supra* note 17, at 7–9.

29. *Id.*

30. Neal & Wilson, *supra* note 27, at 330–31.

31. *See* discussion *infra* Section I.B.

32. *See* BYRD & THARPS, *supra* note 17, at 7–9.

journals: "The Senegal blacks [have] their hair either curled or long and lank," and that the Qua-qua "wear long locs of hair, plaited and twisted, which they daub with palm oil and red earth."[33] The hairstyles they observed the African people wearing were "often elaborate works of art, showcasing braids, plaits, patterns shaved into the scalp," whereas "[u]nstyled and unkempt hair was largely unseen, as were scarves or headwraps. Clearly nothing was meant to cover the African people's crowning glory."[34] Braid patterns and even jewels used to decorate African hair were signatures of their tribes and heritage.[35] African people took pride in the deep historical meaning of their hair.[36] However, once African people were subjected to indentured servitude and enslavement, their hair became a prominent tool of oppression.[37] What was once a crowning glory soon turned into a mark of their societal demise.

When the indentured and enslaved African people arrived to America via the slavery passage, they came without their signature hairstyles or their products and tools to care for their hair.[38] Because there was no opportunity for Black people to groom themselves, let alone style their hair, many suffered from hair breakage and baldness.[39] Arriving like anonymous chattel, their heritage, background, and pride were wiped away.[40] Lack of nutrition, access to proper hygiene, and extreme mental and physical stress led to damaged hair.[41] As a result, scarves and

33. BYRD & THARPS, *supra* note 17, at 8.

34. *Id.* at 8–9.

35. Gina Conteh, *A Brief History of Black Hair Braiding and Why Our Hair Will Never Be a Pop Culture Trend*, BET (Aug. 23, 2019), https://www.bet.com/news/features/1619/the-history-of-hair-braiding-in-black-america.html.

36. *See id.*

37. *Id.*; *see also* BYRD & THARPS, *supra* note 17, at 14.

38. *See* BYRD & THARPS, *supra* note 17, at 10, 12.

39. *Id.* at 12–13.

40. *Id.* at 10.

41. *See id.* at 12–13.

head wraps were used as protection from sun and flies and out of shame for their now "unsightly" hair.[42]

Soon, patterns of social hierarchy started to emerge.[43] While those on the field wore scarves, enslaved people who worked inside the enslavers' houses were required to be more "neat" and "tidy," which led some enslaved people to wear braids, plaits, and cornrows.[44] But those who had access to and wanted to better resemble their owners would wear wigs or have their hair brushed into a European style.[45] Black hair, once admired, began to be seen as unattractive and inferior by both Black and white people.[46] White enslavers set out to create a racial classification system, demarking African features like dark skin and kinky hair textures as "ugly" and "inferior."[47] In an effort to successfully and negatively stereotype African features, white people created a social hierarchy; they elevated physical characteristics associated with whiteness and asserted these characteristics as superior so that Black people could think of themselves as beneath white people.[48]

Their plan was successful. From social issues arising out of slavery—such as the mixing of races that resulted in more Black people who were often characterized as mulattos with lighter skin and looser-curled hair[49]—a definition formed of what constituted good features (i.e., "straight and/or long hair, a small nose, thin lips, and light eyes") and what constituted bad

42. *Id.* at 13; Khanya Mtshali, *The Radical History of the Headwrap*, TIMELINE (May 10, 2018), https://timeline.com/headwraps-were-born-out-of-slavery-before-being-reclaimed-207e2c65703b.

43. *See* BYRD & THARPS, *supra* note 17, at 13.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 14.

48. *See id.*

49. Social issues include the interconnecting of races creating more lighter skinned and fair-haired Black people, often characterized as mulattos. *See* Aaron B. Wilkinson, Blurring the Lines of Race and Freedom: Mulattoes in English Colonial North America and the Early United States Republic v–viii (2013) (Ph.D. dissertation, U.C. Berkeley), https://digitalassets.lib.berkeley.edu/etd/ucb/text/Wilkinson_berkeley_0028E_13422.pdf.

features (i.e., "short or kinky hair, full lips, and a wide nose").[50] Black hair is usually tightly curled or kinky in its natural state.[51] It does not hang the way that white hair does, and often grows upward instead of downward.[52] Many of the "good" features closely resembled that of white people and many of the "bad" features were like those of Black people.[53] As a result, the definitions of "good" and "bad" features have persisted in today's society, furthering the stigma of Black hair.[54]

Along with these definitions of "good" and "bad" features, social clubs known as blue vein societies also emerged among the upper-class Black people after the Civil War.[55] Black people who had enjoyed privileges because of their "good" features, such as lighter complexions and looser hair textures, adopted Eurocentric social norms and created these societies to reinforce these norms, establishing and maintaining their position in the Eurocentric social hierarchy.[56] They were called blue vein societies because originally prospective members were only admitted if their complexions were light enough that their veins were visible.[57] Some of these clubs used comb tests where potential members were required to run a comb through their hair; if the comb passed through the hair smoothly, membership was granted.[58] Blue vein societies further perpetuated the notion that the whiter you appeared, the higher up the social and economic ladder you could climb.[59] Rather than Black hair being celebrated or appreciated, as it was before and even while Black people were enslaved, after

50. Neal & Wilson, *supra* note 27, at 326.

51. *See* Griffin, *supra* note 26.

52. *Id.*

53. Neal & Wilson, *supra* note 27, at 326.

54. *Id.* at 325.

55. *Id.* at 326.

56. *See id.* at 326–27.

57. *Id.* at 326.

58. *Id.* at 327.

59. *See* Charles W. Chesnutt, *The Wife of His Youth*, ATLANTIC (July 1898), https://www.theatlantic.com/magazine/archive/1898/07/the-wife-of-his-youth/306658/.

emancipation, Black hair had to be hidden[60] and changed to conform to a "norm" created by white people and advanced by their own community.[61]

Hair straightening also became more popular after emancipation. [62] In an effort to gain acceptance, Black people developed home remedies designed to loosen or remove the curliness of their natural hair altogether.[63] They used oil-based products like bacon grease as a softener, a heated butter knife as a curling iron, and lye mixed with potatoes to straighten the curl.[64] Additionally, Black people would use straight synthetic hair such as wigs and weaves to cover their own hair to fit in with higher-class white people.[65] There was also the hot comb—a metallic comb that was placed on the stove or over a fire and then run through the hair, section by section, like an iron—to straighten out the curls.[66] While some of these methods worked temporarily, many others did not and caused hair loss and severe burns.[67] The hot comb could become so hot that it scorched the hair and skin that it touched, resulting in permanent damage.[68] Black women and men alike acquiesced to these dangerous and damaging straightening procedures because the prevailing standards of the time dictated that was

60. Governor Esteban Rodriguez Miro of Louisiana created the Tignon Laws, which mandated that women of color (Black people and "Mulattos") cover their hair with scarves and to not decorate their hair with jewels when out in public. Samantha Callender, *The Tignon Laws Set the Precedent for the Appropriation and Misconception Around Black Hair*, ESSENCE (Feb. 9, 2018), https://www.essence.com/hair/tignon-laws-cultural-appropriation-black-natural-hair/. Black women covered their hair and de-accessorized so that white men who were attracted to Black hair would be able to better abstain from their attraction. *Id.*

61. *See* BYRD & THARPS, *supra* note 17, at 16 ("There existed neither a public nor a private forum where Black hair was celebrated in America.").

62. *Id.* at 22.

63. *Id.* at 17.

64. *Id.* at 16–17.

65. *Id.* at 13.

66. *See* Neal & Wilson, *supra* note 27, at 329–30.

67. *Id.*; *see also* BYRD & THARPS, *supra* note 17, at 17 (discussing how lye, commonly used to straighten curly hair, could burn the hair and scalp).

68. Neal & Wilson, *supra* note 27, at 330.

what Black people had to do to be attractive, or even just acceptable, in a white-dominated society.[69]

Despite being a hassle and potentially damaging, these hair-altering and hair-covering practices were commonplace from the eighteenth century until the mid-twentieth century.[70] However, by the 1960s there was a shift in the cultural tides that renewed attention to black identity: many Black people stopped using destructive hair-straightening tactics in an effort to conform to the white standard and instead began embracing their natural, Afrocentric hair.[71] The acceptance and appreciation of natural hair became a political statement of Black pride and solidarity.[72] Even more so, it directly countered the idea of what was acceptable.[73] Although it seemed like this new generation would be successful in gaining acceptance of the Black community, Black people today continue on this uphill battle.[74]

69. *See id.*; BYRD & THARPS, *supra* note 17, at 16–17.

70. *See* Neal & Wilson, *supra* note 27, at 330; *see also* BYRD & THARPS, *supra* note 17, at 13, 16–17 (describing the ways in which black men and women would alter or hide their naturally curly hair).

71. Neal & Wilson, *supra* note 27, at 330.

72. *Id.* Wearing natural hair in the 1960s was part of the natural hair movement, more formally known as the "Black is Beautiful" movement. Princess Gabbara, *The History of the Afro*, EBONY (Mar. 2, 2017), https://www.ebony.com/style/the-history-of-the-afro/. Additionally, many people in the Black Panther Party wore afros, furthering the afro's ties to politics. André-Naquian Wheeler, *The Radical Politics Behind Afros*, I-D (Jul. 7, 2017, 5:50 PM), https://i-d.vice.com/en_us/article/zmn454/the-radical-politics-behind-afros ("It was not until the Civil Rights Movement that the afro became 'cool.' But even then, the hairstyle's popularity was less about being 'attractive' and more about being 'disruptive.' Rocked by the Black Panthers and iconic activists like Angela Davis, Nina Simone, and Nikki Giovanni, a single hairstyle came to represent the never-ending fight against racism.").

73. *See* Neal & Wilson, *supra* note 27, at 330; Ashley R. Garrin, Hair and Beauty Choices of African American Women During the Civil Rights Movement, 1960–1974, at 32 (June 22, 2016) (unpublished Ph.D. dissertation, Iowa State University) (on file with the Iowa State University Digital Repository).

74. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016) (denying prospective employee a job for refusing to cut her locs); Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (employer told employee she could not represent the company with an afro); Michael Harriot, *Wrestling Ref Gets 2-Year Suspension for Forcing Black Student to Cut 'Unnatural' Dreadlocks*, ROOT (Sept. 19, 2019, 3:05 PM), https://www.theroot.com/wrestling-ref-gets-2-year-suspension-for-forcing-black-1838258889 (coach forced 16-year old Black boy to have his locs cut off in the middle of a wrestling match).

B. *Recent Retaliation Against Black Hair*

The hatred of Black hair has often resulted in emotional and verbal abuse.[75] Even in the twenty-first century, Black people are still being traumatized and experiencing hate for the hair on their heads.[76] The idea that traditional Black hairstyles are not "neat" or "acceptable" has made its way from slavery, through the political era of Black empowerment, to classrooms and sporting events, and even to policies in the workplace.[77]

In 2018, wrestling referee Alan Maloney embarrassed and traumatized a young Black wrestler, Andrew Johnson, by making him cut off his hair. [78] Sixteen-year-old Johnson was dedicated to his sport of wrestling.[79] He had been growing his locs for years and, up until 2018, had been wrestling with them without issue.[80] He clearly loved both growing his hair and being on his high school wrestling team.[81] So, when he was confronted by Maloney's racially-motivated and impossible ultimatum—cut his hair or forfeit the match—there was understandable hesitation.[82] Maloney asserted that Johnson's hair exceeded the length allowed under the rules.[83] The New Jersey Wrestling rules stated that students' hair had to be

75. *See* Ezinne Ukoha, *Why It's Time to Release the Systemic Hatred for Natural Hair*, MEDIUM (Mar. 1, 2019), https://medium.com/@nilegirl/why-its-time-to-release-the-systemic-hatred-for-natural-hair-824c8564be7f.

76. *See* Harriot, *supra* note 74; Jesse Washington, *The Untold Story of Wrestler Andrew Johnson's Dreadlocks*, UNDEFEATED (Sept. 18, 2019), https://theundefeated.com/features/the-untold-story-of-wrestler-andrew-johnsons-dreadlocks/ (white wrestling coach called a Black coach the n-word and physically attacked him).

77. Tabora A. Johnson & Teiahsha Bankhead, *Hair It Is: Examining the Experiences of Black Women with Natural Hair*, 2 OPEN J. SOC. SCI. 86, 87–89, 91 (2014); Washington, *supra* note 76.

78. Washington, *supra* note 76. This was not Maloney's first racial incident. *Id.* In 2016, Maloney was at a meeting with fellow referees after a tournament when he spotted a Black referee named Preston Hamilton. *Id.* After seeing Hamilton, Maloney physically assaulted him by poking him in the chest and calling him the n-word. *Id.* Hamilton then body-slammed Maloney. *Id.*

79. *Id.*

80. *Id.*

81. *See id.*

82. *See id.*

83. *Id.*

"trimmed," "well-groomed," and "in its natural state."[84] Maloney believed Johnson's hair to be "unnatural" and was determined to trim it.[85]

Johnson wanted to win and did not want to disappoint his team.[86] He had a lot to lose and not many people on his side.[87] So, he stood embarrassed and powerless as white faces leered and another white face cut off Johnson's hair with dollar store scissors.[88] Maloney instructed that white face with scissors to "cut until I say so . . . cut until I say it's good."[89] A few months later, although he wore his hair in short locs, Johnson grabbed a pair of scissors and chopped off his remaining hair.[90] He loved his hair, but it caused him so much trouble that he had to change who he was physically so that he could finally be accepted.[91]

Sometimes the white hands destroying Black hair are well-intentioned. A sixteen-year-old Black boy, Kobe Richardson, was shot fourteen times by someone he thought was his friend.[92] When he woke from his coma he met a woman who wanted to change his life for the better.[93] Sally Hazelgrove met Richardson through an organization intended to help at-risk youth in Chicago.[94] She felt that one of the best ways to help

84. Bill Evans, *After Dreadlock Debacle, New Wrestling Rules Address Hair, but Do They Clarify Anything?*, NJ.COM (Apr. 30, 2019), https://www.nj.com/highschoolsports/article/hair-addressed-in-new-wrestling-rules-but-does-it-clarify-anything-fleeing-the-mat-change-coming/.

85. Harriot, *supra* note 74.

86. Washington, *supra* note 76.

87. *See id.*

88. Harriot, *supra* note 74.

89. *Id.*

90. Washington, *supra* note 76.

91. *See id.* To address this kind of discrimination and resulting traumatic impact, New Jersey has since enacted a law that specifically protects Black hair, including hair styled in locs, from discrimination of this kind. *See infra* note 292 and accompanying text.

92. Samara Lynn, *'They Don't Know Sally': Black Teen Defends White Woman Who Cut His Dreadlocks in Viral Video*, ABC NEWS (Sept. 14, 2019, 5:00 AM), https://abcnews.go.com/US/sally-black-teen-defends-white-woman-cut-dreadlocks/story?id=65513951.

93. *Id.*

94. *Id.*

Richardson was through his hair.[95] When she cut his locs, Hazelgrove declared in a 2016 tweet that it was "symbolic of change and [his] desire for a better life!"[96] In other words, she felt the locs were going to be an obstacle for Richardson as he attempted to secure future opportunities.[97] Why are Black hairstyles, often used to keep Black hair "styled and neat," considered an obstacle to success? The answer is simple—racism.

This racism is prevalent in the workplace, resulting in a multitude of complaints and lawsuits.[98] In 2016, the supervisor of a Black woman named Kimberly Tigner circulated a petition among Tigner's white colleagues to stop her from wearing her natural hairstyle.[99] In this petition, Tigner's colleagues said her natural hairstyle was "unprofessional and inappropriate for the workplace."[100] This resulted in the director of Tigner's department speaking to her about her hair.[101] She was humiliated and subsequently changed her hair to assimilate to her work environment.[102]

While these aforementioned examples represent egregious and more blatant actions, on a daily basis, Black people face microaggressions based on racial profiling that are often

95. *See* Maya Salam, *A Gift from the N.F.L. Ignites a Firestorm over Dreadlocks*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/arts/music/crushers-club-jay-z-dreadlocks.html.

96. *Id.*

97. *See id.*

98. *See, e.g.*, Tigner v. Charlotte-Mecklenburg Sch., No. 3:18-cv-00680-RJC-DSC, 2019 U.S. Dist. LEXIS 183449, at *1 (W.D.N.C. Oct. 23, 2019); *see also* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016) (prospective employee denied a job for refusing to cut her locs); Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (employer told employee she could not represent the company with an afro).

99. *Tigner*, 2019 U.S. Dist. LEXIS 183449, at *1 (the type of natural hairstyle is not specified in the case).

100. *Id.*

101. *Id.* at *2.

102. *Id.* Although she brought a suit against her company, she was unsuccessful. *Id.* at *12 ("The circulation of a petition regarding Plaintiff's hairstyle and the false accusations regarding Plaintiff's son's criminal record, while certainly inappropriate and offensive, simply fail to satisfy the demanding severe or pervasive standard required to state a claim for hostile work environment.").

overlooked or never talked about.[103] There have been multiple studies showing biases against Black hair.[104] In a 2011 study, straight hair was seen as more adult-like and professional, whereas natural hair was seen as childish.[105] Additionally, there was an almost unanimous belief that straight and long hair was more attractive.[106] Similarly, in 2016, the Perception Institute conducted a study using a national sample of women and found that white women saw kinky and curly hair as "less beautiful, less sexy/attractive," and less professional than "smooth" hair.[107] There was also a finding of implicit biases across the nation in that most study participants saw good hair as hair that was "not frizzy or not 'kinky'" or more specifically, not Black.[108]

This implicit bias shows up in more explicit ways when it comes to real world applications.[109] Hazelgrove was not the only one who thought natural hairstyles would get in the way of future opportunities. Since 2001, Hampton University's School of Business has required students to cut off their braids

103. *See* Laurie A. Rudman & Meghan C. McLean, *The Role of Appearance Stigma in Implicit Racial Ingroup Bias*, 19 GRP. PROCESSES & INTERGRP. REL. 374, 374 (2016).

104. *See, e.g.*, *id.* at 379–81. Straightened hair is seen as adult-like whereas natural hair is viewed as juvenile. *See* Susan J. Woolford, Carole J. Woolford-Hunt, Areej Sami, Natalie Blake & David R. Williams, *No Sweat: African American Adolescent Girls' Opinions of Hairstyle Choices and Physical Activity*, 3 BMC OBESITY, no. 31, 2016, at 1, 1, https://bmcobes.biomedcentral .com/track/pdf/10.1186/s40608-016-0111-7. Additionally, "[t]he 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 (as opposed to natural hair that only looked good on some people), was noteworthy . . . ." *Id.* at 7.

105. Woolford et al., *supra* note 104, at 5–6.

106. *Id.*

107. ALEXIS MCGILL JOHNSON, RACHEL D. GODSIL, JESSICA MACFARLANE, LINDA R. TROPP & PHILLIP ATIBA GOFF, THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 6 (PERCEPTION INST. 2017), https://perception.org/wp-content/uploads /2017/01/TheGood-HairStudyFindingsReport.pdf.

108. *Id.* at 11.

109. *See* Tristan K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. Rev. 91, 97 n.21 (2003) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–36 (1987)).

or locs in order to participate in the program.[110] The dean that implemented this program did so in the belief that those hairstyles would serve as a barrier in employment.[111]

Racism is often subtle and is often directed to race-related traits like hair.[112] In the United States, the "presentable" hair norm does not usually include Black hair.[113] Black people find themselves in a lose-lose predicament, where they can either: (1) allow their hair to be in its natural state, unhindered by chemicals, wigs, and other damaging devices, and jeopardize their safety and happiness in the process, or (2) conform to the white norm to maintain the best chance possible of being safe and accepted, both financially and socially, by a white-dominated society.

II. THE UPHILL LEGAL BATTLE TO INCLUDE HAIR DISCRIMINATION AS A FORM OF RACIAL DISCRIMINATION

Many employers enact grooming policies that include what employees can or cannot do with their hair.[114] Black hairstyles, like locs and braids, can be prohibited in these policies, resulting in racial discrimination lawsuits.[115] Black workers who want to bring a claim against their employers for discriminatory hair regulations usually do so under the federal anti-discrimination laws of § 1981 of the 1866 Civil Rights Act[116] and Title VII of the 1964 Civil Rights Act.[117]

110. Isis Climes, *Natural Hair in Corporate America: An Ongoing Conversation*, FAMUAN (Dec. 8, 2019, 7:47 PM), http://www.thefamuanonline.com/2019/12/08/natural-hair-in-corporate-america-an-ongoing-conversation/.

111. *Id.*

112. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 659 (2003).

113. *See* Johnson, *supra* note 21.

114. *See, e.g.*, Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1083–86 (2010) (discussing Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc)).

115. *See, e.g.*, *id.*

116. 42 U.S.C. § 1981(a).

117. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2).

A. *Federal Statutes: Title VII of the Civil Rights Act of 1964 and Section 1981*

Title VII makes it unlawful for an employer to discriminate on the basis of race, religion, sex, national origin, or color.[118] More specifically, it makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," whether intentional or unintentional.[119] Race is not defined.[120] The United States Supreme Court has interpreted Title VII to prohibit intentional discrimination consciously motivated by animus,[121] stereotypes,[122] and consideration of a protected classification.[123] Because Title VII specifically mentions "race, color, religion, sex, or national origin," in racial discrimination cases involving grooming code challenges, courts have interpreted Title VII to apply only to immutable characteristics or fundamental rights, which has caused many problems for Black people claiming discrimination arising out of natural hairstyles.[124] Immutable characteristics are those that

118. *Id.*

119. § 2000e-2(a)(1).

120. § 2000e.

121. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–07 (1973) (holding that where a potential employee was rejected for a job in which the employer knew he was qualified, the employee had a prima facie case of racial discrimination and had the right to prove that even if there were nondiscriminatory reasons, they were motivated by a racial pretext); *see also* Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011) (holding that evidence of hostility toward an employee's military obligations could amount to discrimination).

122. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that when a plaintiff in a Title VII case proved that gender played a motivating part in an employment decision, it constituted a violation of Title VII unless otherwise proven).

123. *See* Ricci v. DeStefano, 557 U.S. 557, 592–93 (2009) (holding that the consideration of race in certifying exam results constituted intentional race discrimination under Title VII).

124. *See* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975) (holding hair length was not an immutable characteristic and therefore was not afforded constitutional protection); EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1035 (11th Cir. 2016) (holding that locs were not an immutable characteristic and therefore a grooming policy prohibiting locs was not racial discrimination); Campbell v. State Dep't of Corr., No. 2:13-CV-00106-RDP, 2013 U.S.

an individual has no control or ability to change.[125] Whereas skin color and sexual preference are not a choice, how one wears their hair is usually a choice. Hair can be changed in many ways, and often on a whim, by cutting it, dying it, adding heat to straighten it, or adding texturizer to make it curly.

Under Title VII there are two theories of liability. Title VII prohibits discrimination where there is either disparate treatment or a disparate impact stemming from a facially neutral policy.[126] However, when it comes to hair in the workplace, these standards are not applied, and instead it is the employee's job to adapt to the employer policy.[127] The Fifth Circuit stated that there is a simple fix to dealing with discrimination in grooming policies: "If the employee objects to the grooming code [they have] the right to reject it by looking elsewhere for employment, or alternatively [they] may choose to subordinate [their] preference by accepting the code along with the job."[128] Hair discrimination is treated differently from other race-related discrimination because of an outdated framework of how race is defined—the notion that, with the exception of afros, "any other formation of textured or curly hair, like braids or twists, [are] mutable, cultural hair-*styles*."[129] In essence, because hair is a mutable characteristic, it is not racial discrimination under Title VII.[130]

Dist. LEXIS 70923, at *5 (N.D. Ala. May 20, 2013) ("A dreadlock hairstyle, like hair length, is not an immutable characteristic.").

125. *See Willingham*, 507 F.2d at 1091.

126. *See* Julia Bruzina, Erickson v. Bartell*: The "Common Sense" Approach to Employer-Based Insurance for Women*, 47 ST. LOUIS L.J. 463, 467 (2003) (detailing developments of law that advocate for true sex equality in the workplace).

127. In 1971, the Supreme Court expanded its interpretation of Title VII to include unintentional discrimination or "practices that are fair in form, but discriminatory in operation," which later became known as the disparate impact theory. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Congress later codified the disparate impact theory, permitting plaintiffs to bring claims on the basis of unintentional discrimination, i.e., when policies have a "disparate impact," in addition to disparate treatment claims. 42 U.S.C. § 2000e-2(k)(1)(A)–(C).

128. *Willingham*, 507 F.2d at 1091.

129. 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, 1024 (2017).

130. *Id.* at 1024–25.

Another avenue of protection for Black hair is found under § 1981 of the Civil Rights Act.[131] Specifically, § 1981 states:

> 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 [W]hite citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[132]

Section 1981—while traditionally viewed as only protecting discrimination involving the making and enforcing of contracts—was amended in 1991, around the same time the disparate impact theory was codified, to clarify that discrimination is also prohibited in the contractual relationship of employment.[133] However, bringing a § 1981 claim as opposed to a Title VII claim is more difficult because in addition to § 1981 only applying to immutable characteristics, § 1981 is restricted to intentional discrimination.[134]

B. *Federal Discrimination Claims*

1. Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.

In *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that exclusion of an afro was linked directly to race and thus violated Title VII.[135] The plaintiff's supervisor said she "could never represent Blue

131. *See* 42 U.S.C. § 1981(a).

132. *Id.*

133. *See id.*

134. *See* Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 U.S. Dist. LEXIS 34119, at *19 (M.D. Ga. Apr. 25, 2008). As long as there is a "legitimate, nondiscriminatory reason" for the grooming code, the employer prevails. *See* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 263 (S.D.N.Y. 2002).

135. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168–69 (7th Cir. 1976).

Cross with [her] Afro."[136] The court in turn said "[a] laypersons description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[137] The reasoning, as explained later by the U.S. Court of Appeals for the Eleventh Circuit in *EEOC v. Catastrophe Management Solutions*, was that an afro is a direct result of an unaltered hair texture for Black people, therefore making it an immutable characteristic and giving rise to a winnable Title VII discrimination claim.[138]

2. Rogers v. American Airlines

In *Rogers v. American Airlines*, the U.S. District Court for the Southern District of New York decided that a policy barring employees from wearing braids did not constitute a violation of Title VII.[139] In 1980, Renee Rodgers,[140] an American Airlines employee of eleven years, wore her hair in cornrows to work and American Airlines enforced its policy banning employees in customer service positions from wearing braids and cornrows.[141] Through her race and sex discrimination claim, Rodgers alleged that the policy was discriminatory to Black women.[142] The court dismissed Rodgers's complaint because

136. *Id.* at 168.

137. *Id.*

138. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016).

139. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

140. In this Note I refer to the case name as *Rogers* and to the actual person as Rodgers. Professor Paulette Caldwell found that the accurate spelling of the plaintiff's last name is "Rodgers," but the official case name spells it "Rogers." Paulette M. Caldwell, *Intersectional Bias & the Courts: The Story of* Rogers v. American Airlines, *in* RACE LAW STORIES 571, 575 n.12 (Devon W. Carbado & Rachel F. Moran eds., 2008).

141. *Rogers*, 527 F. Supp. at 231–32. Rodgers challenged the policy as a form of intentional race discrimination, and also as intersectional discrimination—that this policy discriminated against her on the basis of race and sex. *Id.*

142. *Id.* Rodgers brought claims of discrimination under the Thirteenth Amendment, Title VII, and Section 1981. *Id.* Section 1981 is another avenue of protection for discrimination claims; however, bringing a Section 1981 claim as opposed to a Title VII claim is more difficult because Section 1981 applies to immutable characteristics and is restricted to intentional discrimination. *See* 42 U.S.C. § 1981(a); Chapman v. Higbee Co., 319 F.3d 825, 832–33 (6th Cir. 2003) ("[T]o

"both men and women, black and white" would be affected by the policy.[143] In analyzing the sex discrimination claim, the court stated "an even-handed policy that prohibits to both sexes a style more often adopted by members of one sex does not constitute prohibited sex discrimination."[144] The court said that the regulation had "at most a negligible effect," did not regulate on the basis of an immutable characteristic, and "concern[ed] a matter of relatively low importance in terms of" Title VII's protected interests.[145] However, Black people being refused jobs due to wearing hairstyles linked to their ancestral heritage certainly does seem like the very discrimination Title VII is meant to protect.

In considering whether there was sex discrimination pursuant to Title VII, the court stated that while the outcome would ultimately be the same, the argument that "the 'corn row' style has a special significance for [B]lack women" merited extra consideration.[146] Rodgers argued that braids, specifically in the style of cornrows, is "historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[147]

Rodgers also raised the issue that mandating Black people to wear hair dissimilar to their culture is akin to the enslaver-enslaved relationship: "that is, a master mandate that one wear hair divorced from ones [sic] historical and cultural perspective and otherwise consistent with the 'white master' dominated society and preference thereof."[148] If the enslaved, or in this

prevail on a section 1981 claim, a litigant must prove intentional discrimination on the basis of race . . . .").

143. *Rogers*, 527 F. Supp. at 231.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 232. In efforts to further her point, she then went on to say that the style was recently popularized by a famous Black actress, Cicely Tyson. *Id.* Doing so may have hindered her argument because despite the hairstyle being popular since before the colonizers shipped Black people to America, the court agreed with the defense's argument that Rodgers did not start wearing braids until a different actress who was White popularized them. *Id.*

148. *Id.*

case, the employee, does not comply, then the enslaver, or employer, is within his right to punish. In this instance, punishment was the continued racist treatment and loss of employment opportunities.[149]

Ultimately, the court found in favor of American Airlines, holding that the grooming policy applied equally to members of all races.[150] Invoking the notion of immutability, which later became the followed precedent for Title VII claims, the court also stated in its opinion that braids are "not the product of natural hair growth but of artifice."[151] Thus, *Rogers* set the standard for the immutability doctrine in regard to hair.[152] According to the court, "[a]n all-braided hair style is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."[153] The court also made a trivial remark that American Airlines allowed Rodgers to wear her hair as she liked while off duty and in a bun with a hairpiece attached during working hours.[154] This "allowance" only goes but so far.

While Rodgers was allowed to wear her hair in a bun using a hairpiece, the hairpiece gave her headaches and therefore caused Rodgers actual physical pain to abide by American Airlines's idea of professionalism.[155] Judge Sofaer, a white male with seemingly little expertise in the matter of Black hair, wrote in his opinion that a "larger hairpiece would seem in order."[156] Remarks like these from the court show a problematic lack of empathy for Black people and a refusal to see the full picture of discriminatory policies. While there was some "allowance," the court failed to also recognize that the underpinnings of policy

149. *See id.* at 231.
150. *Id.* at 232.
151. *Id.*
152. *See id.*
153. *Id.*
154. *Id.* at 233.
155. *See id.*
156. *Id.*

remained—cornrows, by themselves, did not reflect the "conservative and business-like image" that American Airlines wanted for its employees.[157] This is deeply rooted racism, thinly veiled as a neutral policy. It is highly likely that American Airlines considered Rodgers's Black hairstyle, created by and predominantly worn by Black people, to be unprofessional and unappealing. The court, to the detriment of Black people, perpetuated a stereotype that natural Black hairstyles, such as buns and braids, are unprofessional.[158]

Perhaps the largest fault in Rodgers's claim was that there was no one else similarly situated, which would have helped in her Title VII disparate impact argument.[159] This lack of similarly situated Black people was further solidified when Rodgers testified that other Black female American Airlines employees had been allowed to wear braids and did not face any hiring consequences due to their hair.[160] Consequently, instead of it being a racial issue, it seemed like more of a personal issue between Rodgers and her supervisor, which seriously undermined her argument.[161] In the decades following the *Rogers* decision, with the exception of afros, courts have continued to uphold employer policies prohibiting locs, braids, and twists.[162]

3. Pitts v. Wild Adventures, Inc.

In 2002, Patricia Pitts wore her hair in cornrows to work.[163] Almost immediately after wearing the new hairstyle, her

157. *Id.*

158. *See id.*

159. *See* Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 464 (2008).

160. *Rogers*, 527 F. Supp. at 233.

161. *Id.*

162. *See, e.g.*, Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002) (holding that "it is beyond cavil that Title VII does not prohibit discrimination on the basis of locked hair.").

163. Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 U.S. Dist. LEXIS 34119, at *3 (M.D. Ga. Apr. 25, 2008).

employer expressed disapproval and suggested that she change her hairstyle into something more aesthetically pleasing or "pretty."[164] So, Pitts wore two strand twists, which are similar to braids but with two strands of hair instead of three.[165] This time, Pitts's supervisor felt the hairstyle was not acceptable because it too closely resembled locs.[166] Pitts refused to continue following suggestions from her employer to make her hair less Black and thus more acceptable to her employer.[167] Additionally, changing her hair would have cost Pitts more time and money than she wished to spend,[168] and it would have been stressful on her scalp.[169] When Pitts initially wore her new hairstyle to work, there was no formal grooming policy, but just a few days after Pitts refused to change her hair for a third time, a written policy was created banning Black hairstyles like "dreadlocks, cornrows, beads, and shells" unless they were covered up.[170]

When Pitts sought protection from the court by filing a Title VII race discrimination claim, the district court for the Middle District of Georgia held that locs are not an immutable characteristic and therefore not akin to a fundamental right that Title VII protects.[171] Furthermore, the court declared 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."[172] Yet again, the court decided that it was appropriate for an employer to restrict Blackness.

164. *Id.*

165. *Id.*; *see also* Sandeen, *supra* note 5.

166. *Pitts*, 2008 U.S. Dist. LEXIS 34119, at *3.

167. *Id.*

168. *See* Bianca Lambert, *How Much it Costs to Maintain Natural Black Hair*, HUFFINGTON POST (Feb. 28, 2020, 5:45 AM), https://www.huffpost.com/entry/costs-natural-black-hair_l_5e441e19c5b6d0ea3811b813.

169. BYRD & THARPS, *supra* note 17, at 17.

170. *Pitts*, 2008 U.S. Dist. LEXIS 34119, at *3.

171. *Id.* at *19.

172. *Id.* at *15.

4. EEOC v. Catastrophe Management Solutions

A few years after *Pitts*, another disturbing case dealing with hair discrimination made its way to the courts.[173] A Black woman named Chastity Jones applied for a job with Catastrophe Management Solutions (CMS), underwent an interview, and earned the position, beating out numerous applicants.[174] She was well qualified for the position, but after being given the conditional offer of employment,[175] she was told she would have to comply with a grooming policy that would require her to cut off or cover her locs.[176] The human resources manager let Jones know that the reasoning for this policy was because "they tend to get messy" and then told Jones "I'm not saying yours are, but you know what I am talking about."[177] The formal policy stated: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable."[178] Jones had her locs throughout her interview, along with her other professional attire, and not once did anyone tell her that her image appeared unprofessional.[179] Jones declined to change her hair, and, despite being more qualified than other applicants, her offer was rescinded solely because she refused to change her hair.[180] This resulted in a battle to overturn decades of post-*Rogers* decisions upholding systemic racism.[181]

173. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016).

174. *Id.*

175. Jones first had to get lab tests done and complete paperwork before beginning employment. *Id.*

176. *Id.* at 1022.

177. *Id.* at 1021.

178. *Id.* at 1022.

179. *See id.* at 1021.

180. *See id.* at 1022.

181. *See* EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1139–40 (S.D. Ala. 2014).

a. The district court decision

The EEOC filed suit on behalf of Jones against CMS, asserting violations of Title VII in the complaint.[182] In doing so, the EEOC attempted to set new precedent contrary to decades of case law, arguing that Black hair could be and would continue to be discriminated against unless hair discrimination is included as part of racial discrimination.[183] More specifically, the EEOC alleged that the historical perspective and current experiences of Black people have continuously proved natural hairstyles to be part of the Black identity, just like skin color.[184] Additionally, the EEOC argued that the continued allowance of banning locs and braids went against the purpose of the Title VII and that the immutability doctrine is part of a view that has already been discredited because of the new understanding that race is a social construct rather than a blatant physical trait.[185]

Historically, mutable characteristics associated with race, like hair, names, and vernacular, were used to signify racial identity.[186] The EEOC stated that by giving employers the full power to apply blanket prohibitions against hairstyles such as locs and braids—which almost exclusively ends up being a prohibition against Black people wearing Black hairstyles—"courts generally have licensed employers to enforce a racial hierarchy that sanctions hairstyles and appearance associated with whites and outlaws those associated with Blacks."[187]

In response to the EEOC's claim, the court stated that banning locs was not race-based because the policy impacted other

182. *Id.* at 1140.

183. *See id*. at 1143.

184. *Id.* at 1143–44.

185. *See* Plaintiff's Brief in Opposition to Defendant Catastrophe Mgmt. Sols.' Motion to Dismiss at 12–13, EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139 (S.D. Ala. 2014) (No. 1:13-cv-00476-CB-M).

186. Greene, *supra* note 129, at 1009.

187. 852 F.3d 1018, 1024. Perhaps one of the pitfalls of this case was that the EEOC did not outright allege there was a disparate impact to the policy. While there was "loose language" supporting a disparate impact theory, the EEOC stated that they were only pursuing a disparate treatment case. *Id.*; Greene, *supra* note 129, at 1009.

races, too.[188] As a result, the court found the EEOC failed to state a plausible claim for relief.[189] Furthermore, the court said "Title VII does not protect against discrimination based on traits, even a trait that has sociocultural racial significance" because race and culture are "two distinct concepts," despite a history of courts defining race based on culture where convenient.[190] Through this reasoning, the court reaffirmed previous decisions that hairstyles like locs are not protected solely because they are a "reasonable result" of hair texture.[191] The court also created a heightened standard where locs remain just a hairstyle unless someone can prove that locs are exclusively or uniquely worn by Black people, in place of the previous standard where a hairstyle's tie to race was determined by whether a certain race primarily wore the hairstyle.[192]

As a result of the district court's decision to grant CMS's motion to dismiss, the EEOC was unable to conduct further discovery into the reasoning or motivation of the policy, and it could not produce expert witnesses that would have further testified to the ties of hairstyles like locs and braids to African ancestry.[193] This ruling was a major upset to the civil rights community and presented a real threat to the livelihood of Black people.[194] Essentially, the court permitted employers to regulate Black hair under almost any circumstance, with the

188. *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1144.

189. *Id.*

190. *Id.* at 1143–44. The Supreme Court has used multiple definitions throughout history to define race, which often fall into four categories: status-race, formal-race, historical-race, and culture-race. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991).

191. *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1144.

192. *Id.* at 1142–43.

193. *Id.* at 1144.

194. *Dreadlock Ruling Sparks Social Media Debate,* L.A. SENTINEL (Sept. 28, 2016), https://lasentinel.net/dreadlock-ruling-sparks-social-media-debate.html ("First, we as a race of people were financially blocked due to slavery. Then it was systemic racism that blocked us as American blacks from thriving. Then it was our names that were too ethnic to deserve job positions verses [sic] our character, intelligence, and credentials. Now it's our hairstyles.").

sole exclusion being an afro, which still may be regulated to be "neat" and "well-groomed."[195]

b. The Eleventh Circuit decision

The district court's ruling in *EEOC v. Catastrophe Management Solutions* led to an even worse outcome after the EEOC appealed to the Eleventh Circuit.[196] As a final blow in the decades of the war against Black hair, the Eleventh Circuit upheld the district court's ruling in *EEOC v. Catastrophe Management Solutions*, cementing that Black people effectively had no claim for race discrimination when it involved Black hair, aside from policies against afros.[197]

Ironically, the court did acknowledge that locs were a product of the "natural outgrowth of the immutable trait of black hair texture," but added that locs were not an actual immutable characteristic, and therefore no real burden existed in cutting off locs or not growing them at all.[198] According to the court, a "protected trait" under Title VII is one that someone is born with or cannot change.[199] Additionally, the court found that Title VII focused on matters that would impose a burden on an employee based on a prohibited basis.[200] Again, repeating the district court's opinion, the Eleventh Circuit said "prohibited bases" included hair texture, but not hairstyles.[201] And yet again, the court stated that the only way locs could be considered a racial characteristic was if all or only Black people had or were born with locs.[202]

195. See *infra* Section II.C. for a discussion of EEOC guidance on hair.

196. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (11th Cir. 2016).

197. *Id.* at 1035.

198. *Id.* at 1030; *see also* Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 128 (2018) (citing *id.*).

199. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1029 n.4.

200. *See id.* at 1030.

201. *Id.* at 1032.

202. *Id.* at 1027 ("[C]haracteristics are a matter of birth, and not culture.").

The court ignored a great deal of evidence that would have suggested that this decision was neither plausible nor fair.[203] The court defined race using the concept of genetic characteristics.[204] In doing so, the court failed to recognize that there are "no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites."[205] The result was the establishment of an impossible-to-fulfill standard of exclusivity for hair textures and hairstyles. This new standard was harsher than the *Rogers* court's opinion that stated there could be an actionable claim if people could prove that certain hairstyles were predominately worn by Black people.[206] The court failed to consider the precedent that held that afros are a protected trait because they are an outgrowth of the natural texture of Black hair.[207] The court also ignored other precedent where other circuit courts of appeal stated that, when determining whether a sexual orientation discrimination claim could survive, immutability included characteristics that were fundamental to an individual's identity.[208] Just as the court said it is not "much of a linguistic stretch" to conclude that definitions of racial characteristics were a matter of birth, not culture, it is also not "much of a linguistic stretch" to conclude that immutability, including characteristics fundamental to an individual's identity, is also a matter of culture, not just birth.[209] This same reasoning should be applied to race. Even the U.S.

203. *See supra* notes 175–80 and accompanying text.

204. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027.

205. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994).

206. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

207. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976). While the natural texture of Black hair can often result in an afro, not all Black people are born with afro-like hair, and some white people are. *See* López, *supra* note 205. Furthermore, there are Black people who have to brush out their curls to make it more into an afro—effectively also making afros a hairstyle. *See* Gabbara, *supra* note 72.

208. Greene, *supra* note 129, at 1033–34 (citing Brief for NAACP et al. as Amici Curiae Supporting Appellants, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. Dec. 28, 2016) (No. 14-13482)).

209. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027.

Court of Appeals for the Seventh Circuit, in 1976, found that where an employer claimed someone could never represent the company with afro hair, there "could hardly be [a] more explicit" example of racial discrimination.[210]

c. The aftermath of failed appeals

Following the Eleventh Circuit's decision, pressure from the Black community resulted in a formal petition for a rehearing, which disappointingly, but expectedly, was denied.[211] Had the Eleventh Circuit reheard and reversed its previous decision, the future of race discrimination claims based on hair in the workplace would be more optimistic, and notably, the judges who dissented in the rehearing denial agreed.[212] The dissent pointed out that the panel rested its entire decision on the pleadings and prevented any real discovery of patterns of racial discrimination.[213] For instance, Judge Jordan of the panel said CMS "does not hire anyone, black or white, who uses an 'excessive hairstyle,' a category that includes dreadlocks."[214] But there was never any evidence allowed to see if CMS ever applied its hair policy to someone who was not Black.[215]

Additionally, the dissent pointed out that the panel rested its decision of immutability on expired case law from *Willingham v. Macon Tel. Publ'g Co.*, which was subsequently overturned in *Price Waterhouse v. Hopkins*:

> None of the traits the employer identified as its reasons for not promoting Ms. Hopkins were immutable. Nonetheless, the Supreme Court held that discrimination on the basis of these traits, which Ms. Hopkins *could* but did not change,

210. *Jenkins*, 538 F.2d at 168 (holding that a policy against afros violated Title VII).

211. *See* Petition of the EEOC for Rehearing En Banc, EEOC v. Catastrophe Mgmt. Sols., 876 F.3d 1273, 1273–74 (11th Cir. 2017) (No. 14-13482) (holding the appeal will not be heard en banc).

212. *Catastrophe Mgmt. Sols.*, 876 F.3d at 1289–90 (Martin, J., dissenting).

213. *Id.* at 1278.

214. *Id.* at 1273 (Jordan, J., concurring).

215. *Id.* at 1280 (Martin, J., dissenting).

> constituted sex discrimination. The Court explained that discrimination on the basis of these mutable characteristics—how a woman talks, dresses, or styles her hair—showed discrimination on the basis of sex.[216]

In other words, the very concept of protecting race discrimination only in cases of an immutable trait is legally invalid.[217] Had the court not applied the immutability doctrine, and had the Eleventh Circuit reheard this case based on allowing mutability for racial discrimination claims, Jones would have satisfied the requirements to show disparate treatment and prevailed in her Title VII claim.[218]

As is the natural progression of cases, the plaintiffs filed a petition for certiorari with the United States Supreme Court.[219] However, the petition for certiorari was also denied.[220] The Eleventh Circuit's decision was disappointing, but if the court granted certiorari, that would not have necessarily guaranteed a positive outcome. In fact, had the Supreme Court upheld the Eleventh Circuit's decision, any other individual who brought suit for racial discrimination based on hair in the workplace would face near impossible success.

C. *Administrative Guidance and Military Recognition*

Over time, numerous employers have adopted policies prohibiting certain types of hairstyles like braids or locs, creating questions about the application of Title VII.[221] In order

216. *Id.* at 1281.

217. *Id.* at 1284 ("The supposed distinction between an 'immutable' racial trait and a 'mutable' one is illusory.").

218. *Id.* at 1289.

219. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, *cert. denied*, 138 S. Ct. 2015 (2018).

220. *Id.*; *U.S. Supreme Court Declines to Review Major Employment Discrimination Case Targeting Natural Black Hairstyles*, LEGAL DEF. EDUC. FUND (May 14, 2018), https://www.naacpldf.org/press-release/u-s-supreme-court-declines-review-major-employment-discrimination-case-targeting-natural-black-hairstyles/.

221. *See* Annie Herndon Reese, Fisher Phillips, *The Roots of the CROWN Act: What Employers Need to Know About Hairstyle Discrimination Law*, JD SUPRA (Apr. 29, 2020), https://www.jdsupra.com/legalnews/the-roots-of-the-crown-act-what-85819/.

to provide clarification on how Title VII applies to policies that place restrictions on hair, and in response to the federal decisions on racial discrimination in the workplace, administrative agencies have released their own guidance.

Long before the final outcome in *EEOC v. Catastrophe Management Solutions*, the Equal Employment Opportunity Commission (EEOC) released a compliance manual in 2006 in support of clarifying race to include mutable characteristics.[222] The EEOC manual prohibits discrimination based on "physical characteristics associated with race, such as a person's color, hair, facial features, height and weight."[223] This signifies that the EEOC considers hair to be associated with race.[224] According to the EEOC's guidance, employers can impose neutral hairstyle rules upon their employees, such as requirements that hair be neat, clean, and well-groomed.[225] However, any such rules must be applied evenly and respect the differences in hair textures for different races.[226] Specifically, the guidance provides that to comply with Title VII, employers cannot prevent Black people from wearing their hair in a natural "afro" style as long as the afro complies with the neutral hairstyle rules.[227]

Even before the EEOC's guidance, courts generally accepted this understanding of Title VII.[228] The EEOC's guidance leaves a lot to the imagination. It does not state whether it would be permissible for an employer to require the afro to be picked or combed, nor does it account for the fact that not all afros are

222. U.S. EQUAL EMP. OPPORTUNITY COMM'N, § 15: RACE AND COLOR DISCRIMINATION (2006) [hereinafter EEOC COMPLIANCE MANUAL], https://www.eeoc.gov/policy/docs/race-color.html#VIIA. The EEOC's latest stance, which could be subject to change whenever there is a transition in administrative leadership, is favorable toward protecting Black hair in the workplace. *Id.*

223. *Id.*

224. *See id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168–69 (7th Cir. 1976).

created equal; some have looser curls while others are frizzy.[229] Will there be a preference for one type and not the other? What if the natural hair is braided, twisted, or locked to make the hair "neater" and more manageable?

More recently, there was public controversy[230] with the United States Army's grooming policy barring natural hairstyles, which were referred to as "matted" and "unkempt."[231] In 2014, former Secretary of Defense Chuck Hagel ordered the military branches to review their different hair policies, leading to a reconsideration of allowance for natural hairstyles.[232] The Secretary of Defense listened to the concerns of Black women and ultimately agreed that not only were these policies offensive, but they were also racially discriminatory.[233] The U.S. Army's original guidelines prohibited locs, two-stranded twists, and other natural hairstyles in order to abide by the rules for uniformity and professionalism.[234] The U.S. Army agreed that anyone's hair could become "matted" and "unkempt," yet Black women were consistently singled out based on a racial ideology that Black

229. *See* EEOC COMPLIANCE MANUAL, *supra* note 222; *see also supra* note 207 and accompanying text.

230. Maya Rhodan, *U.S. Military Rolls Back Restrictions on Black Hairstyles,* TIME (Aug. 13, 2014), http://time.com/3107647/military-black-hairstyles/ ("U.S. military has rolled back prohibitions on popular black hairstyles within its ranks, following months of fierce backlash.").

231. U.S. DEP'T OF ARMY, REG. 670–1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA § 3–2, 5–6 (2014) [hereinafter ARMY REGULATION]. This view of natural hairstyles is very familiar to the view expressed by Jones's employer in EEOC v. Catastrophe Management Solutions. *See supra* notes 177–79 and accompanying text. Even though anyone's hair can become unkempt, matted, or messy, both the Army and CMS treated Black hair as "uniquely susceptible" to these issues. *See* Greene, *supra* note 129, at 1019; *see also* D. Wendy Greene, *A Multidimensional Analysis: What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 364–65 (2013) (arguing that denying Black people from employment opportunities due to their natural hair is in violation of Title VII).

232. Helene Cooper, *Hagel Seeks Review of Military Policies on Hairstyles*, N.Y. TIMES (Apr. 29, 2014), https://www.nytimes.com/2014/04/30/us/hagel-seeks-review-of-military-policies-on-hairstyles.html.

233. *Id.*

234. ARMY REGULATION, *supra* note 231, § 3–2(a)(2)–(3), at 5–6.

people were more susceptible to being disheveled or unclean.[235] As a result of being asked to review its policies, the Army removed bans against natural hairstyles in addition to the discriminatory wording of "matted" and "unkempt."[236] In 2014 the U.S. Navy also updated its guidelines to allow for twists and loose braids.[237] In 2015, the U.S. Marine Corps followed the U.S. Army by upgrading its own hairstyle regulations, allowing women to wear twists, locs, and braids as long as they "present a neat, professional, well-groomed appearance."[238] Even though the policies remained problematic in other ways, such as the same protection not being afforded to males, and the subjective wording of "neat" and "well groomed," credit is due to these branches of the military for correcting some of their race-based policies.[239] If the Eleventh Circuit had followed this course in *EEOC v. Catastrophe Management Solutions*, this would be a different Note.

After the *Catastrophe Management Solutions* decision, the New York City Commission on Human Rights (NYCHR) released its Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, which stated that Black people have the right to maintain their "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."[240] The Guidance began by discussing anti-Black racism and how

235. *See, e.g.*, Caitlin Byrd, *The Air Force Has Lifted Its Ban on Dreadlocks, a 'Phenomenal' Change for Black Women*, POST & COURIER (Aug. 10, 2018), https://www.postandcourier.com/news/the-air-force-has-lifted-its-ban-on-dreadlocks-a-phenomenal-change-for- black-women/article_b3e44966-967d-11e8-95aa-cb35f8217cca.html; ARMY REGULATION, *supra* note 231, § 3–2.

236. ARMY REGULATION, *supra* note 231, § 3–2(a), at 5.

237. U.S. DEP'T OF NAVY, NAVPERS 15665I, UNIFORM REGULATIONS ch. 2, § 2, art. 2201.1 (2020), https://www.public.navy.mil/bupers-npc/support/uniforms/uniformregulations/chapter2/pages/2201PersonalAppearance.aspx#hair.

238. Cpl. Aria Herrera, *Uniform Board Decision Updates Hair Regulations*, MARINES (Dec. 14, 2015), https://www.marines.mil/News/News-Display/Article/627669/uniform-board-decision-updates-hair-regulations/.

239. It is important to note that the U.S. Airforce, while asked to update their hair policies in 2014, did not do so until 2018. *See* Rhodan, *supra* note 230; Byrd, *supra* note 235.

240. NYC COMM'N ON HUMAN RIGHTS, NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR, at 1 (2019) [hereinafter NYC GUIDANCE].

it has been a persistent issue throughout New York City.[241] The Guidance shed light that this discrimination often takes form in employment and school prohibitions against natural hair and natural hairstyles closely associated with Black people.[242] It also pointed out that "[t]he decision to wear one's hair in a particular style is highly personal, and reasons behind that decision may differ for each individual."[243] The Guidance went a step further by explaining natural hairstyles and the associated racist views.[244] It explained that Black hair could naturally be formed into locs without manipulation or could be cultivated into locs.[245] Additionally, it stated: "There is a widespread and fundamentally racist belief that Black hairstyles are not suited for formal settings, and may be unhygienic, messy, disruptive, or unkempt. Indeed, white slave traders initially described African hair and locs as 'dreadful,' which led to the commonly-used term 'dreadlocks.'"[246]

The Guidance instituted a reminder that the New York City Human Rights Law (NYCHRL) prohibited employment discrimination when there was disparate treatment and clarified that Black hairstyles were considered a protected racial characteristic because they "are an inherent part of Black identity."[247] As a result of the guidelines, the city commission created the ability to enforce penalties of up to $250,000 with no cap on damages.[248] The Guidance explained that there were multiple ways an employer's policy could be in violation of the NYCHRL:

> Covered employers that enact grooming or appearance policies that ban or require the

241. *Id.*

242. *Id.*

243. *Id.* at 3.

244. *Id.* at 4.

245. *Id.*

246. *Id.*

247. *Id.* at 6–7.

248. Stacey Stowe, *New York City to Ban Discrimination Based on Hair*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/style/hair-discrimination-new-york-city.html.

> alteration of natural hair or hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs may face liability under the NYCHRL because these policies subject Black employees to disparate treatment. Covered employers are engaging in unlawful race discrimination when they target natural hair or hairstyles associated with Black people, and/or harass Black employees based on their hair.[249]

In addition to warning and listing ways an employer could be liable under the NYCHRL, the Guidance also listed examples of violations that included policies prohibiting traditionally Black hairstyles, requiring employees to alter the state of their hair, or any policy that may effectively discriminate against Black people and their hair.[250]

Commissioner and Chairwoman of the NYCHR, Carmelyn Malalis, stated that the policies regulating hair were based on "racist standards of appearance" and that there was nothing keeping them "from calling out these policies."[251] The Guidance affirmed that the requirement for Black people to continuously manipulate their hair or use chemically-based styling techniques could result in breakage, hair loss, and, in more extreme cases, the development of conditions like trichorrhexis nodosa and traction alopecia.[252] Following the Guidance from

249. NYC GUIDANCE, *supra* note 240, at 7 (citing Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 39 (App. Div. 2009)).

250. *Id.* at 7–8 ("Examples of discrimination include: [f]orcing Black people to obtain supervisory approval prior to changing hairstyles, but not imposing the same requirement on other people . . . [r]equiring only Black employees to alter or cut their hair or risk losing their jobs . . . [t]elling a Black employee with locs that they cannot be in a customer-facing role unless they change their hairstyle . . . [r]efusing to hire a Black applicant with cornrows because her hairstyle does not fit the 'image' the employer is trying to project for sales representatives . . . [and] mandating that Black employees hide their hair or hairstyles with a hat or visor.").

251. Stowe, *supra* note 248, at 2.

252. NYC GUIDANCE, *supra* note 240, at 5. Trichorrhexis nodosa is a defect in the hair shaft that causes the hair to break off easily. *Id.* Traction alopecia is a gradual hair loss caused by tight or tension-heavy hairstyles. *Id.*; *see also* Venessa Simpson, *What's Going on Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII*

the different state and city administrative agencies, states and cities began to pass legislation clarifying the definition of race.[253] The state legislatures, in turn, have put pressure on Congress to create broader federal legislation to include hair discrimination as racial discrimination.[254]

III. MOVING FORWARD AFTER *EEOC V. CATASTROPHE MANAGEMENT SOLUTIONS*

Upon enactment of Title VII, Black people challenged employers' grooming policies in an attempt to show the relationship between racial discrimination and hair.[255] However, after *Rogers*, the protection of natural hair as a racial characteristic became more restrictive.[256] Furthermore, the Eleventh Circuit's decision effectively made it impossible for Black people to receive Title VII protection when subjected to race-based discrimination based on their natural hair.[257] As a result of these decisions, when employers have policies that prohibit natural hairstyles, Black people must submit to the policy or risk being turned down for jobs, or even fired.[258] Rather than wearing a protective style like braids, twists, or locs, Black people, wishing to wear their hair in a more "manageable" state *and* keep their job, were faced with limited and unfavorable options: cut off their hair, "straighten their hair with a chemical relaxer or hot comb" and subject themselves to severe damage, or wear a weave or wig to completely cover

Protection, 47 SW L. REV. 265, 276–78 (2017) (giving additional information on trichorrhexis nodosa and traction alopecia).

253. *See* discussion *infra* Section III.B.

254. *See supra* Section II.B.

255. *See, e.g.*, Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 165 (7th Cir. 1976).

256. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981). *Rogers* created the immutability standard. *See supra* note 151–53 and accompanying text.

257. *See* Alexia Fernández Campbell, *California Is About to Ban Discrimination Against Black Workers with Natural Hairstyles*, VOX (July 3, 2019), https://www.vox.com/identities/2019/7/3/20680946/california-crown-act-natural-hair-discrimination.

258. *See* Onwuachi-Willig, *supra* note 114, at 1125.

their natural hair.[259] Solutions are needed to ensure that Black people do not face this kind of ultimatum. The law should reflect that race discrimination includes hair discrimination.

Multiple avenues have been, and should continue to be, pursued to rectify the current lack of protection for racial discrimination based on hair. The avenues that remain after the failed attempt for judicial change in *EEOC v. Catastrophe Management Solutions* include: (1) courts applying an updated definition of race in future lawsuits; (2) state legislation, like California's,[260] explicitly defining racial discrimination to include mutable characteristics; and (3) federal legislation clarifying racial discrimination to include discrimination based on characteristics associated with race, effectively prohibiting racial discrimination of Black hair. To aid in protecting Black hair, some administrative agencies and the military created or updated racial discrimination guidelines.[261] These guidelines led to and often formed the basis of state legislation and city legislation.[262]

A. *Redefining Race*

The first option, though unlikely to occur, is for courts to change and broaden their definition of race to include mutable characteristics associated with race. Perhaps purposely, neither Title VII nor § 1981 defines race, although both statutes were created to prevent discrimination based on race, among other

259. *Id.* at 1089. Additionally, achieving the white norm by having more straightened hair can be expensive and can damage a Black woman's psyche. *See* MCGILL JOHNSON ET AL., *supra* note 107.

260. *See* S.B. 188, Reg. Sess. § 2, § 3 (Cal. 2019–2020) (amending § 212.1 of the California Education Code and § 12926 of the California Government Code, respectively) [hereinafter Cal. CROWN Act]. Similar legislation has also been passed in New York and New Jersey. *See* 2019 Assemb. Bill A07797A (N.Y. 2019) [hereinafter N.Y. Assemb. Bill]; S.B. S3945, Reg. Sess. (N.J. 2019).

261. *See, e.g.*, Griffin, *supra* note 26.

262. *See* discussion *infra* Section III.B.

categories.[263] Because Title VII makes it illegal to discriminate based on race, courts, in adopting an updated definition of race, would include hair discrimination protection under Title VII.[264] After all, this is one of the main reasons why there has continued to be an obstacle to Black people who want to prevail in hair discrimination lawsuits.[265]

Race should include cultural characteristics such as speech, dress, and of course, hair styles because it is these characteristics that are often attacked through racism.[266] Even though race has historically been linked to more than just skin color, the courts now are likely to willfully ignore that race is more than immutable characteristics.[267] In *EEOC v. Catastrophe Management*

263. *See* 42 U.S.C. § 2000e-2 (2012); *see also* 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . as is enjoyed by white citizens . . . .").

264. *See, e.g.*, Greene, *supra* note 129, at 1028 n.218 (citing D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" & the State of Title VII Protection*, 47 U. MICH. J.L. REF. 87, 133–36 (2013) ("Recognizing the undetected salience of race as a biological construct within contemporary social and legal thinking even though it has been firmly established that race is not a genetic but rather a social construct—a construct which has real, defining meaning.")); Ronald Turner, *On Locs, Race, and Title VII*, 2019 WIS. L. REV. 873, 907 [hereinafter Turner (2019)] ("'Race' must be untethered from biology and the flawed immutability analytic must be interred and no longer applied in Title VII cases involving employers' refusal to employ Black women because of their natural hair or locs, braids, twists, and other hairstyles.")

265. *See* Turner (2019), *supra* note 264, at 901.

266. *See generally* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008) [hereinafter *What's Hair Got to Do with It?*] (arguing for courts to implement a broader definition of race that takes into account historical and contemporary understandings of race). Additionally, Merriam-Webster's editorial manager, Peter Sokolowski, confirmed for Kennedy Mitchum that Merriam will update its definition of racism to make it more apparent that racism includes a "systematic oppression upon a group of people." *US Dictionary Merriam-Webster to Change its Definition of Racism*, AL JAZEERA (June 10, 2020), https://www.aljazeera.com/news/2020/06/dictionary-merriam-webster-change-definition-racism-200610090139069.html. When the editorial manager of the Merriam-Webster dictionary chose to update the definition of racism, he acknowledged that updating definitions is a continuous process and that it is important to describe language as it is actually used. *Id.* ("This is the kind of continuous revision that is part of the work of keeping the dictionary up to date, based on rigorous criteria and research we employ in order to describe the language as it is actually used.").

267. *What's Hair Got to Do with It?*, *supra* note 266, at 1366 ("In 1806, Judge Tucker explained in Hudgins v. Wrights, Blacks of 'pure' and mixed African ancestry displayed 'a flat nose and woolly head;' Native Americans were 'copper coloured person[s] with long jetty black, straight hair;' and whites exhibited 'a fair complexion, brown hair, not woolly nor inclining thereto,

Solutions, the court had the opportunity to define race in a way that included mutable characteristics but instead chose to use an outdated definition from the 1960s, restricting race to biology.[268] The notion of restricting race to biology played a large part in enforcing Jim Crow era race roles, like the "one-drop" and "traceable amount" laws.[269] Effectively, the court continued to use a definition that directly benefitted racist regimes.[270] Instead of moving away from the outdated definition, the court held that broadening the definition of race would lead to "absurd results" because both white and Black employees with locs could have challenged the policy.[271] Ironically, federal judges have said immutability as it applies to race is a legal fiction, or in other words, there is nothing in legislative history or even in the actual statutes that state the immutability doctrine *must* be applied.[272] The immutability doctrine is a court-created standard.[273] Although race is so much more than "immutable" characteristics, courts are likely to

with a prominent Roman nose.'"). How race is defined is usually used to further a purpose of who is protected. *Id.* In the past, courts used more broad definitions of race to prevent certain races from having more expansive rights of their White counterparts. *See id.* (citing State v. Belmont, 35 S.C.L. (1 Strob.) 445, 449–53 (S.C. Ct. App. 1847)).

268. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026–27 (11th Cir. 2016) ("Take, for example, the following discussion in a leading 1961 dictionary: 'In technical discriminations, all more or less controversial and often lending themselves to great popular misunderstanding or misuse, RACE is anthropological and ethnological in force, usu[ally] implying a physical type with certain underlying characteristics, as a particular color of skin or shape of skull . . . although sometimes, and most controversially, other presumed factors are chosen, such as place of origin . . . or common root language.'").

269. Turner (2019), *supra* note 264, at 886 (citing Amos N. Jones, *Black Like Obama: What the Junior Illinois Senator's Appearance on the National Scene Reveals About Race in America, and Where We Should Go from Here*, 31 T. MARSHALL L. REV. 79, 86 (2005)). The one-drop rule is a racial classifier used during enslavement and the Jim Crow era that made it so that a single drop of "black blood" would classify a person as Black. *Id.*

270. *See id.* at 888.

271. EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014).

272. *See* Petition of the Equal Employment Opportunity Commission for Rehearing En Banc, EEOC v. Catastrophe Mgmt. Sols., 876 F.3d 1273, 1284 (11th Cir. 2017) (No. 14-13482). ("The panel opinion itself shows us that the notion of an 'immutable' racial characteristic is fiction."). Furthermore, afros, which are considered an immutable characteristic and not a hairstyle, are actually mutable because they can be changed, and thus are in fact a hairstyle. *Id.* at 1284–85.

273. *See id.* at 1284–85.

continue to refer to original definitions of race, which were born out of racism and limited understanding.[274]

B. *Legislative Solutions*

Black people "are forced to choose between their livelihood or education and their cultural identity and/or hair health," and no system offers any kind of remedy.[275] State legislation is perhaps the best avenue to afford Black people some protection from a racist system.[276] By having each individual state create their own legislation, states can provide guidance to federal legislatures on what language works for pre-federal legislation and fill in those gaps post-federal legislation. For this reason, state legislation is a necessary avenue of protection.

California was the first state to enact legislation explicitly protecting Black people from workplace hair discrimination.[277] California's legislation, Creating a Respectful and Open Workplace for Natural Hair (the CROWN Act)[278] was created from a partnership with Dove, the National Urban League, Color of Change, and the Western Center on Law and Poverty (the CROWN Coalition) in recognition that "Black women are unfairly impacted" and that society has "enabled

274. Turner (2019), *supra* note 264, at 893 (The court "accepted a dictionary definition of 'race' derived from and perpetuating an invented, antiquated, and debunked biological determinism 'largely developed by Europeans seeking to justify colonization and enslavement of people they viewed as physically different - and inferior.'") (citing CRYSTAL MARIE FLEMING, RESURRECTING SLAVERY: RACIAL LEGACIES AND WHITE SUPREMACY 8 (2017))).

275. N.Y. STATE ASSEMB., LEGIS. PROCEEDING, at 463–64 (June 20, 2019) (statement of Tremaine S. Wright) [hereinafter N.Y. STATE ASSEMB.].

276. *See* Jessie Higgins, *24 States Consider Bills to Ban Natural Hair Discrimination*, UPI (Feb. 27, 2020, 3:00 AM), https://www.upi.com/Top_News/US/2020/02/27/24-states-consider-bills-to-ban-natural-hair-discrimination/2351582755705/. As of February 27, 2020, 24 states have considered passing legislation to ban hair discrimination. *Id.*

277. *See California Becomes First State to Ban Discrimination Against Natural Hair*, CBS NEWS (July 4, 2019, 8:48 AM), https://www.cbsnews.com/news/crown-act-california-becomes-first-state-to-ban-discrimination-against-natural-hair/. Although California was the first state to create legislation protecting hair discrimination, Washington, D.C. was the first territory to ban hair discrimination. *See Natural Hair Discrimination Is Illegal in the District*, OFF. ATT'Y GEN. FOR D.C. (Oct. 28, 2019), https://oag.dc.gov/blog/natural-hair-discrimination-illegal-district.

278. Cal. CROWN Act, *supra* note 260.

discrimination against Black women's hair."[279] Before Governor Gavin Newsom passed this legislation, California and Dove conducted research on the true impact and intersection of Black hair and employment, finding some alarming, albeit not surprising, statistics, including: Black women are 80% more likely to change their hair to conform to expectations at work, and Black women are 50% more likely to be reprimanded, or know of a Black woman who has been reprimanded, because of her hair.[280]

California's CROWN Act ensures that traits historically associated with race, such as hair textures and hairstyles, including "protective hairstyles" such as braids, locs, and twists, would be protected from workplace and educational institution discrimination.[281] The CROWN Act also formally recognizes, perhaps for the first time, that societal norms and laws have historically equated "'blackness,' and the associated physical traits, for example, dark skin, and kinky and curly hair to a badge of inferiority."[282] The CROWN Act also recognizes that hair has historically been a determining factor of an individual's race, and that "[p]rofessionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional."[283] Importantly, the CROWN Act also declares:

> [a]cting in accordance with the constitutional values of fairness, equity, and opportunity for all, the Legislature recognizes that continuing to enforce a Eurocentric image of professionalism through purportedly race-neutral grooming

279. *The CROWN Act: Working to Eradicate Race-Based Discrimination*, DOVE (Nov. 11, 2019), https://www.dove.com/us/en/stories/campaigns/the-crown-act.html [hereinafter CROWN Coalition].

280. *Id.*

281. Cal. CROWN Act, *supra* note 260.

282. *Id.* § 1(a).

283. *Id.* § 1(b).

> policies that disparately impact Black individuals and exclude them from some workplaces is in direct opposition to equity and opportunity for all.[284]

Interestingly, as discussed in a statement issued by Dove, there was an even broader reasoning cited as support for passing California's CROWN Act: Employers who refuse to hire or promote Black people, or fire Black people altogether because of their hair, work against the United States and destabilize our capitalistic society.[285]

Shortly after California's legislation, New York enacted Bill S6209A/A07797A (A07797A) prohibiting race discrimination based on natural hair or hairstyles.[286] Under this legislation, race is defined to include, but is not limited to, ancestry, color, ethnic group identity and ethnic background, as well as traits historically associated with race including, but not limited to, hair texture and protective hairstyles.[287] New York defines "race" and "protective hairstyles" in nearly the same way to California's CROWN Act.[288] New York's Bill A07797A was proposed along with Bill A07169, which would require businesses contracting with the state to provide data on pay for employees based on race, gender, and ethnicity that is available to the public, in order to address a history of wage discrimination.[289] Bill A07797A is part of a series of legislation to fill in gaps left by courts and to protect Black people.[290]

284. *Id.* § 1(g).

285. *See* CROWN Coalition, *supra* note 279.

286. N.Y. Assemb. Bill, *supra* note 260.

287. *Id.*

288. "The term 'race' shall, for the purposes of this article include traits historically associated with race, including but not limited to, hair texture and protective hairstyles. The term 'protective hairstyles' shall include, but not be limited to, such hairstyles as braids, locks, and twists." *Id.* § 1 (amending § 292 of N.Y.'s Exec. Law), § 2 (amending § 11 of N.Y.'s Educ. Law); *see also* Cal. CROWN Act, *supra* note 260.

289. N.Y. STATE ASSEMB., *supra* note 275, at 21–22.

290. *See* NYC GUIDANCE, *supra* note 240, at 3–6.

In response to the horrendous cutting of wrestler Andrew Johnson's locs during a wrestling match,[291] the Governor of New Jersey signed into law the New Jersey CROWN Act exactly one year after the incident.[292] This bill follows the footsteps of California and New York to define race as being "inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles . . . . [L]ike braids, locks, and twists."[293] Additionally, the new legislation makes it illegal to target people in public spaces because of their hair texture, type, or hairstyle.[294] In 2020, Washington state followed in passing legislation and signed into law the Washington House of Representatives Bill 2602 (HB 2602).[295] HB 2602 amends the Washington Law Against Discrimination and defines race as "inclusive of traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles."[296] Maryland also passed its own version of the CROWN Act in 2020, as well.[297]

Although the existing state legislation is a step in the right direction, these laws will likely need to be amended to include additional language to more broadly protect Black people from workplace hair discrimination. This will be especially important if federal legislation passes. For example, the current legislation does not explain that policies calling for hair to be

291. *See* discussion *supra* Section I.B.

292. Create a Respectful & Open Workspace for Natural Hair Act, N.J. S2945, Reg. Sess. (2018-2019 Regular Session) [N.J. CROWN Act]; Mariel Padilla, *New Jersey Is Third State to Ban Discrimination Based on Hair*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/us/nj-hair-discrimination.html.

293. N.J. CROWN Act, *supra* note 292, at ch. 272.

294. Padilla, *supra* note 292.

295. H.R. 2602, 66th Leg., Reg. Sess. (Wa. 2020).

296. *Id.*

297. Act of May 8, 2020, ch. 473, 2020 Md. Laws 2442 (to be codified as amended at Md. Code Ann. § 20-101); Emily Opilo, *From Hairstyles to Child Support, These Are some of the New Maryland Laws Going into Effect Thursday*, BALT. SUN (Oct. 1, 2020, 5:00 AM), https://www.baltimoresun.com/politics/bs-pr-md-pol-october-new-laws-20201001-t753lqdmf5gqznp5s5fl53pyj4-story.html.

"neat" and "tidy" could also negatively impact Black people.[298] With the wide range of hair textures in the Black community, it is likely that employers will still use these subjective policies to assert that less accepted curl textures—textures that are more kinky and coarse as opposed to loose curls—are going against the policy.[299] This means that certain afros will be more protected than others, as well as certain braids, locs, and twists. Legislation needs to address this issue, as well, in order to close this possible loophole.

In addition to state legislation, federal legislation is needed. In December 2019, U.S. Representatives Cedric Richmond, Ayanna Pressley, Marcia Fudge, and Barbara Lee introduced the federal version of the CROWN Act into the House of Representatives.[300] Federal legislation would be optimal to ensure that the United States gives some protection from hair discrimination. However, it would likely contain gaps, requiring states to gap-fill, and take longer to enact.[301]

Until all states create legislation protecting Black hair, or until a federal CROWN Act is enacted, Black people will continue to be forced to choose between wearing their hair in its natural form or using damaging and expensive alternatives to wearing their hair in order to be more secure in their job prospects.[302] If employers continue to enact grooming policies with an undercurrent that Black hair is unacceptable, consequently, Black people will either have to succumb to outdated,

298. See *supra* Section II.C. for a discussion on how the EEOC's guidance fails to account for the fact that not all afros are equal.

299. *See, e.g.*, Crystal Powell, *Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward*, BYU L. REV. 933, 955–57 (2019).

300. CROWN Act of 2020, H.R. 5309, 116th Cong. (2019). The House passed the CROWN Act in September 2020, and as this Note goes to publication, it is awaiting passage by the Senate. *Id.*; Dana Givens, *The House of Representatives Pass Anti-Hair Discrimination Bill, the CROWN Act*, BLACK ENTER. (Sep. 24, 2020), https://www.blackenterprise.com/the-house-of-representatives-pass-anti-hair-discrimination-bill-the-crown-act/.

301. Powell, *supra* note 299, at 965.

302. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("If the employee objects to the grooming code [they have] the right to reject it by looking elsewhere for employment, or alternatively [they] may choose to subordinate [their] preference by accepting the code along with the job.").

Eurocentric, and racist views of "good hair," or Black people will be forced to pass on jobs with better benefits or career opportunities. Without both the state and federal governments stepping in to create legislation, Black people nationwide will continue to suffer from hair discrimination.

CONCLUSION

Black people have been the backbone to building America since its formation. Though Black people have come a long way, forced to conform to white, European standards both in speech and style, their successes still have not been enough to combat the systemic racism that persists in our society. If we continue to allow employers to use subjective and race-based standards for what is considered work-appropriate hair, Black people ultimately will be forced out of opportunities. Unchecked, hair discrimination will perpetuate an initiative started in times of enslavement to create a social hierarchy in which Black people are at the bottom. Black people need protection because the courts have not, thus far, extended protection for Black people based on hair discrimination in the workplace and other race-related issues. Additionally, the legal system must work to ensure that the Black people who are qualified for the job are not excluded because of racial stigma against natural hair. This will benefit Black people, stimulate the American economy, and create a more efficient and well-working society, that results in better economic growth.

For centuries Black people have faced discrimination just for being Black. I hope that this Note provides a push for more states to pass legislation, eventually leading to federal legislation that prohibits employers from racially discriminating against natural hairstyles and formally recognizes the role hair texture and hairstyles play in determining race.