Black Hair(tage): Career Liability or Civil Rights Issue?

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In 2014, the Census Bureau reported that of the twenty million children, under the age of five, living in the United States, 50.2% were minorities. For those who feared that White Americans would soon become the minority, recent data reveals that the day has already come, and by 2020, more than half of America's children under the age of eighteen will be members of a racial minority or ethnic group. However, despite the country's increasing racial diversity, our society's preference for Eurocentric standards of beauty remains the same.

"Eurocentric" standards of beauty refer to the bias shown towards European or Caucasian culture and the physical traits associated with it. Furthermore, as the United States is seen as one of the most powerful countries in the world, our standard of beauty has seeped into other countries as a result of globalization, influencing the way other cultures define beauty. For example, preference

2. Id.
5. Id.
for lighter skin remains prevalent in Asian culture. Historically, fair skin was considered a symbol of wealth, separating upper-class individuals from the working class who typically labored outdoors and had darker skin. Today, in certain parts of Asia, many women use skin-whitening creams and avoid walking outside in the sun to keep their skin as close to white as possible.

Double eyelid surgery has also become a popular practice in some Asian countries for people who want to change their epicanthic fold, a trait common to Asians, to be in conformity with Eurocentric standards of beauty.

The issue with using whiteness as a yardstick for measuring one's beauty is that it reinforces a system of white supremacy. Based on this standard, White people, by definition, are the most attractive, and anyone who deviates from it is considered less attractive or ugly. The popular saying, "beauty is in the eye of the beholder," implies that the concept of beauty is entirely subjective. In our culture, the beholder is the media, advertising companies, and the fashion and beauty industries, whose opinions and representations of beauty our society has, by and large, adopted.

For instance, white standards of beauty are visible in the entertainment industry, where most of the women who appear in major Hollywood films are exclusively White. Moreover, the range of Black representation on the big screen is so limited that someone who has never stepped foot in the United States could reasonably assume that the vast majority of Black women in America are light skinned, which is obviously untrue. Likewise, the fashion industry lacks

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7. Id.
8. Tranchina, supra note 4.
9. Id.
11. Id.
racial diversity. In 2014, 82.7% of the models in New York’s Fashion Week—arguably the world’s biggest fashion event—were White. Women of color are also under-represented in most product and commercial advertisements, even when the product being marketed is intended for a minority audience.

In addition to valuing whiteness, Eurocentric standards of beauty normalize having long, straight hair. In his *Note on the State of Virginia*, Thomas Jefferson mentions “flowing hair,” in addition to, “a more elegant symmetry of form” when describing the superior beauty of Whites while relegating Black people to orangutans. And while there is nothing wrong with fitting the norm, the consequences suffered by women who do not are damaging, specifically for women of color. Black women are especially vulnerable to the effects of Eurocentric beauty standards because these standards emphasize skin tones and hair types that exclude most Black women.

Most recently, Amara La Negra, an Afro-Latina cast member on VH1’s *Love & Hip Hop Miami*, made headlines after shutting down music producer Young Hollywood, after he insulted her natural hair, insinuating that it would keep her from succeeding as an artist because Hawaiians are not “elegant” or “breathtaking.” Young Hollywood’s comments highlight only some of the common stereotypes and microaggressions Black women endure as a result of choosing to wear their hair naturally. He mockingly called her “soul sista” and “Nutella queen,” causing her to walk out of the studio.

22. Id.
fit ‘the box,’ I want to be Amara La Negra, and I’m not going to change that for anybody else.”

Likewise, in light of the recent “explosion” of the natural hair movement, some Black women have decided to quit using chemical relaxers, and are learning to love and embrace their hair in its natural state. Others remain on the fence in the natural versus straightened-hair debate, as the wrong decision can cost them their jobs. In the professional world, employers, by enforcing “workplace grooming policies,” get to make that decision for them. These policies allow employers to regulate employees’ dress and appearance in order to maintain a “professional” image within the company.

Generally, the courts will respect an employer’s grooming policies, so long as they serve legitimate business purposes and do not discriminate on the basis of race, religion, or sex. However, in 2016, the Eleventh Circuit upheld an employer’s ban on dreadlocks—a hairstyle commonly associated with Black heritage. In the context of employment law, Congress has limited the definition of race under Title VII to “immutable traits” of a person’s race, excluding cultural aspects associated with race. This narrow interpretation has left the courts to grapple with the question of what qualifies as “race discrimination” in employment cases, with the courts tending to rule in favor of the employer. Furthermore, the distinction made between “immutable” biological traits and cultural aspects associated with race, allows employers to discriminate based on an individual’s expression of their cultural identity.

25. Id.
26. Natural hairstyles refer to when Black women style their hair in a way that is consistent with the hair’s natural texture. Gandy, supra note 19.
28. Id.
33. See Perkins, supra note 30.
34. Kaplan & Smith, supra note 32.
This Note will consider the courts' current conceptualization of race, and explain why the immutability requirement, as it applies to protected classes under Title VII, should be abandoned or applied less stringently. This Note will discuss the purpose, provisions, and exclusions of Title VII and address some of its inadequacies. The Note will further analyze the existing case law related to workplace grooming policies that ban certain hairstyles, and discuss possible precedent for broadening the category of race to include ethnic hairstyles. And lastly, this Note concludes with some plausible recommendations for amending the law.

I. THERE'S NOTHING DREADFUL ABOUT MY LOCKS

In 2014, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against Catastrophe Management Solutions (CMS) on behalf of Plaintiff Chastity Jones, a Black woman, whose job offer was rescinded after she declined to cut off her dreadlocks. The EEOC argued that by rescinding Jones's offer pursuant to its grooming policy, CMS violated Title VII of the Civil Rights Act of 1964, as the practice of banning dreadlocks, a hairstyle “physiologically and culturally associated with people of African descent,” in the workplace, constitutes racial discrimination. CMS's policy read: “[a]ll 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 [hairstyles] are acceptable.”

The district court dismissed the Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(6), for failing to plausibly state a claim of intentional discrimination based on race. Subsequently, in its amended complaint that went before the Eleventh Circuit, the EEOC made four new arguments to defend its position that having dreadlocks was a racial characteristic for purposes of Title VII. First, it rejected the court's biological definition of race and asserted that race was a social construct. Second, it argued that the concept of race was not “limited to or defined by immutable

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35. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020–21 (11th Cir. 2016).
36. Dreadlocks ("locks") consist of sections of hair that are permanently locked together and cannot be unlocked without cutting.
38. Catastrophe Mgmt. Sols., 852 F.3d at 1022.
39. Id. at 1020.
40. Id. at 1022.
41. Id.
physical characteristics."\(^{42}\) Third, the EEOC referred to its own manual and explained that race encompassed "cultural characteristics related to race or ethnicity, including 'grooming practices.'"\(^{43}\) Lastly, the EEOC likened dreadlocks to skin color, a characteristic of race.\(^{44}\)

After addressing the race point, the EEOC indicated that it intended to proceed under a disparate treatment theory, alleging that CMS intentionally discriminated against Jones on the basis of race.\(^{45}\) However, in the view of the court, this is where the EEOC misstepped.\(^{46}\) While claiming to bring their suit under a disparate treatment theory, the EEOC made disparate impact arguments instead.\(^{47}\) They argued that "the people most adversely . . . affected by a dreadlocks ban, such as CMS's [policy], are African-Americans," and because this was a disparate treatment case, the Eleventh Circuit declined to address the EEOC's arguments that CMS's policy had a disproportionate effect on Black employees.\(^{48}\) Ultimately, because the EEOC conflated two very similar, but legally distinct theories of liability, the Eleventh Circuit affirmed the district court's ruling.\(^{49}\)

II. STRANDS OF TITLE VII

Nearly fifty years ago, President Lyndon B. Johnson signed the comprehensive Civil Rights Act of 1964 in response to the long-standing history of segregation and discrimination in the United States—which denied certain groups access and opportunities for decades.\(^{50}\) From this legislation, Title VII was created specifically to ensure equal opportunity in America's workplaces and to provide a federal remedy for those discriminated against on the basis of race, sex, religion, or national origin.\(^{51}\) The law also created the EEOC.\(^{52}\) The law generally prohibits employers from using a person's race, sex, religion, or national origin to make hiring decisions, grant or
deny promotions, or determine a person’s pay or benefits.\textsuperscript{53} Further, Title VII protection extends to both employees and job applicants.\textsuperscript{54}

Despite the passing of this law, discrimination based on race and gender in the workplace remains a serious problem.\textsuperscript{55} In 2016, the EEOC received a total of 91,503 complaints, and more than half of the claims were related to both race and sex discrimination.\textsuperscript{56}

A. The Immutability Requirement

With the passing of the Genetic Information Nondiscrimination Act (GINA)\textsuperscript{57} and the Americans with Disabilities Act Amendment Act (ADAAA),\textsuperscript{58} Congress has added genetic information and disability to the list of characteristics employers cannot consider under Title VII. In light of these recent developments in the law, it begs the question of why other characteristics are excluded from Title VII’s statutory scheme, namely, cultural aspects related to race and other traits fundamental to one’s identity.\textsuperscript{59}

While the concept of immutability provides a unifying principle for all traits covered by Title VII, it fails to address more elusive forms of discrimination that the law does not account for.\textsuperscript{60} For example, under current law, it is perfectly legal for an employer to consider an applicant’s appearance when making hiring decisions.\textsuperscript{61} Employers recognize that attractiveness sells and that appearance affects perceived characteristics such as intelligence, motivation, wealth, and overall capability.\textsuperscript{62} Furthermore, psychological studies

\begin{itemize}
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} U.S. EQUAL OPPORTUNITY EMP. COMM’N, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/YTW4-6QAU].
  \item \textsuperscript{57} Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. See Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff (2008). Under this law, employers may not use genetic information in making employment decisions or request genetic information or test results as a condition of employment. Id.
  \item \textsuperscript{58} The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent allowed by the ADA and generally should not require extensive analysis. ADA Amendments Act, 42 U.S.C. § 12101 (2008).
  \item \textsuperscript{59} Sharona Hoffman, The Importance of Immutability in Employment Discrimination Law, 52 WM. & MARY L. REV. 1483, 1483 (2011).
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{63} Perkins, supra note 30.
\end{itemize}
have proven this very phenomenon of associating physical attractiveness with success.64

A famous and historic illustration of this phenomenon was the nation’s first televised presidential debate between Richard Nixon and John F. Kennedy in 1960.65 Viewers who watched the debate on television saw Nixon who appeared pale, sickly, and underweight from a recent hospitalization in comparison to Kennedy, who looked calm, confident, and reportedly had been tanning the day before.66 Those who only listened to the debate on the radio thought Nixon was the winner.67 However, by 1960, eighty-eight percent of Americans had televisions and believed that Kennedy won the debate.68

Some argue that employers have a legitimate business interest in employee appearance, and it should be no surprise that employers are more likely to hire physically attractive individuals and exclude applicants who do not appear to fit in.69 Hence, in theory, an employer could choose not to hire someone because she is overweight, does not wear makeup, or is simply “less attractive.”70

As discussed earlier, our society privileges whiteness as the standard of beauty, and those who do not meet that standard are perceived unfavorably.71 Furthermore, these biases related to appearance can impact social interactions, including one’s ability to gain employment.72 Thus, a woman like Chastity Jones—who has dreadlocks—may be perceived as lazy, incompetent, or less productive simply because she does not meet societal expectations of what is acceptable appearance or beauty.73 What makes appearance-based racial discrimination difficult to detect is that it is not “explicitly coded.”74 Instead, policies that target ethnic hairstyles are rooted in people’s attitudes, and frankly, misconceptions about black hair.75

66. Id.
67. Id.
68. Id.
69. See Williams, supra note 64.
70. See id.
71. See Ramsey, supra note 3.
72. See Mahajan, supra note 62, at 165.
73. See EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1018 (11th Cir. 2016); Mahajan, supra note 62, at 165.
74. Axelrod, supra note 27.
Natural hairstyles like Afros have historically been tied to radical political movements and leaders like Angela Davis and the Black Panthers. But wearing one's hair naturally has little to do with politics. It is simply wearing one's hair how it naturally grows on one's head. Specific to dreadlocks, the most enduring stereotype about black natural hair is that it is dirty. Urban legend has it that Bob Marley had forty-seven different strands of lice in his dreadlocks when he died. These types of speculations are problematic because they perpetuate harmful stereotypes about black hair that are often inaccurate.

Another stereotype is that Afros and dreadlocks are the results of unwashed, or "unkept" hair. On the contrary, dreadlocks, like Afros, are the result of natural hair growth and require extensive maintenance. Like any haircare routine, washing one's hair on a regular basis is essential to keeping the hair neat and clean. Water also helps "lock" the hair as it naturally kinks the hair, resulting in a stronger hold. Lockticians also recommend using natural oils and hair butters to retain moisture and condition the hair to prevent dryness. Furthermore, as the hair continues to grow, there are several methods one can use to incorporate new growth into existing hair strands, including palm rolling, dread balling, and crocheting.

It is unlikely that when Congress first passed the Civil Rights Act of 1964 it considered bans on ethnic hairstyles a form of racial discrimination. But as proven with the creation of GINA and the ADAAA, Title VII can be expanded to reach injustices not contemplated in 1964. [citation needed]
The courts’ current conceptualization of race under Title VII leave Black women, who stand at the intersection of race and gender, the most vulnerable to discriminatory practices like banning quintessentially black hairstyles. Professor Kimberlé Crenshaw, prominent civil rights advocate and critical race theorist, introduced the term “intersectionality” as a way of framing social justice issues, particularly those that affect Black women. The term in its name recognizes the overlapping and intersecting systems of injustice certain communities face, instead of categorizing things independently as a race, gender, or class issue as that approach fails to capture the experience of individuals who are subject to injustice vis-à-vis all these identities at once. Quite oppositely, the courts do not recognize intersectional claims of discrimination.

In DeGraffenreid v. General Motors, five Black female plaintiffs sued General Motors for employment discrimination, alleging that the company’s “last hired–first fired” seniority system perpetuated the effects of past discrimination against Black women. Evidence presented at trial “revealed that General Motors simply did not hire Black women prior to 1964 and that all the Black women hired after 1970 lost their jobs in a seniority-based layoff [following] a subsequent recession.” In that case, the district court held that “black women” were not a special class under Title VII and that they could only sue on the separate bases of race or sex discrimination, not both. The court reasoned that the plaintiffs “should not be allowed to combine statutory remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended.” Additionally, the court concluded that “because General Motors did hire women—albeit white women—during the period that no Black women were hired,” the seniority system could not have possibly perpetuated any sort of sex discrimination.

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90. Id.
91. Id.
94. Crenshaw, supra note 92, at 141.
95. Id. at 142.
96. Id. at 141.
97. Id. at 142.
Following the DeGraffenreid court’s logic, Black women are protected only to the extent their experiences fit neatly into either of the two classes protected by the law. In practice, this view favors the most privileged covered by Title VII’s statutory scheme, specifically White women and Black men, while marginalizing Black women, who are burdened by and subjected to more nuanced forms of discrimination. This reality demands the need to change the way courts understand race generally, in order to afford greater protections for certain subclasses within minority groups.

In EEOC v. Catastrophe Management Solutions, the Eleventh Circuit held that Title VII protection only extends to immutable traits of race and that mutable characteristics such as hairstyles, even if culturally associated with a protected class, are not protected characteristics. However, Chastity Jones is not the first plaintiff to sue her employer for banning her hairstyle. In 1981, Renee Rogers, a flight attendant, sued American Airlines for its grooming policy that prohibited employees from wearing cornrows. She argued that the policy violated her right under Title VII among other things, and discriminated against her as a Black woman.

The district court disagreed and held that a neutral employer policy against women wearing cornrows was not a race-based distinction, and that such a policy would only violate Title VII if it had a disparate impact on Black women and was not consistent with a job-related or business necessity. The court went on further to say that if the policy banned Afro hairstyles, then it would be a race-based distinction and closer to a violation of Title VII, as Afros are a result of natural hair growth, not artifice. In the court’s opinion, an all-braided hairstyle is an “easily changed characteristic” and cannot be the basis of a discrimination claim. To add insult to injury, the court attributed a hairstyle that has been culturally and historically worn by Black people to a White woman, by suggesting that the plaintiff only chose to wear her hair in braids after the actress...
Bo Derek “popularized,” but really culturally appropriated, the hairstyle in the film 10.

The court’s determination that American Airlines’s policy did not exclusively target Black women, but applied evenly to anyone who might want to wear his or her hair this way, fails to consider the cultural significance or practical reasons why Black women choose certain hairstyles, illuminating the federal judiciary’s overwhelming whiteness and lack of cultural competency. While to some hair may seem trivial, the issue of black hair is anything but trivial.

During the late 18th Century, “tignon laws” required Black and Creole women in Louisiana to wear head scarves because they wore their hair “in such elaborate ways that it attracted the attention of White men.” These laws were not only to keep Black women out of the White male gaze, but to mitigate White women’s jealousy, as it was common for White men to openly keep Black women as their mistresses. Thus, very early in American history, Black women’s natural hair was an issue of law and a matter of contention.

Market research revealed that in 2012, the black haircare market was valued at $684 million with a projection of $761 million by 2017. When taking into account general market brands, weaves, extensions, wigs, independent beauty supply stores, distributors, e-commerce, styling tools, and appliances, the industry is worth approximately $500 billion—in other words, half a trillion dollars.

It should come as no surprise that Black women spend a significant amount of money on haircare given the persistent intolerance and bias surrounding natural hair in the workplace.

Workplace grooming policies generally require that an employee’s hair is groomed in a manner that is professional, businesslike, not “too excessive,” or unconventional. Moreover, since these policies track...
normative standards of appearance, specifically Eurocentric standards of beauty, they appear to be racially neutral when in fact they are race specific. When enforced, these policies exclude Black women’s natural hairstyles—put differently, Black women who decide to wear their hair in its unaltered texture are excluded from the workplace. Thus, in order to be in compliance with these policies, Black women must alter the natural qualities of their hair or wear false hair.

Famous Judge Mablean Ephriam, from Fox Network’s Divorce Court, was fired after seven years, in part because she refused to wear a wig per the network’s demand. Unlike the plaintiff in Rogers, “Judge Mablean was willing to perm or straighten her hair.” However, in season six, she had no choice but to wear a wig after suffering severe hair loss as a result of the chemical relaxing process. Additionally, the cost of chemical relaxers ranges from $60 to $300, or $40 to $400 for touch-ups between relaxers, which is usually required every six weeks. Again, the judiciary ignores Black women’s unique struggles associated with the long, arduous, and relatively expensive process of styling one’s hair to adhere to workplace grooming policies, that their White counterparts do not experience.

Despite the courts having categorized both braids and dreadlocks as mutable characteristics, both hairstyles take to the natural texture of the person’s hair, which is a biological element of race. The Eleventh Circuit even conceded that black hair texture is an immutable characteristic, similar to skin color, but strangely reached the opposite conclusion regarding black hairstyles, noting that they are not because they can be changed. Prior to Rogers, the Fifth Circuit ruled that businesses could refuse to hire men with long hair because hair length is a mutable characteristic not protected under Title VII. Subsequent courts that followed this reasoning upheld employers’ policies against braids, facial hair, and dreadlocks, essentially making hair a permissible basis for employment decisions.

120. Id.
123. Onwuachi-Willig, supra note 121, at 1125.
124. Id. at 1114.
125. Gandy, supra note 19.
126. EEOC v. Catastrophe Mgmt. Sols., 862 F.3d 1018, 1030 (11th Cir. 2016).
127. Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).
In a different case, not related to hair but culture, the Fifth Circuit upheld an employer’s “speak-only-English” policy after a plaintiff of Mexican descent sued his company for firing him for speaking in Spanish to a co-worker.\textsuperscript{129} He argued that the company’s policy discriminated on the basis of national origin, which was a protected characteristic under Title VII, but the court disagreed.\textsuperscript{130} The court reasoned that even though he was of Mexican descent, he chose to speak in Spanish and that choice qualified as a mutable cultural characteristic.\textsuperscript{131} Furthermore, the court, in explaining its decision, emphasized that “[n]ational origin” was not to be confused with “ethnic or socio[-]cultural traits.”\textsuperscript{132} Thus, CMS was able to win its case against Chastity Jones by relying on well-established legal precedent that Title VII does not protect the culture of the individuals it was created to protect.\textsuperscript{133}

Operating under this same schema, discriminating against a person who speaks English with an accent, which is often associated with one’s national origin, is not expressly prohibited under Title VII either.\textsuperscript{134} In fact, some employers have successfully used claims of “unintelligible English” to deny jobs to non-native speakers.\textsuperscript{135} However, in recent years, the amount of litigation surrounding accent discrimination has skyrocketed and the EEOC has been able to reach some favorable settlements on behalf of their employees.\textsuperscript{136} For example, in 2012, Delano Regional Medical Center in California’s San Joaquin Valley settled for $975,000 in a national origin case involving a class of roughly seventy Filipino American hospital workers.\textsuperscript{137} The plaintiffs alleged that the medical center’s staff frequently harassed them, mocked their accents, and ordered them to speak in English at times when they already were.\textsuperscript{138} Supervisors, staff, and even volunteers at the hospital were encouraged to berate the workers, and the plaintiffs endured these types of comments for nearly six

\textsuperscript{129}. Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980).
\textsuperscript{130}. \textit{Id.}
\textsuperscript{131}. Wilkinson, supra note 128.
\textsuperscript{132}. Garcia, 618 F.2d at 269.
\textsuperscript{133}. Kaplan & Smith, supra note 32.
\textsuperscript{134}. See Beatrice Bich-Dao Nguyen, \textit{Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers}, 1 \textit{ASIAN L.J.} 117, 122 (1994).
\textsuperscript{135}. \textit{Id.} at 117.
\textsuperscript{138}. \textit{Id.}
years.\textsuperscript{139} According to the EEOC, some workers received threats of arrest if they did not speak English and were told to go back to the Philippines.\textsuperscript{140} In one particularly egregious incident, "an employee sprayed air freshener on a claimant's lunch due to the offender's self-professed hatred of Filipino food."\textsuperscript{141}

In some cases, an employer can legally dismiss an employee if a fluency in English is required to perform the job and the employee cannot be understood within the context of the work environment and work assignments.\textsuperscript{142} However, the courts take a "very searching look" at an employer's reasons for using accent as a basis for terminating someone's employment.\textsuperscript{143} The most common example of an employer legally being able to fire an employee for their accent is in a customer service or telemarketing job, where it is helpful that customers understand the employee.\textsuperscript{144}

The bottom line is that it is not always illegal for an employer "to render a decision based on an individual's accent."\textsuperscript{145} In court, all the employer would need to prove is that effective spoken communication in English is necessary for the employee to perform his or her job duties and the person's accent materially interferes with his or her ability to communicate orally in English.\textsuperscript{146} In such cases, courts must make a determination about the individual's comprehensibility, which is a process that is riddled with subjectivity and bias.\textsuperscript{147}

\textbf{B. "Accident of Birth"}

The Supreme Court has suggested that the identification of an immutable characteristic can support suspect class status and warrant heightened scrutiny.\textsuperscript{148} When the Supreme Court has found that the trait at issue is not immutable, it has declined to apply heightened scrutiny.\textsuperscript{149}

In \textit{Frontiero v. Richardson}, the Court defined an immutable characteristic as "an accident of birth."\textsuperscript{150} In \textit{Plyler v. Doe}, it declined to grant suspect class status to undocumented students because the law

\begin{itemize}
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{143} Koster, \textit{supra} note 136.
\item \textsuperscript{144} \textit{Workplace Discrimination}, \textit{supra} note 142.
\item \textsuperscript{145} Koster, \textit{supra} note 136.
\item \textsuperscript{146} \textit{Workplace Discrimination}, \textit{supra} note 142.
\item \textsuperscript{147} See Nguyen, \textit{supra} note 134, at 117.
\item \textsuperscript{148} Hoffman, \textit{supra} note 59, at 1510.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Frontiero v. Richardson}, 411 U.S. 677, 686 (1973).
\end{itemize}
views entry into that class as voluntary, and immutable characteristics are not products of “conscious . . . action.” In previous cases, the Court has determined that a group is a suspect class when it bears “traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Nevertheless, in Plyler, the Court recognized the special disabilities Congress imposed on undocumented persons for violating federal law, but found that the state’s differential treatment of aliens is consistent with its interest in enforcing its immigration policy. Finding that undocumented immigrants were not a suspect class, the Court applied rational basis analysis to ultimately strike down the statute denying undocumented students access to free public school education, as the Court saw no real difference between a lawful resident and an undocumented person receiving public education.

Today, in the employment context, Section 1324(1)(b) of the Immigration Reform and Control Act makes it illegal for employers to discriminate based on citizenship or immigration status. In the United States, a person’s citizenship is immutable until they become eligible for naturalization, suggesting that citizenship is not absolutely unchangeable. On the other hand, for some, citizenship can be considered “an accident by birth,” specifically those who automatically become citizens by virtue of being born in the United States. Either way, one’s citizenship status does not comfortably fit within the concept of immutability that seems to govern federal antidiscrimination statutes.

Some might consider one’s political affiliation “as personally defining as [one’s] religion.” However, in Vieth v. Jubelirer, the Court decided that political affiliation is not an immutable characteristic, as it “may shift from one election to the next.” Nevertheless, the immutability requirement does little to explain why some traits are protected by Title VII, while others are not.

154. See id. at 230; see also Hoffman, supra note 59, at 1510.
156. Hoffman, supra note 59, at 1508.
157. Id. at 1516.
158. See id.
159. Id. at 1536.
161. Hoffman, supra note 59, at 1521.
Many characteristics can be described as “accidents of birth,” but “they do not enjoy protected status.”\textsuperscript{162} For example, there are no employment discrimination statutes that address height, eye color, or handedness.\textsuperscript{163} Therefore, it is clear that not all immutable characteristics are or should be the subject of Title VII.\textsuperscript{164} In fact, there are many immutable traits that are excluded from statutory protection presumably “because employers are unlikely to care about them or . . . make adverse decisions based on them.”\textsuperscript{165} Thus, it may be unreasonable for the legislature to intervene and add these traits to the law when the “probability of bias based on these [characteristics] is very low.”\textsuperscript{166}

It is also important to highlight that Vieth is the only case after 1986 in which the Supreme Court discusses immutability, suggesting that its application is no longer necessary and potentially irrelevant to the equal protection analysis altogether.\textsuperscript{167} Thus, the immutability requirement may need to be abandoned in light of our society’s ever-evolving understanding of race, sex, and other identities protected under Title VII.

C. “Fundamental to the Identity”

In addition to adopting the Supreme Court’s “accident by birth” interpretation of immutability, the lower courts also find a trait to be immutable when it is “so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”\textsuperscript{168} Under this test, the trait does not have to be entirely fixed in order for it to be considered immutable—overcoming the hurdle presented by the “accident of birth” standard.\textsuperscript{169}

Traits “so fundamental to the identity” are thought to be a part of one’s self-concept, which is comprised of a mixture of “cultural, familial, historical, and internal factors.”\textsuperscript{170} For example, although religion is one of the protected classes under Title VII, it is technically mutable, given that an individual has the ability to convert to a different faith.\textsuperscript{171} However, some would argue that one’s religious

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.}
  \item \textsuperscript{163} \textit{Id.} at 1522–23.
  \item \textsuperscript{164} \textit{Id.} at 1523.
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.} at 1523.
  \item \textsuperscript{168} Hoffman, \textit{supra} note 59, at 1512 (citation omitted).
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} Marcosson, \textit{supra} note 167, at 682–83.
  \item \textsuperscript{171} Hoffman, \textit{supra} note 59, at 1508.
\end{itemize}
beliefs are nevertheless fundamental to one’s world-view and identity.172

This standard would also apply to individuals who acquire unalterable disabilities through accidents or other misfortunes after birth.173 For example, some members of the deaf community decline to wear cochlear implants because they view their disability as a fundamental component of their identity.174 Although a separate law, the ADAAA would apply to this type of situation; the spirit of the statute honors the personal choice of an individual, who chooses to remain deaf, and finds penalizing that choice to be unacceptable.175

D. Race as a Social Construct

Under the Supreme Court’s “accident of birth” interpretation, Chastity Jones’s claim might have survived based on the Eleventh Circuit’s concession that black hair texture is an immutable trait as it is a biological element of race.176 However, race can be illusory when understood as an entirely biological construct.177 One scholar defines race as a “group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry.”178 Based on this view, race is determined by heredity and subject to chance.179 But as the EEOC argued in EEOC v. Catastrophe Management Solutions, one’s race is not defined or limited by biological characteristics.180 In fact, the scientific community would generally agree that “race is a social construct without biological meaning.”181 Some geneticists believe that while race can serve as a useful tool to study human genetic diversity, it is an imprecise proxy for the relationship between ancestry and genetics—making it a poorly defined marker to measure that diversity.182 For example, in one study where genomes from Africa and Europe were compared, there was “no single variant” between the two continents.183

172. Id.
173. Id. at 1518.
174. Id.
175. Id. at 1519.
178. Id. at 40.
179. Id.
182. Id.
183. Id.
The EEOC also alleged race “‘encompasses cultural characteristics related to race or ethnicity,’ including ‘grooming practices’” when citing its Compliance Manual, but astoundingly the federal courts are not bound by the EEOC’s manual, nor by its interpretations of its own regulations, which the EEOC is responsible for enforcing.\footnote{184}

Certainly, there are some challenges posed by asking the courts to include culture within the meaning of race.\footnote{185} First, the courts would have to choose among competing definitions of race.\footnote{186} Second, the courts must decide which cultural practices are associated with a particular race.\footnote{187} And third, the courts would have to justify why some cultural characteristics and practices are included as a part of race and explain why others are excluded from Title VII protection.\footnote{188}

With respect to racial classifications, the Supreme Court has said, “clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.”\footnote{189}

In Perkins v. Lake County Department of Utilities, the court was faced with the challenge of defining race in an employment discrimination suit, alleging disparate treatment in the workplace, due to the plaintiff’s status as an American Indian.\footnote{190} And although the plaintiff’s claim alleged discrimination on the basis of national origin, the court largely focused on racial discrimination, and discussed how perception plays a major role in determining who is a member of a minority group for purposes of Title VII.\footnote{191}

In this case, the employer filed two motions for summary judgment, that he was not an American Indian, therefore he was not a member of a protected class covered by the statute and could not make out a prima facie case of discrimination.\footnote{192} Thus, the question before the court was whether the plaintiff was in fact American Indian.\footnote{193}

The court admitted that there was no straightforward answer when it comes to determining one’s racial classification; it is “deceptively complex.”\footnote{194} The court described the amorphous nature of the
term "race" and explained how "[t]he traditional racial categorizations of Negroid, Caucasoid, and Mongoloid have been narrowed, expanded, and/or reconfigured by various social scientists and other disciplines over the years to the point that the very notion of 'race' may be deemed illusory." The court then considered the history of racial classification in America, namely the "one-drop rule," when race was decided by a person's blood and anyone with a single drop of "black blood," or ancestor of African descent, was considered Black. Quite oppositely, the "Pocahontas exception" made allowances for Whites who claimed Native American ancestry, allowing up to one-sixteenth of Native American blood. However, "[a]s early as 1934 the United States Supreme Court recognized that there was no strict formula for determining racial class." In fact, the Supreme Court's approach to determining racial classes proves to be drastically inconsistent with how the lower courts have treated race in earlier employment discrimination cases.

The particular difficulty of categorizing individuals into racial categories for purposes of Title VII is that the statute distinguishes between national origin and race, when in cases of racial discrimination, that distinction is often unclear and based on the employer's perception of that individual. To explain this, the court cited the Code of Federal Regulations's definition of national origin discrimination, which provides in part: "[t]he Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

195. Id. (citation omitted).
199. Compare Saint. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (finding that racial classifications are for the most part "sociopolitical, rather than biological, in nature") with Rogers v. Am. Airlines, Inc., 527 F. Supp. 329, 232 (S.D.N.Y. 1981) (finding that "[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 [under Title VII]"") (citation omitted), and Garcia v. Gloor, 618 F.2d 264, 269 (6th Cir. 1980) (stating that Title VII is directed only at discrimination based on race, sex, color, religion or national origin and does not apply to ethnic or socio-cultural traits).
The court concluded by emphasizing that the purpose of Title VII is to equalize the position of all employees and suggested that the standard of proof, for plaintiffs to demonstrate their membership to a protected class, should be lower.\textsuperscript{202}

In\textit{Ham v. South Carolina}, Justice Douglas conveyed in his dissenting opinion the idea that “individuals . . . flaunt social conventions about gender, race, and status through both action and physical appearance.”\textsuperscript{203} In a case about a potential juror’s prejudice towards people who wear beards, Justice Douglas discussed how unconventional hair growth is symbolic to rebellion against traditional society and “disapproval of the way the current power structure handles social problems”—presumably in reference to the Hippie Movement during the 1960s.\textsuperscript{204} He went on further to say that taken as a statement of one’s commitment to social reform, unconventional hair growth may be seen as a threat to those who support the status quo.\textsuperscript{205} And as Justice Douglas’s comments are insightful, they are prescient of future litigation arising from workplace grooming policies and systemic intolerance of Black women’s hair.\textsuperscript{206}

In recent years, “natural hair has become a politicized trend.”\textsuperscript{207} But as one naturalista\textsuperscript{208} puts it, “I’m not trying to make a statement by being myself.”\textsuperscript{209} Some girls have even faced punishment at school because of their hair.\textsuperscript{210} At a charter school in Massachusetts, two Black female students were kicked off their sports teams and prohibited from attending their school prom because they wore their hair in braids.\textsuperscript{211}

\begin{thebibliography}{99}
\bibitem{202} Perkins, 860 F. Supp. at 1276.
\bibitem{204} \textit{Ham}, 409 U.S. at 530 (Douglas, J., dissenting).
\bibitem{205} Id.
\bibitem{206} See \textit{id.} at 529–30.
\bibitem{208} Refers to a person who wears her hair in its natural state. See \textit{Confessions of a Naturalista: Natural Hair is Overrated}, FOR HARRETT (Sept. 22, 2014), http://www.forharriet.com/2014/09/confessions-of-naturalista-natural-hair.html [https://perma.co/Q892-5YPU].
\bibitem{209} Ali, supra note 207.
\end{thebibliography}
The rationale behind the policy was to "serve a 'diverse student population' that fosters a culture that emphasizes education rather than style, fashion or materialism."212 Furthermore, the school believed its policy against hair extensions was in line with its educational mission because of their alleged high cost.213 In reality, the school's dress code accomplished the exact opposite. First, enforcement of this hair policy resulted in the singling out of several Black students whose studies and activities were presumably interrupted to have their hair inspected.214 Second, it seemed that the school was unaware of how textured hair grows in comparison to straight hair, as the former grows up and the latter grows down, thus any Black student's hair (as it grows naturally), per se, exceeded the height limit imposed by the dress code.215 Third, the school was clearly misinformed about the relative inexpensiveness of braiding hair (hair used for cornrows and braids).216 Generally, people who wear braids use Kanekalon jumbo braid hair, which costs $2.99 per pack, and that is on the pricier end of the spectrum.217 Thus, the school was not eradicating any socioeconomic differences, as a package of braiding hair would cost about the same as a package of Goody hair ties.218

In the professional setting, the unfairness of these grooming policies stems from the fact that White women are able to wear their hair in its natural state, whereas Black women are oftentimes criticized, or in some cases fired, for doing the same.219 For some Black women, hair is inextricably tied to identity.220 Especially in a society that adheres to Eurocentric standards of beauty, hair, like skin color, can be a determinant of a positive black self-image or a "politically 'healthy' state of black subjectivity."221

212. Id. (citation omitted).
213. Id.
214. See id.
217. Id.
218. GOODY OUCHLESS ELASTIC, https://www.target.com/p/goody-174-ouchless-153-elast ic-black-4mm-17-ct/-/A-11895556?ref=tgt_adv_XSO000000&AFID=google_pla_dfoCPNG =PLA_Health+Beauty+Shopping&adgroup=SC_Health+Beauty&LID=70080000011 70770pga&network=g&device=c&location=9008452&gclid=Cj0KCQjwlK7cBRcnARISAj iE3MiHOTXnH61t32e2CXYSP97-DV6f1ud64qYvGIGuzEmKrX4MPluJJaAgEIeALw wcB&gclid=aw.ds [https://perma.co/Q5BS-V9R9].
219. See, e.g., Ali, supra note 207.
220. Pergament, supra note 203, at 44.
The internalization of white beauty standards begins as early as childhood, when young Black girls are constantly bombarded with messages from the media, their peers, and society about what beauty is.\textsuperscript{222} Furthermore, upon realizing that they will never fit society’s racial definition of beauty, self-acceptance can become increasingly difficult, and result in negative self-perception and a culture of self-hatred.\textsuperscript{223} A historical example of this phenomenon is the famous Clark “doll experiment,” first conducted in 1939 by social psychologists Kenneth and Mamie Clark, which was designed to illustrate internalized attitudes about race, and the effect of segregation on Black children.\textsuperscript{224}

The participants were shown four dolls and asked to identify the race of the dolls and which color doll they preferred.\textsuperscript{225} Most children chose the white doll and assigned positive attributes to it, while rejecting the black doll and labeling it as the “bad” doll.\textsuperscript{226} Finally, when asked to choose the doll that looked most like the child, some participants became so upset after being forced to identify with the “bad” doll that they stormed out of the room.\textsuperscript{227} From this, the Clarks concluded that “color in a racist society was a very disturbing and traumatic component of an individual’s sense of his own self-esteem and worth.”\textsuperscript{228}

Ultimately, the Clarks’ research proved to be so powerful that the U.S. Supreme Court cited the doll experiment as one of the key factors in its decision of \textit{Brown v. Board of Education}, because of the demonstrated psychological and emotional harm caused by segregation.\textsuperscript{229} In the Court’s unanimous opinion, Chief Justice Earl Warren wrote that the legal separation of Black children generated “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”\textsuperscript{230}

Since \textit{Brown}, the Clark doll experiment is still being used to assess children’s attitudes about race, but instead of the question asking...
which doll is "good" or "bad," the participant is asked which doll is "pretty" versus "ugly"—precisely to test the effects of white beauty standards on Black children.\textsuperscript{231} Sixty years later, the research still yields the same results: that antiblack racism is internalized at a young age.\textsuperscript{232}

Similar research has been done on the effects of white beauty standards on the life trajectories of Black women, specifically, the impact internalization has on self-image, academic success, socialization, and employment.\textsuperscript{233} The family is often the earliest and biggest influence in a child’s life, and has a major role in the child’s emotional, social, and cognitive development.\textsuperscript{234} Among Black Americans, skin color prejudice, also known as "colorism," is a widespread problem that is perpetuated by those both inside and outside the community.\textsuperscript{236} In 2001, researchers found that people’s attitudes about their own skin color corresponded with the skin color most idealized by their family members.\textsuperscript{236} They found that lighter skin coincided with higher levels of cultural pride, whereas people with darker complexions reported lower self-esteem.\textsuperscript{237} Cultural standards of beauty and attractiveness also play a significant role in one’s academic achievement.\textsuperscript{238} Studies found that young Black girls whose hair and skin color was the most unlike their White classmates, were often alienated at school and in other social settings.\textsuperscript{239} This social isolation resulted in lower levels of academic achievement among darker-skinned Black girls, which led to higher dropout rates in high school and limited employment opportunities as adults, further demonstrating how white standards of beauty alone can impact the life trajectory of Black women.\textsuperscript{240}

\begin{thebibliography}{99}
\bibitem{233} Bryant, supra note 21, at 80.
\bibitem{237} Id.
\bibitem{238} Bryant, supra note 21, at 83.
\bibitem{240} Id.
\end{thebibliography}
Ultimately, race is a social construct with perceivable consequences. And although hair is a biological occurrence, it too has “social and political meanings.” For these reasons, the judiciary’s concept of immutability with respect to race is incompatible with society’s existing understanding of race, and therefore, should be abandoned.

III. FINDING PRECEDENT TO EXTEND TITLE VII PROTECTION TO ETHNIC HAIRSTYLES

Despite the prevalence of hair grooming policies by employers, the courts have been unwilling to find a constitutional basis for the argument that hairstyles should be protected by Title VII. With respect to constitutional challenges, in *Kelley v. Johnson*, a police officer challenged a county regulation that limited the length of male police officers’ hair. Based on a rational basis analysis, in that case, the Supreme Court held that the regulation did not violate any right guaranteed by the Fourteenth Amendment. The majority noted that law enforcement officers were subject to regulations requiring specific dress and behavior while members of the general public were not. Furthermore, the majority noted that the Fourteenth Amendment liberty interest in personal grooming is limited by the state’s police power, thus the county’s interest in an easily recognizable, uniform police force, outweighed the plaintiff’s right to wear his hair as he wished.

Similarly, the majority of courts have found that hair-length requirements that “do not cause disparate treatment [between] male and female employees” are not impermissible under Title VII. For example, in *Earwood v. Continental Southeastern Lines, Inc.*, the Fourth Circuit held that sex-differentiated grooming standards, as applied to male bus drivers, did not constitute sex discrimination under Title VII. The court reasoned that discrimination must be based on immutable characteristics or protected characteristics, not mere personal preference.

In claims of racial discrimination, “courts have also been unwilling to find a constitutional basis for the claim that hairstyles are

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241. *Id.* at 70.
243. *Id.*
245. *Id.* at 249.
246. See *id.* at 245.
247. *Id.*
250. *Id.* at 1351.
immutable and should enjoy constitutional protection” (i.e. be protected by Title VII). However, the immutability requirement has not been “uniformly applied in cases where an immutable characteristic adversely affects an individual's ability to comply with a grooming requirement.” In Bradley v. Pizzaco, a Black plaintiff successfully argued that a policy banning beards disparately impacted Black men due to their susceptibility to pseudofolliculitis (PFB). He argued that because the condition occurs in fifty percent of Black men in comparison to only one percent of White men, enforcing the policy was disparate impact race discrimination. Furthermore, because the plaintiff was a pizza delivery man, the no-beard policy was neither directly related nor necessary to the job. Conceivably, a no-beard policy in other professions may be reasonable. For example, firefighters who must wear respirators, and in order for the mask to operate properly and safely, its edges must be able to seal securely to the wearer's face. In Fitzpatrick v. City of Atlanta, the city made this very argument and was able to defend its no-beard policy for firefighters as a business necessity. Nevertheless, like the plaintiff in Bradley, Chastity Jones could similarly argue that CMS’s policy against dreadlocks is disparate impact race discrimination, as the hairstyle is consistent with the immutable trait of hair texture, and the policy is not job-related or a business necessity. To prevail on a disparate impact claim, she would have to demonstrate how the grooming policy has “an actual, . . . not necessarily deliberate, adverse impact on [a] protected group[,]” in this case, Black people.

Here, the chances that an individual other than a Black person would have dreadlocks—albeit the occasional White Rastafarian—are presumably low considering the high prevalence of the hairstyle

251. See Pergament, supra note 203, at 55.
252. Id.
253. Pseudofolliculitis barbae (also known as razor bumps) is a bacterial infection caused by shaving. The condition arises when “highly curved hair grows back into the skin causing inflammation and a foreign body reaction. Over time, this can cause keloidal scarring, which looks like hard bumps of the beard and neck areas.” The most effective remedy is to grow a beard. See Pseudofolliculitis Barbae, AM. OSTEOPATHIC COLL. DERMATOLOGY, https://www.aocd.org/page/PseudofolliculitisBarbae [https://perma.cc/6VNY-SYCC]; see also Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 796 (8th Cir. 1993).
254. Bradley, 7 F.3d at 796.
255. See id. at 798; see also Pergament, supra note 203, at 55.
256. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1114 (11th Cir. 1993).
257. Id. at 1119.
258. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (11th Cir. 2016) (citation omitted).
in the Black community. Furthermore, Jones was initially hired for a call center position and it is unclear how dreadlocks would impede on her ability to perform her job, or interfere with CMS’s business interests, given she would be presumably interacting with customers through telephone communications only. By enforcing this policy, CMS is effectively forcing Jones to cut off all her hair, as that is the only way to “undo” dreadlocks, and be bald or wear a wig until her hair grows back, assuming that her natural hair will not be considered “excessive” or “unusual.” Furthermore, assuming that CMS’s policy generally follows societal standards of appearance, requiring Jones to change her hair would impose undue burdens that are not generally expected of White women, whose hair is considered the norm.

IV. RECOMMENDATIONS

As discussed earlier, Title VII “can be expanded to reach injustices not contemplated in 1964.” For example, when Congress passed Title VII, it did not view gender stereotyping to be sex discrimination. It was not until Price Waterhouse v. Hopkins, in 1989, when the Supreme Court expanded Title VII to include gender stereotyping. Likewise, Congress did not initially consider sexual harassment actionable under Title VII until Meritor Savings Bank v. Vinson, when the Court held that a claim of “hostile work environment” sexual harassment was a form of sex discrimination. Yet, surprisingly, there is currently no federal law prohibiting discrimination on the basis of sexual orientation.

The lower courts are split on the issue of LGBT employees who experience sexual harassment related to their sexual orientation. Some courts have ruled that these types of comments represent discrimination on the basis of sexual orientation, which is not covered under federal law, whereas other courts have ruled that these types of comments stem from gender stereotypes, which are recognized as a form of sex discrimination prohibited by law. Additionally, there

260. See Catastrophe Mgmt. Sols., 852 F.3d at 1022.
261. See id. at 1021.
262. See id. at 1022.
263. Gandy, supra note 19.
264. Id.; see also supra Section II.A.
265. See Gandy, supra note 19.
269. Id.
270. See Price Waterhouse, 490 U.S. at 258; Your Rights, supra note 268.
are several federal court decisions supporting the protection of transgender individuals in cases involving sex discrimination. Most recently, the Eleventh Circuit reversed summary judgment for the employer on plaintiff’s claim that she was terminated from her job as an automechanic because she was transgender. The court remanded the case for trial because there was sufficient evidence to create a triable issue of fact as to whether gender bias was a motivating factor for the plaintiff’s termination. Likewise, in Smith v. City of Salem, the plaintiff alleged that he was suspended based on sex, because he began to express a more feminine appearance and advised his employer of his intention of undergoing a complete physical transformation from male to female. In that case, the Sixth Circuit held that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. The court reasoned that the “narrow view” of the term “sex,” in prior case law denying transgender individuals statutory protection, was no longer valid in light of the Supreme Court’s ruling in Price.

In Oncale v. Sundowner Offshore Services, Inc., the late Justice Antonin Scalia, one of the most celebrated originalists in Supreme Court history, noted in the majority opinion that, while same-sex harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII:

> [S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits ‘discriminat[jon] ... because of ... sex’ ... [This] must extend to sexual harassment of any kind that meets the statutory requirements.

CONCLUSION

Surely, Justice Scalia’s logic would similarly apply to hair discrimination against Black women. And although Congress may

273. Id. at *892.
275. Id. at 578.
276. Id. at 572–73.
278. See id.
not have drafted Title VII with plaintiffs like Chastity Jones in mind, that does not mean that the courts cannot interpret the law to strike down racially discriminatory grooming policies.\textsuperscript{279}

It is bizarre that the Eleventh Circuit found itself bound by the definition of race at the time Title VII was enacted, when in recent cases, the Supreme Court has expressly rejected narrow interpretations of national origin and sex.\textsuperscript{280} The EEOC has even provided guidance in the form of its Compliance Manual, that although not binding on the courts, it is indeed helpful to resolving the issue of what constitutes race.\textsuperscript{281}

While the issue of hair may seem trivial to some, for Black women it is consequential, as choosing to wear one’s hair naturally can end up being a career liability. Being a Black woman in a space where standards of professionalism reinforce social hierarchies that privilege whiteness is having to be constantly aware of how you fit in and daily having to battle others’ preconceptions about your capabilities based on pervasive stereotypes about Black women generally. To target black hairstyles in workplace grooming policies is to correlate black culture with unprofessionalism and force Black women to adopt more palatable alternatives in order to maintain employment. And although employers have the right to enforce dress codes, the practice of banning dreadlocks, braids, or any other quintessentially black hairstyle, is unquestionably racist as there is no existing evidence that these hairstyles run counter to the image of a professional workplace.

Thus, in order to effectively combat racial discrimination in the workplace, the courts must expand the margins of race for purposes of Title VII to encompass traits beyond immutable characteristics, by eliminating the immutability requirement altogether or at least applying it less stringently to include cultural aspects associated with race.

\textbf{KAILI MOSS*}

\textsuperscript{279} See EEOC v. Catastrophe Mgmt. Sols., 862 F.3d 1018, 1023 (11th Cir. 2016).
\textsuperscript{280} Id. at 1027.
\textsuperscript{281} Id. at 1031.

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