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# Another Hair Piece: Exploring New Strands of Analysis Under Title VII

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***Another Hair Piece:  
Exploring New Strands of Analysis Under Title VII***

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## **Another Hair Piece: Exploring New Strands of Analysis**

ANGELA ONWUACHI-WILLIG\*

### TABLE OF CONTENTS

INTRODUCTION .....	2
I. THE ORIGINAL HAIRPIECE .....	11
II. HAIR DOS AND DON'TS .....	13
A. SPLITTING HAIRS: UNDERSTANDING THE DIFFERENCES BETWEEN THE HAIR OF BLACK AND WHITE WOMEN.....	13
B. STRANDS OF ANALYSIS .....	15
III. PERMANENT DAMAGE.....	21
IV. EXTENSIONS TO A HAIR PIECE .....	23
A. GOOD AND BAD HAIR: HAIR BIASES IN THE WORKPLACE .....	25
B. BROKE AND HARRIED.....	29
C. IT'S NO LYE!: THE EFFECTS ARE DISPARATE.....	37
V. HAIR RAISING .....	41
CONCLUSION .....	45

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## INTRODUCTION

Imagine that you are a white woman who works as a bartender in a popular casino in an alternate racial universe. Your employer has issued and enforces the following grooming policy as it relates to hairstyles:

### POLICY

Employees will adhere to the following appearance guidelines within the workplace. Failure to abide by these guidelines may result in disciplinary action, including termination.

Appearance: Employees must maintain a professional image at all times.

Hair: Extreme or fad hairstyles are prohibited.

- Males:

Hair must be worn in a short style and must not extend below the top of your shirt collar. Ponytails are prohibited.

- Females:

Hair must be worn in braids of any kind, including cornrows,<sup>1</sup> locks,<sup>2</sup> twists,<sup>3</sup> or a short style that does not extend below the top of your shirt collar.

You file a lawsuit, alleging discrimination at the intersection of race and gender. You do not contest the difference in hair length restrictions placed on male and female workers. Courts have repeatedly applied the undue burden test—a special hybrid, disparate treatment-disparate impact test used in sex-discrimination grooming cases—and upheld policies that allow women to wear their hair long but require men to wear their hair short.<sup>4</sup> These courts reason that such hair-length policies impose different but essentially equal burdens on men and women.<sup>5</sup>

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<sup>1</sup> Braids are a hairstyle that consists of sections of hair where three segments of each section are repeatedly twisted over each other until their very ends. See Zondra Hughes, *The Explosion of Braids, Locks, and Twists*, EBONY, Sept. 2002, at 108 (discussing the variety of braided hairstyles used by professional black women). Cornrows are a type of braided hairstyle where the hair is braided onto the scalp in rows, usually all the way down to the nape of the neck and then hanging down from there. See Anita M. Samuels, *Rediscovered Cornrows*, N.Y. TIMES, Jul. 30, 1995, § 1, at 40. Cornrows are relatively inexpensive hairstyles. As one article stated, they can cost “\$10 to \$35 a head at the Nubian salon, \$10 to \$15 if a homegirl does it.” *Id.*

<sup>2</sup> Locks consist of sections of hair that are “permanently locked together and cannot be unlocked without cutting.” Shauntae Brown White, *Releasing the Pursuit of Bouncin’ and Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 INT’L J. MEDIA & CULTURAL POL. 295, 296 n.3 (2005); see also Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 873 n.3 (2006) (defining locks); Samuels, *supra* note 1, at 40 (defining locks as “allowing the hair to mat”). According to White, the term “loc” or “lock” is preferred to the term “dreadlock,” as “the term dreadful was used by English slave traders to refer to Africans’ hair, which had probably loc’d naturally on its own during the Middle Passage.” White, *supra*, at 296 n.3.

<sup>3</sup> Twists are a hairstyle similar to regular braids. However, braids consist of three segments of hair that are repeatedly twisted over each other until their very ends, while twists are made by twisting two segments of hair over each other repeatedly until their ends. See Hughes, *supra* note 1.

<sup>4</sup> Although the undue burden test examines the effects of a policy on different groups and is, at times, referred to as a disparate impact test, it is a means for determining disparate treatment, not disparate impact—at least as disparate impact is traditionally understood. In order to assert a valid disparate treatment claim based upon a grooming or

Instead, you challenge the policy as discriminatory at the intersection of race *and* gender.<sup>6</sup> You could easily comply with the grooming code by just cutting your hair very short, but you want to wear your hair long and down—a prerogative that has been routinely recognized for women outside of the military context.<sup>7</sup> You argue that you are uniquely and negatively affected by the company’s grooming policy in a way that white men are not because their required short hairstyle matches the normative ideal for men in society. You further contend that the policy, like many others, is discriminatory because it is founded upon a race-based preference for black hair. You also explain that black women do not suffer the same harms because the costs of wearing their hair in braids, locks, or twists are not as burdensome in terms of time or money; after all, such styles are suited for black hair.<sup>8</sup> You concede that you technically could wear your

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dress code under Title VII, a plaintiff must make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of a protected category. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108–09 (9th Cir. 2006) (en banc); *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 673 (9th Cir. 1980). “An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.” *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000). Once a plaintiff establishes such a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its action. *McDonnell*, 411 U.S. at 802. In a grooming code case with different requirements for different groups, an employer can justify its requirements only by showing that they are bona fide occupational qualifications (BFOQ). *Jespersen*, 444 F.3d at 1109 n.1 (citing 42 U.S.C. § 2000e-2). A BFOQ is a qualification that is reasonably necessary to the normal operation or essence of an employer’s business. *See id.*; *see also* ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 17–18 (2001). However, a BFOQ cannot be used as a defense in cases involving racial discrimination. *See* 110 CONG. REC. 2550 (1964) (expressly rejecting race as a BFOQ under Title VII).

<sup>5</sup> *See, e.g.*, *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (asserting that, by “longstanding” and “binding precedent,” grooming policies that treat men and women differently are not viewed as discriminatory); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (holding that grooming standards that approve different hair lengths for men and women do not violate Title VII); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974) (“We agree with the district court that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of [Title VII.]”); *see also* POST, *supra* note 4, at 43–44; Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2559–65 (1994) (noting that courts have held that the regulation of appearance traits like “beards” and “bust size” is discrimination based upon the trait, rather than the sex that closely correlates with that trait).

<sup>6</sup> In her article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, Professor Kimberlé Crenshaw introduced the concept of intersectionality, which explains how race and gender can interact to shape the multiple dimensions of black women’s experiences in the workplace. Crenshaw explained the way in which black women may face unique forms of discrimination that differ from the discrimination faced by black men or white women; in this sense, she proclaimed, black women may encounter discrimination in contexts where neither black men nor white women would. *Id.*

<sup>7</sup> *See* Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 410 (2007) (noting the freedom afforded to most white females outside of the military context to style their hair based on “personal preferences”).

<sup>8</sup> There are a small percentage of black women whose hair texture and structure are like those of most white women—naturally straight and thin. An overwhelming majority of black women, however, have tightly coiled hair that grows into an Afro, not down, when grown long. *See id.* at 411 (“The natural hair texture of most Black women is kinky, wooly, or tightly curled.”). In this Essay, when I refer to “black hair” or “black women’s hair,” I am referring to the hair texture and structure that belongs to the vast majority of black women. Likewise, there are white women who have “curly” hair; it is important to note, however, that the hair texture and structure for nearly all, if not all, of these women differ greatly from those of black women. For example, when grown long, the hair of

hair in braids, locks, or twists, but you explain that, compared to black hair, your hair is thin, straight, and fine. As a result, wearing your hair in any of these styles would impose burdensome costs from a monetary and psychological perspective and in terms of the time and energy it would take to maintain such a hairstyle every day.

You think your case is a slam dunk and, in all likelihood, you would be correct in our actual society.<sup>9</sup> Many courts (and many people) in our society would find the notion of forcing white women to abide by a grooming policy that does not acknowledge or recognize the structure and texture of their hair ludicrous. Yet, antidiscrimination case law imposes just such a requirement on black women by upholding implicit demands that they straighten their hair and then maintain that hairstyle through various processes.<sup>10</sup> This case law not only reinforces gender expectations about hair length, but also is based upon an invisible white and gendered norm that presupposes that black women can wear their hair straight and hanging down—in other words, fit within the gendered ideal for women—without altering the physical structure of their hair<sup>11</sup> or enduring enormous burdens on their finances, health, and time.<sup>12</sup>

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nearly all white women with curly hair grows down, even if puffy, and not up into an Afro. Additionally, even if an Afro of sorts grows, the structure of these white women's hair generally is not tightly coiled and kinky. *See infra* section II.A.

<sup>9</sup> We are now leaving the alternate universe. On her blog “Alienated Conclusions,” one black female writer modeled a post after Gloria Steinem’s essay “If Men Could Menstruate” to write “‘If’ Black Women Were White Women.” With regard to hair, she wrote in relevant part:

Straight blond hair would be considered “wild and unruly” because when the wind blew, it did not stay in place. Women with naturally straight hair would hide their “unruly” and “wild” stick-straight hair in public. The desire for “lightweight hair” that defied gravity would permanently end the use of blow dryers. Keeping one’s natural blond hair wild and straight would become indicative of a political statement.

Alienated Conclusions, <http://nerdsevolving.blogspot.com/2009/08/what-black-women-were-white-women.html> (Aug. 23, 2009, 22:00 EST).

<sup>10</sup> *See, e.g.*, *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (upholding a policy that banned braided hairstyles); *see also* *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*6 (M.D. Ga. Apr. 25, 2008); *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*2–3 (N.D. Ga. Sept. 19, 1996); *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (describing how Cheryl Tatum, a black woman who wore her hair in a pageboy style of tiny braids, was fired from her job as a restaurant cashier at the Hyatt because her style was determined to violate the employer’s policy against “extreme and unusual hairstyles”); Teressa Gubbins, *The Debate: Uniformity vs. Diversity*, DALLAS MORNING NEWS, Jan. 29, 2002, at 1C (noting that Officer Gina Mosley was fired for refusing to cut her locks). Grace Salvant, a college student, was initially denied the opportunity to return to her former job at Ruby Tuesday because of her braids, even though the company had previously allowed women to wear braids at work. Salvant explained that “she wears braids 90 percent of the time because of the convenience and that she has never chemically treated her hair.” Hazel Trice Edney, *Howard Student Knocks Out Restaurant Hair Policy*, DISTRICT CHRON. (Wash., D.C.), Mar. 3, 2008, available at <http://media.www.districtchronicles.com/media/storage/paper263/news/2008/03/03/Cover/Howard.Student.Knocks.Out.Restaurant.Hair.Policy-3247838.shtml> (describing how protest led to a repeal of a no-braids policy, but noting that the employer Ruby Tuesday maintains its policy against locks and describing the interaction of one employee who was asked to remove her twists). Wendi Hathorn, another college student, complied with a request to remove her twists before she was hired, but explained her reasons for desiring twists as a natural hairstyle: “I wasn’t happy with having to take my hair out because my hair is natural and I didn’t want to straighten it every day before I go to work.” *Id.*

<sup>11</sup> *See* Rosette & Dumas, *supra* note 7, at 410 (“[L]ong straight hair has generally been considered the gold standard for attractiveness.”); Rose Weitz, *Women and Their Hair: Seeking Power Through Resistance and Accommodation*,

Consider, for example, the case Darlene Jespersen filed against Harrah's Casino in Reno, Nevada.<sup>13</sup> Jespersen was a twenty-plus-year veteran, white, female bartender at Harrah's,<sup>14</sup> which had a dress code that read, in relevant part:

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/female):

Appearance: Must maintain Personal Best image portrayed at time of hire.

Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.

No faddish hairstyles or unnatural colors are permitted.

• Males:

Hair must not extend below top of shirt collar. Ponytails are prohibited.

Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.

Eye and facial makeup is not permitted. . . .

• Females:

Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.

Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.

Nail polish can be clear, white, pink or red color only. No exotic nail art or length. . . .

Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.<sup>15</sup>

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15 GENDER & SOC'Y 667, 672 (2001) (“[C]ertain ideas about attractiveness and female hair appear deeply and widely embedded in American society. First, to be most feminine and hence most attractive, women’s hair should be long . . . .”); White, *supra* note 2, at 297–98 (“While long hair, as Brownmiller argues, has been used as a measure of femininity for white American women, African American women have been subjected to that same measurement. In addition, the measurement of beauty and femininity is taken one step further in that an African American woman’s hair is more valued not only if it is long, but also if it is straight. . . . While American women have been subjected to a standard of beauty the average woman might find difficult to attain, the African American woman is doubly subjected in that the standards were not even created for her.”); *see also infra* section II.A and Part IV.

<sup>12</sup> *See infra* section IV.B.

<sup>13</sup> *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

<sup>14</sup> *Id.* at 1106–07.

<sup>15</sup> *Id.* at 1107.

Jespersen took issue only with the requirement to wear make-up and refused to comply, which ultimately resulted in the end of her employment at Harrah's.<sup>16</sup> Thereafter, Jespersen sued her employer, arguing disparate treatment and disparate impact on the basis of sex under Title VII.<sup>17</sup> In deciding her claim, the Ninth Circuit, sitting en banc, first applied the undue burden or unequal burdens test. In grooming code cases under Title VII, a plaintiff may establish a prima facie case of discrimination by establishing that the challenged employment action had a discriminatory effect on the basis of a protected category;<sup>18</sup> however, a grooming requirement "that imposes different but essentially equal burdens on men and women" is not considered to be discriminatory.<sup>19</sup> Ultimately, the Ninth Circuit held that Jespersen had failed to prove sex discrimination because Harrah's grooming code requirements, while different for men and women, did not "place[] a greater burden on one gender than the other."<sup>20</sup>

Additionally, the Ninth Circuit rejected Jespersen's disparate treatment claim on the ground of sex stereotyping. Although the court noted that dress or grooming codes could result in an intentional discrimination claim based on sex-stereotyping, it held that Harrah's policy did not support a stereotyping claim because it was not "adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear" and because it did not "objectively inhibit a woman's ability to do the job."<sup>21</sup>

*Jespersen* received significant, nationwide attention,<sup>22</sup> and legal scholars have criticized its holding and reasoning.<sup>23</sup> No scholar, however, has analyzed the case at the intersection of race and sex by asking: What if Jespersen had been a black woman? How would the focus of the case and thus the ensuing analysis been different?

One possibility is that a black Jespersen may have also challenged Harrah's hair grooming requirements for women. After all, what does it mean for black women when an employer orders its female employees "to wear [their] hair down at all times, no exceptions" and to have

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<sup>16</sup> *Id.* at 1108. Jespersen "found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender." *Id.* Darlene Jespersen left her job, but the Ninth Circuit acknowledged that she was "effectively terminated" for refusing to comply with Harrah's make-up requirement. *Id.* at 1105, 1108.

<sup>17</sup> *Id.* at 1108–09.

<sup>18</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Jespersen*, 444 F.3d 1104; *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 673 (9th Cir. 1980).

<sup>19</sup> *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000).

<sup>20</sup> *Jespersen*, 444 F.3d at 1109.

<sup>21</sup> *Id.* at 1112.

<sup>22</sup> For example, in 2007, the *Duke Journal of Gender Law & Policy* hosted a symposium entitled "Makeup, Identity Performance & Discrimination" that focused almost entirely on *Jespersen*. See 14 DUKE J. GENDER L. & POL'Y 1–560 (2007).

<sup>23</sup> See, e.g., Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work After Jespersen v. Harrah's Operating Company, Inc.*, 42 U.S.F. L. REV. 299, 300–01 (2007) (critiquing the *Jespersen* court's reading of Title VII and its likely impact on the "commercialization of women's sexuality"); Devon W. Carbado, G. Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in EMPLOYMENT DISCRIMINATION STORIES 105, 116–18, 132–48 (Joel Wm. Friedman ed., 2006) (arguing that "*Jespersen* misunderstands the nature of contemporary sex discrimination"); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1057–58 (2009) (critiquing *Jespersen* in the context of gender subordination and self-expression); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 468, 479–90 (2007) (discussing the implications of *Jespersen* for sexual stereotyping law and workplace identity); see also Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 396–400 (2008) (describing scholarship on "workplace assimilation").

their hair “teased, curled, or styled every day”<sup>24</sup> For most black women, wearing their hair “down” would require that their hair be straightened, either by a hot comb<sup>25</sup> or a chemical relaxer<sup>26</sup> (otherwise known as a “permanent” or “perm”). Assuming that braids, locks, and twists were prohibited, the same processes would be required to tease, curl, or style the hair of most black women, as their natural hair is usually tightly coiled and grows into an Afro.

In sum, while the grooming requirements for Harrah’s imposed significant burdens on women of all races,<sup>27</sup> they presented additional challenges for black women based on the biological nature of black women’s hair. This burden on black women would have been even greater if those same requirements were read by supervisors to prohibit hairstyles such as braids, locks, and twists.<sup>28</sup> Even in our “post-racial” society, where race has purportedly become meaningless,<sup>29</sup> significant phenotypical differences between Blacks and Whites<sup>30</sup> are ignored in ways that reify the subordinate status of black women in the workplace.

This Essay uncovers the invisible white and gendered norms about hair that I contend have resulted in a misapplication of current antidiscrimination case law to hair grooming policies that prohibit natural hairstyles<sup>31</sup> for black women, such as braids, locks, and twists. First, this Essay

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<sup>24</sup> See *Jespersen*, 444 F.3d at 1107.

<sup>25</sup> A hot comb is a metal comb that is heated on a stovetop and used to straighten hair. It is also known as a pressing comb or straightening comb.

<sup>26</sup> Relaxers are the chemicals used to straighten tightly coiled hair, usually of people of African descent. Madame C.J. Walker created the first hair straightening process for black women. The first black-female, self-made millionaire, she “achieved her wealth through a hair straightening empire in the early twentieth century.” Monica Bell, Comment, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 133–34 (2007); see also Tracey Owens Patton, *Hey Girl, Am I More Than My Hair?: African American Women and Their Struggles with Beauty, Body Image, and Hair*, NWSA J., Summer 2006, at 24, 29 (“In the twentieth century, the 1905 invention of Madame C.J. Walker’s hair softener, which accompanied a hair-straightening comb, was the rage.”).

<sup>27</sup> See Rhode, *supra* note 23, at 1057; see also *Jespersen*, 444 F.3d at 1107.

<sup>28</sup> See *infra* Part IV. We do not know if Harrah’s banned braids, locks, or twists on the ground that they were not “professional” or were “extreme” hairstyles. In a number of instances where employers have prohibited black females from wearing natural hairstyles, however, the bans were not explicit. Instead, the employer codes simply prohibited “extreme,” “unconventional,” or “eye catching” hairstyles, and supervisors, with the backing of their employers, identified black women’s natural hairstyles as violations of their workplace policies. See, e.g., *Hollins v. Atl. Co.*, 188 F.3d 652, 655 (6th Cir. 1999) (reprimanding a black female employee for an “eye catching” and “too different” hairstyle); *Caldwell, supra* note 10, at 367; see also *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002) (involving the claim of a black man whose dreadlocks were deemed “unconventional”).

<sup>29</sup> See Ian F. Haney López, *Post-Racial Racism: Policing Race in the Age of Obama*, 97 CAL. L. REV. (forthcoming 2009) (describing others’ understanding of a “post-racial” society as consisting of “the seeming evaporation of race as a basis for social ordering”).

<sup>30</sup> Throughout this Essay, the words “Black” and “White” are capitalized when used as nouns to describe a racialized group; however, these terms are not capitalized when used as adjectives. Also, the term “Blacks” is used instead of the term “African Americans” because the term “Blacks” is more inclusive. See *Why “Black” and Not “African-American”?*, J. BLACKS HIGHER EDUC., Spring 2004, at 18, 18–19. Additionally, “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4.

<sup>31</sup> Natural hair is “[h]air that is not chemically altered or straightened by the pressing comb.” INGRID BANKS, HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN’S CONSCIOUSNESS 172 (2000); accord White, *supra* note 2, at 295–96 n.2 (“Natural hair is hair that has not been altered by chemicals and can be tightly coiled (or kinky) as well as straight.”); see also Bell, *supra* note 26, at 132–33 (noting that natural hairstyles are also referred to as

argues that antidiscrimination law fails to address intersectional race and gender discrimination<sup>32</sup> against black women through hair-based grooming restrictions because it does not recognize braided, twisted, and locked hairstyles as black-female equivalents of Afros, which are protected as racial characteristics under existing law.<sup>33</sup> The claim here is that, based on current rationales, natural hairstyles for black women should already be protected under antidiscrimination law and are currently excluded only because of courts' incomplete understanding of the nature of black women's hair. If courts fully acknowledged the biological differences between black and white hair, and examined these cases at the intersection of race and gender, they would understand braids, locks, and twists to be the functional equivalents of Afros and would view these hairstyles in the same light as other phenotypical and racial characteristics, such as skin color and nose width. In today's society, black women can change their noses and skin tones, just as they can change their hair, but the law would never uphold a restriction that implicitly required Blacks to modify either their skin tone or nose width.

Additionally, this Essay argues that courts should extend the application of the special "undue burden" test from gender discrimination cases to race discrimination cases and apply the test intersectionally in hairstyle-related grooming code cases brought by black women. Specifically, this Essay argues that antidiscrimination law fails to address such intersectional race and gender discrimination against black women because it does not recognize the undue burdens that such policies impose on black women to either hide or change a natural, phenotypical characteristic.<sup>34</sup> Overall, this Essay explains the dangers of implicit racial bias in

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"traditional hairstyles"). Natural hairstyles are those hairstyles that allow black women to keep their hair in its natural structure and texture or allow black women to avoid further chemical and heat processing of their hair.

<sup>32</sup> See *supra* note 6.

<sup>33</sup> See *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 166–67 (7th Cir. 1976) (recognizing a valid Title VII claim where plaintiff alleged that her employer fired her because of her Afro hairstyle); E.E.O.C. Dec. No. 71-244, 4 Fair Empl. Prac. Cas. (BNA) 18 (June 10, 1971) (finding that an employer's line of sight grooming policy adversely affected black employees who naturally have a different hair texture than white employees); see also *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (asserting that a code that prohibits "the 'Afro/bush' style might offend Title VII").

Even the Afro, however, is not fully protected. Many employers allow only short Afros. See, e.g., Tania Padgett, *Ethnic Hairstyles in Corporate Life*, NEWSDAY (Melville, N.Y.), Nov. 25, 2007, available at 2007 WLNR 23314578 (quoting one business owner as saying "that, outside of short-cropped Afros, most ethnic hairstyles are a 'no-no' in his office"). In other words, in some workplaces, black women are not allowed to grow their natural hair beyond a prescribed length, while white women are allowed to grow their natural hair without limitation.

<sup>34</sup> Although intuition and common sense suggest that black women suffer disparate effects from bans on natural hairstyles such as braids, locks, and twists, I do not focus my analysis on the potential for a successful disparate impact claim for several reasons. First, no black woman has ever filed (although a black man has) a traditional disparate impact claim based upon natural hairstyle restrictions—one that accepts the grooming requirements as facially neutral. Second, disparate impact theory is viewed as a weak tool for combating discrimination by plaintiffs' attorneys. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 13–14 (2006) (arguing that the focus of disparate impact doctrine on "discrete decision[s] (to hire, to fire, to promote) . . . make[s] it a poor tool for addressing discrimination that does its work through an accumulation of small, repeated instances of biased perception and evaluation"); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 654–58 (2005) (explaining how the disparate impact theory "falls short" in "addressing work culture as a source of discrimination"); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–53 (2006) (arguing that disparate impact theory has proven useful in only a limited group of testing cases). But see Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 984–1000 (2005) (arguing for the revival of disparate impact theory as a litigation tool). Third, part of my goal in addressing disparate treatment claims is to expose the invisible raced and gendered norms behind employer appearance codes regarding hair—to expose the policies as lacking in neutrality.

the workplace as demonstrated by raced and gendered norms in grooming codes that place a ban on hairstyles such as braids, locks, and twists.

Part I of this Essay discusses the case *Rogers v. American Airlines*,<sup>35</sup> the seminal case on hair, grooming restrictions, and black women, which other courts cite pro forma in dismissing similar claims of race and gender discrimination. Part I also highlights key points from Professor Paulette Caldwell's analysis of *Rogers* in her article, *A Hair Piece: Perspectives on the Intersection of Race and Gender*.<sup>36</sup>

Part II explains why the *Rogers* court reached the wrong conclusion under that court's own rationale. Specifically, it reveals how the court's application of its rationale was based on a flawed understanding of black hair and an assumption of white characteristics for black women's

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Disparate impact theory, however, applies where a policy is facially neutral. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 & n.15 (1977). Fourth, despite extensive searches, I have been unable to collect data regarding the percentages of black women and white women who have tightly coiled hair as opposed to straight hair. This lack of statistics regarding the hair types of black women and non-black women makes it difficult to address disparate impact claims on a broader, more general level. For detailed analyses of disparate impact theory, see Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 43 (2005); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003); Selmi, *supra*; Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. \_\_ (2010); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004).

Looking at specific workplace statistics, however, a black female plaintiff could prevail on a challenge to her individual employer's restriction on braids, locks, and twists under a disparate impact analysis. An employer violates Title VII under the disparate impact theory if it maintains a specific employment practice that, although facially neutral, "in fact fall[s] more harshly on one group than another and cannot be justified by business necessity." *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15; see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (holding that, to establish a Title VII disparate impact claim, plaintiff must identify specific employment practice challenged and show statistically that the practice has excluded "applicants . . . because of their membership in a protected group"), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (placing burdens of production and persuasion on defendant to "demonstrate that the challenged practice is job related . . . and consistent with business necessity"). "Discriminatory intent need not be proven, the theory can apply to either objective or subjective practices, and those practices can turn on either immutable characteristics or difficult to change characteristics, regardless of whether or not reliance on those characteristics serves to perpetuate the effects of pre-Title VII intentional discrimination." *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 266 (S.D.N.Y. 2002) (citations omitted). In this sense, each disparate impact plaintiff in a natural-hairstyle grooming case would have to produce evidence of (1) the relevant population of employees within the business who are affected by the policy (all black women with extremely curly or tightly coiled hair, regardless of whether they actually straighten their hair or not) and (2) the comparison group for all others in the relevant population, such as all non-black women, excluding Afro-Latinas, who do not have tightly coiled hair. As I mentioned above, however, this information is difficult to obtain because statistics are not collected regarding the hair types of black and white women, although intuition strongly suggests that a very high percentage of black women belong in group one and a very high percentage of white women belong in group two in any workplace. See *infra* section IV.C (briefly analyzing a potential disparate impact claim).

<sup>35</sup> 527 F. Supp. 229; see also Caldwell, *supra* note 10 (critiquing *Rogers*); Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. American Airlines*, in RACE LAW STORIES 571, 571–600 (Rachel F. Moran & Devon W. Carbado eds., 2008) (same).

As Caldwell reveals in her chapter in *Race Law Stories*, this published case name actually misspells the plaintiff's last name. The correct spelling is "Rodgers." Caldwell, *supra*, at 572 (citing Complaint, Class Action, at 1, *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (No. 81 Civ. 4474 (AS))). For the sake of consistency, however, I use the spelling "Rogers" throughout this Essay.

<sup>36</sup> Caldwell, *supra* note 10.

hair. Part II then describes the law regarding appearance regulations on hair and how the law has shifted or not shifted since *Rogers*. In particular, this Part exposes the case law’s implicit (though admittedly essentialist) acknowledgement of race as a social construct, one that is defined by many phenotypical factors, including not just skin color, but also hair.<sup>37</sup>

Part III examines how lawyers’ past arguments for plaintiffs such as *Rogers* have failed to capitalize on the biology of black women’s hair in seeking protection from discrimination based on employers’ bans on hairstyles, such as braids, locks, and twists. Specifically, it analyzes critiques regarding past arguments that focused solely on the cultural connections between hair and race.

Part IV exposes antidiscrimination law’s role in reaffirming racialized and gendered appearance standards, with white women as the gender norm and black men as the race norm, and explicates how these norms ignore the reality of black women’s hair in its natural state and thus discriminate against them based upon a racial characteristic. In particular, it reveals how policies against braids, locks, and twists rest upon race-based preferences for white hair and hairstyles—regardless of whether braids, locks, and twists are “culturally” associated with black women today or not.

More specifically, Part IV begins by providing lawyers with the tools for explaining how a ban on natural hairstyles for black women leaves black women with far fewer choices in hair grooming than white women. Essentially, due to the biological nature of black women’s hair, such policies currently leave black women with one of two choices if they wish to wear their hair long and hanging down: either (1) straighten their hair with a chemical relaxer or hot comb or (2) wear a weave or wig. Both choices require black women to either change the structure and texture of their natural hair or cover it up. In essence, with the exception of a miniscule number of white women whose hair structure and texture may bear a resemblance to those of black women, black women whose employers ban natural hairstyles are left with only one option for wearing their hair in its natural structure and texture: an Afro. Even that option is severely restricted by many employers, who allow only short Afros. In this sense, many black women are not allowed to wear their natural hair exactly as it grows out of their heads as lengthily as white women are allowed to wear theirs.

Additionally, Part IV demonstrates the significant financial, temporal, health, and psychological burdens placed on black women as a result of these two non-natural choices for long hair that hangs down. In so doing, it highlights the evidence that supports a finding that employers’ prohibitions of braided, locked, and twisted hairstyles have a disparate effect or place an undue burden on black women.

Finally, Part IV explicates how bans on natural hairstyles for black women are discriminatory against black women under traditional disparate impact theory. Even if most

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<sup>37</sup> See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1493 (2000) (“[G]ross morphological differences (e.g., the broadness of the nose, the fullness of the lips, the curl of the hair) have and continue to be used to delineate racial categories and to assign persons to racial groups.”); see also *id.* at 1515–22 (discussing how skin color has “played an important role within the Black community”). Essentialism posits that there is “a unitary, ‘essential’ . . . experience [that] can be isolated and described independently of [gender,] race, class, sexual orientation, and other realities of experience” for any identity group, such as women. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); see also Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 924–28 (2005) (defining both intersectionality and anti-essentialism); cf. Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN. L. REV. 1077, 1084–88 (2008) (exploring how unconscious biases contribute to “racial identification,” arguably akin to essentialism).

black women ultimately choose to straighten their hair, black women are significantly more likely than white women to be affected by hair restrictions that ban braids, locks, or twists.

Part V then studies and analyzes the termination experience of Judge Mablean Ephriam, formerly of *Divorce Court*, who was fired by Fox Network because of a dispute over “hair.” Finally, this Essay concludes by detailing the importance of analyzing the social meaning behind the repeated judicial validation of the invisible raced and gendered norms that underlie employers’ prohibitions of natural hairstyles for black women.

## I. THE ORIGINAL HAIRPIECE

This . . . type of regulation has at most a negligible effect on employment opportunity.

—*Rogers v. American Airlines*<sup>38</sup>

*Rogers v. American Airlines* is the seminal case concerning employer grooming codes as they relate to the intersection of race and gender. In *Rogers*, a black female employee of American Airlines filed a discrimination lawsuit under Title VII, arguing that the airline discriminated against her “as a woman, and more specifically a black woman” through a grooming policy that prohibited employees in certain roles from wearing all-braided hairstyles.<sup>39</sup> An employee for eleven years, Rogers declared, “[T]he ‘corn row’ style [her hairstyle] has a special significance for black women.”<sup>40</sup> She argued that the cornrow hairstyle “has been, historically, a fashion and style adopted by Black American women, reflective of [the] cultural, historical essence of the Black women in American society.”<sup>41</sup> In response to Rogers’s claim, American Airlines filed a motion to dismiss the lawsuit.<sup>42</sup>

The district court evaluated Rogers’s claims of discrimination “as a woman, and more specifically, a black woman” through two separate analyses: one for sex and the other for race, but not for both race and sex as her complaint indicated.<sup>43</sup> First, the district court reviewed her claim of gender discrimination, dismissing that claim on the ground that American Airlines’s restriction on braided hairstyles applied to both men and women.<sup>44</sup> The court further reasoned that the fact that women wear braided hairstyles far more often than men was inconsequential because the policy did “not regulate on the basis of any immutable characteristic of the employees involved.”<sup>45</sup>

Thereafter, the court examined Rogers’s case as a pure race discrimination claim and dismissed that claim as well.<sup>46</sup> The court first highlighted the fact that the policy applied equally

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<sup>38</sup> *Rogers*, 527 F. Supp. at 231 (referring to the airline’s prohibition on braided hairstyles).

<sup>39</sup> *Id.*; see also Caldwell, *supra* note 35, at 575 (noting that “American [Airlines’s] grooming rules [were] for customer-contact ground personnel”).

<sup>40</sup> *Rogers*, 527 F. Supp. at 231.

<sup>41</sup> *Id.* at 231–32 (internal quotation marks omitted).

<sup>42</sup> *Id.* at 231.

<sup>43</sup> *Id.* at 231–32.

<sup>44</sup> *Id.* at 231.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 234.

to members of all races.<sup>47</sup> The court noted that Rogers “first appeared at work in the all-braided hairstyle . . . soon after the style had been popularized by a white actress [Bo Derek] in the film ‘10.’”<sup>48</sup> Then, although conceding that a policy “prohibiting the ‘Afro/bush’ style might offend Title VII,” the court reasoned that Rogers’s lawsuit differed from one based on a ban of Afros because an all-braided hairstyle “is not the product of natural hair growth but of artifice.”<sup>49</sup> The court contended that, unlike a braided hairstyle, an Afro hairstyle “would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics” because it is a “natural hairstyle.”<sup>50</sup> The court further asserted, “An all-braided hairstyle 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.”<sup>51</sup>

Finally, the court explained that the airline did not require Rogers to change her hairstyle; after all, she could have followed the airline’s suggestion to “pull her hair into a bun and wrap a hairpiece around the bun during working hours.”<sup>52</sup> In response to Rogers’s claim that the hairpiece—not her real hair, but an artifice—had caused her to have severe headaches, the court asserted that “even if any hairpiece would cause such discomfort, the policy does not offend substantial interest.”<sup>53</sup>

In sum, the district court dismissed Rogers’s discrimination claims based on American Airlines’s appearance policy on the following grounds: (1) the contested appearance provision did “not regulate on the basis of any immutable characteristic” and (2) the challenged policy applied equally to both races and sexes.<sup>54</sup> It never even addressed Rogers’s intersectional race and sex challenge to the airline’s hair-related grooming restriction.<sup>55</sup>

In 1991, Professor Paulette Caldwell analyzed the *Rogers* case in her well-known article *A Hair Piece*.<sup>56</sup> Caldwell argued that *Rogers*’s flaw was that it rested upon the premise that racism and sexism, though similar in certain respects, existed and operated separately and independently from each other.<sup>57</sup> Because of this flaw, Caldwell explained, “[t]he court refused to acknowledge that American’s policy need not affect all women or all blacks in order to affect black women discriminatorily.”<sup>58</sup>

Caldwell further highlighted what she saw as a focus on protecting against discrimination “almost exclusively in biological terms”<sup>59</sup> and an avoidance of cultural conceptions of race. Pointing to the court’s reference to Bo Derek’s braided hairstyle in *10*, Caldwell described the

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<sup>47</sup> *Id.* at 232.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 233.

<sup>53</sup> *Id.*

<sup>54</sup> *Rogers*, 527 F. Supp. at 231–32.

<sup>55</sup> See Caldwell, *supra* note 35, at 571.

<sup>56</sup> Caldwell, *supra* note 10. Caldwell also examined *Rogers* in her chapter “Intersectional Bias and the Courts: The Story of *Rogers v. American Airlines*” in *Race Law Stories*. See Caldwell, *supra* note 35.

<sup>57</sup> See Caldwell, *supra* note 10, at 371.

<sup>58</sup> *Id.* at 377; see also Caldwell, *supra* note 35, at 573 (asserting that “race and gender discrimination operated together to affect [Rogers] as a black woman in a way that was not experienced by either white women or black men”).

<sup>59</sup> Caldwell, *supra* note 10, at 378.

trivialization of black women’s hair choices by the court. According to Caldwell, through the reference to Bo Derek alone, the court not only inaccurately framed Rogers’s decision to wear a braided hairstyle, but also implied that there was no relationship between braided hair and the culture of black woman and incorrectly indicated that black and white women have the same motivations for wearing braided styles.<sup>60</sup>

Thereafter, Caldwell cautioned that the prohibitions against braided hairstyles rest upon notions that once were used to oppose the wearing of Afros.<sup>61</sup> Those reasons included proclamations that Afros were “extreme, too unusual, not businesslike, inconsistent with a conservative image, unprofessional, inappropriate with business attire, too ‘black’ (i.e., too militant), [and] unclean.”<sup>62</sup>

## II. HAIR DOS AND DON’TS

My sista got a brand new perm  
my boys says she looks pretty fine body real firm . . .  
My sista loves her blackness  
but the U.S. says that her perm is her attractiveness.

—Arrested Development, “Africa’s Inside Me,”  
*Zingalamaduni*<sup>63</sup>

### A. SPLITTING HAIRS: UNDERSTANDING THE DIFFERENCES BETWEEN THE HAIR OF BLACK AND WHITE WOMEN

The *Rogers* court made the wrong decision on the plaintiff’s race and gender discrimination claim. Indeed, unlike Caldwell, who made a cultural argument for Title VII protection in *Rogers*, I contend in this Essay that the court reached the incorrect conclusion based upon its own rationale regarding biology and natural hairstyles. Although the *Rogers* court clearly understood that there were significant differences in the structures and textures of black and white hair—Afros and non-Afros—its ultimate conclusion was rooted in an incomplete or flawed understanding of black hair, especially as it relates to black women.

The court in *Rogers* referred to all-braided hairstyles as “not [being] the product of natural hair growth but of artifice” and then, in the same breath, offered American Airlines’s suggestion for Rogers to use a hairpiece as an alternative for her in covering up her naturally grown hair.<sup>64</sup> Such language exposes the court’s incomplete understanding of the full implications of tightly coiled and kinky hair for black women in the United States. First, the court revealed its

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<sup>60</sup> *Id.* at 379–80.

<sup>61</sup> *Id.* at 384–85. Caldwell, however, identified braided hairstyles as both mutable and immutable, unlike Afros, which have been identified as immutable. *Id.*

<sup>62</sup> *Id.*; see also Padgett, *supra* note 33 (“[B]lack hair has been controversial—especially when worn in its natural state in styles like Afros, braids, cornrows and dreadlocks.”).

<sup>63</sup> ARRESTED DEVELOPMENT, *Africa’s Inside Me*, ZINGALAMADUNI (Capitol Records 2006).

<sup>64</sup> *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981).

unspoken preference for white hairstyles through its very contention that the use of a ponytail of straight, artificial hair was an appropriate alternative to the all-braided hairstyle that it called “artifice.” Second, the court exposed its assumption of white traits in Rogers’s hair through its suggestion that a black woman could easily pull her hair back into a bun. Packed into that proposal is an assumption of white hair as the norm. In reality, it is extremely difficult to get natural, tightly coiled and kinky hair to stay down and pull it back into a bun.

What is important here is that the district court rejected what Blacks identify as a natural hairstyle—a hairstyle that allows black women to wear their hair down and long while retaining the natural structure and texture of their hair.<sup>65</sup> The district court left unstated society’s normative ideal for women’s hair: straight hair, which hangs down as it grows longer—hair that is not naturally grown by black women.<sup>66</sup> Since the *Rogers* decision, courts have continued to uphold employers’ bans on natural hairstyles for black women, applying *Rogers* pro forma and without any analysis about how the biological nature of black women’s hair should influence the law in this area.<sup>67</sup>

After all, the hair of black women is not naturally straight. It is tightly coiled into tiny curls. Unlike a white woman, for a black woman, receiving a permanent does not mean that she is curling her hair, but rather the opposite—that she is straightening it.<sup>68</sup> One author proclaimed, “What is unique about African hair is its *degree of curliness* . . . that [it] is curly to the *nth* degree.”<sup>69</sup>

The curliness of any individual’s hair is determined by the shape of that person’s hair shafts.<sup>70</sup> Each hair grows from a follicle, “which is the pore from which the hair emerges,” with the hair shaft made of keratin, “a fibrous protein . . . made up of three different layers of keratin.”<sup>71</sup> The second layer, the cortex, “determine[s] the thickness or thinness of [the] hair shaft.”<sup>72</sup> Additionally, “flat or oval shaft[s] that grow[] more on one side than the other creat[e] a curve.”<sup>73</sup> Thus, follicles that extend from those pores—almost flat shaped follicles—grow curly or tightly coiled hair while round follicles grow straight hair.<sup>74</sup>

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<sup>65</sup> See generally LONNICE BRITTENUM BONNER, *PLAITED GLORY: FOR COLORED GIRLS WHO’VE CONSIDERED BRAIDS, LOCKS, AND TWISTS* (1996) (discussing and providing tips for how black women can protect, maintain, and wear their hair naturally).

<sup>66</sup> See *supra* note 11 and accompanying text; see also Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 37 (2008) (identifying the difficulty in challenging identity norms); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 794 (1991) (“What we see as obvious—often so obvious that we really give it no thought—may be only one of many ways of looking at things, but a way that has dominated our legal culture for many years.”).

<sup>67</sup> See, e.g., *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at \*5 (M.D. Ga. Apr. 25, 2008); *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*2–3 (N.D. Ga. Sept. 19, 1996).

<sup>68</sup> Tina Ezell Hull, *Catching the Natural Wave: African American Women Learning to Love Their Hair’s True Texture*, CHARLOTTE OBSERVER, Dec. 14, 2007, at E1.

<sup>69</sup> LONNICE BRITTENUM BONNER, *GOOD HAIR: FOR COLORED GIRLS WHO’VE CONSIDERED WEAVES WHEN THE CHEMICALS BECAME TOO RUFF* 15 (1991).

<sup>70</sup> *Id.* at 17.

<sup>71</sup> *Id.* at 16.

<sup>72</sup> *Id.* at 17. The outside layer, the cuticle, contains the hair’s coloring, and the third, middle layer, the medulla, is a soft keratin layer. *Id.* at 16–17.

<sup>73</sup> *Id.* at 17.

<sup>74</sup> *Id.*

Most black women have thick cortexes, which results in their having coarse or woolly hair.<sup>75</sup> Also, black women's hair usually grows out of almost flat-shaped follicles, resulting in tightly coiled hair, while white women's hair tends to grow out of rounded shafts, creating straight hair.<sup>76</sup> The end result is that black women generally have tightly coiled, wooly hair and white women, who tend to have thinner cortexes than black women, generally have straight, fine (compared to black women) hair.

## B. STRANDS OF ANALYSIS

Little has changed regarding dress codes and the law since *Rogers*. Even in the face of changing gender norms in our society, antidiscrimination law continues to reinforce traditional expectations about appearance. For example, courts continue to uphold policies that require men to wear their hair short<sup>77</sup> or women to wear make-up<sup>78</sup> on the ground that such restrictions do not constitute sex discrimination because they do not impose unequal burdens on one sex over the other.<sup>79</sup> In upholding these codes, courts give legitimacy to the gendered beauty expectations for men and women, essentially proclaiming that desirable men and women adhere to such gender norms.<sup>80</sup>

*Jespersen* provides an excellent example of such judicial validation of traditional gender norms in the workplace. Recall again that Harrah's Casino required women to wear their hair down and have it teased, curled, or styled every day; wear stockings; and wear face powder, blush, mascara, and lip color at all times while only requiring men to wear their hair short and to have clean, neatly trimmed nails.<sup>81</sup>

There, the Ninth Circuit held that Harrah's policy "appropriately differentiate[d]" the grooming requirements between women and men and that such differences had "only a negligible effect on employment opportunities."<sup>82</sup> In so doing, the court essentially reinforced societal gender expectations for women to "pretty up" their faces with make-up, including with "foundation, blush, mascara, and lip color."<sup>83</sup> As Judge Pregerson indicated in his dissent, the majority opinion in *Jespersen* sent "[t]he inescapable message . . . that women's undoctored

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 17–18.

<sup>77</sup> *See, e.g.,* Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387, 1389 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257 (N.D. Ind. 1998).

<sup>78</sup> *See, e.g.,* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109–12 (9th Cir. 2006) (en banc).

<sup>79</sup> *See generally* Carbado et al., *supra* note 23, at 135–48 (noting that the *Jespersen* court's decision focused on the absence of unequal burdens and comparing that decision to other Title VII gender discrimination decisions).

<sup>80</sup> *See id.* at 105–13 (detailing the historical and current norms of make-up for women).

<sup>81</sup> *Jespersen*, 444 F.3d at 1107.

<sup>82</sup> *Id.* at 1110 (quoting Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975)).

<sup>83</sup> *Id.* at 1114 (Pregerson, J., dissenting); *see also* Kirsten Dellinger & Christine L. Williams, *Makeup at Work: Negotiating Appearance Rules in the Workplace*, 11 GENDER & SOC'Y 151, 158 (1997) (finding that one of the reasons that many women wear make-up is "because it makes them feel confident about themselves," "more polished," "prepared to meet the public," and "[m]ore attractive").

faces compare unfavorably to men's, . . . that women's faces are incomplete, unattractive, or unprofessional without full makeup."<sup>84</sup>

Validation of this message was further supported by the majority's refusal to acknowledge the burdens imposed on women by societal make-up norms.<sup>85</sup> In pointing out how obvious these burdens are on Harrah's female bartenders, Judge Kozinski argued:

[I]s there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave—certainly not if she were to do the careful and thorough job Harrah's expects. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual. While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.<sup>86</sup>

Such failure to acknowledge what Judge Kozinski referred to as "incontrovertible" not only gave Harrah's grooming requirements legal weight but also added legitimacy to the idea that the grooming requirements' burdens on women are normal, reasonable, and unworthy of challenge. The sad fact is that *Jespersen* simply follows a line of cases that have maintained and legitimated gender norms.<sup>87</sup> Moreover, it made matters worse for future plaintiffs who, because of the court's refusal to take judicial notice, would have to go to great lengths to support their claims by putting forensic cosmetologists on the stand to prove the obvious about the costs of makeup application in terms of money and time.

Much like with gender, little has changed in antidiscrimination law in regard to race and dress codes. No court or agency has even implied that Afro hairstyles are not protected. The strongest case concerning the protection of Afros as a racial characteristic under Title VII came in 1971, after the Civil Rights Movement and on the tail end of the Black Power Movement. In that case, the employer's policy provided as follows: "The hair is not to be kept bushy and

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<sup>84</sup> *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting).

<sup>85</sup> *Id.* at 1111 (majority opinion) (refusing to "take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short").

<sup>86</sup> *Id.* at 1117 (Kozinski, J., dissenting).

<sup>87</sup> *See, e.g., supra* notes 77–78 and accompanying text; *see also* POST, *supra* note 4, at 44 ("What seems in fact to be driving the outcome in *Willingham* is the conviction that employers reasonably may impose sex-based stereotypes in matters of grooming, so long as these stereotypes conform to traditional gender conventions.").

should not extend in line of sight beyond the ears.”<sup>88</sup> The plaintiff, a black male, filed a claim of race discrimination under Title VII, contending that the employer “discharged him because his Afro-American hair style did not conform to the company’s standards of uniform appearance” and stating that “his hair style is a manifestation of his racial identity.”<sup>89</sup> In evaluating that claim, the EEOC determined that the employer discriminated against the plaintiff on the basis of race, reasoning that applying the “‘line of sight’ hair grooming policy to all employees, without regard to their racially different physiological and cultural characteristics, tends to adversely affect Negroes because they have a texture of hair different from Caucasians.”<sup>90</sup>

Thereafter, many other courts followed suit, either in their holding or dicta. For example, in *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, the plaintiff filed a charge of discrimination after she had changed her hairstyle to an Afro and experienced resistance from her employer.<sup>91</sup> For three years before, her supervisor had had no problem with her or her hair,<sup>92</sup> but when the plaintiff changed her hairstyle to an Afro, her supervisor told her that she “could never represent Blue Cross with [her] Afro.”<sup>93</sup> In finding that the plaintiff’s charge was sufficient to support allegations in the complaint of both racial and sex discrimination, the Seventh Circuit reasoned as follows: “A lay person’s 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.”<sup>94</sup> Similarly, and more recently, courts such as those in *Rogers* and *McBride* have hinted at protection for Afros, asserting that “an employer’s policy prohibiting the ‘Afro/bush’ style might offend Title VII.”<sup>95</sup>

Still, though, courts continue to uphold employers’ identification of natural hairstyles such as cornrows and braids, which are predominantly worn by black women, as unprofessional, extreme, or unusual forms of grooming that can be banned in the workplace.<sup>96</sup> For example, in 2008, the district court in *Pitts v. Wild Adventures, Inc.* rejected the plaintiff’s discrimination claim based on the employer’s “memo that prohibited ‘dreadlocks, cornrows, beads, and shells’ that are not ‘covered by a hat/visor.’”<sup>97</sup> Pitts’s supervisor had told her to get her hair done in a “pretty style” and refused to allow Pitts to wear cornrows or twists because they “had the look of dreadlocks.”<sup>98</sup> In rejecting Pitts’s discrimination claim, the court reasoned that “[d]readlocks and cornrows are not immutable characteristics” and “[t]he fact that the hairstyle might be predominantly worn by a particular protected group is not sufficient to bring the grooming policy within the scope of” the law.<sup>99</sup>

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<sup>88</sup> E.E.O.C. Dec. No. 71-244, 4 Fair Empl. Prac. Cas. (BNA) 18 (June 10, 1971) (internal quotation marks omitted).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The EEOC even endorsed a cultural argument for protecting Afros, “not[ing] that the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression . . . an automatic badge of racial prejudice.” *Id.*

<sup>91</sup> 538 F.2d 164, 167 (7th Cir. 1975) (en banc).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 168.

<sup>95</sup> *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); *see also McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*2 n.2 (N.D. Ga. Sept. 19, 1996).

<sup>96</sup> *See, e.g., McBride*, 1996 WL 755779, at \*2–3.

<sup>97</sup> No. 7:06-CV-62-HL, 2008 WL 1899306, at \*1, \*6 (M.D. Ga. Apr. 25, 2008).

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.* at \*6. Courts have held the same with regard to black men who wear their hair in styles such as locks, though black men are not the subject of this Essay. For example, in *Eatman v. United Parcel Service*, the district court

In fact, even in cases where the employer's treatment of the plaintiff occurred precisely because she was black, courts have found no disparate treatment discrimination. For example, in *Santee v. Windsor Court Hotel L.P.*, the district court determined that the employer was not liable for race discrimination under Title VII where the employer refused to hire a black woman with dyed blonde hair, but not white women with dyed blonde hair, on the ground that the black woman violated its grooming policy against "extremes in hair color."<sup>100</sup>

One noteworthy change in race-based antidiscrimination law, however, has occurred with respect to race and facial hair. In some early antidiscrimination cases, courts were hesitant to extend the rationale for protecting Afro hairstyles to facial hair restriction cases, even where the requirement of shaved facial hair caused black men to suffer from pseudofolliculitis barbae (PFB),<sup>101</sup> a painful skin disorder resulting from ingrown hairs that is scientifically proven to be

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rejected the black male plaintiff's disparate treatment race discrimination claim on the ground that "Title VII does not prohibit discrimination on the basis of locked hair" and his disparate impact claim on the ground that the plaintiff had "shown only that a large percentage of those employees with what UPS considers 'unbusinesslike' hair are black employees." 194 F. Supp. 2d 256, 262, 266-67 (S.D.N.Y. 2002) *see also* D. Aaron Lacy, *Hair Today, Gone Tomorrow: Conforming for Hire*, 64 MIAMI L. REV. (forthcoming 2010) (manuscript at 1-3) (chronicling his job search experiences while wearing locks in his hair)

<sup>100</sup> No. Civ.A.99-3891, 2000 WL 1610775, at \*1, \*3 (E.D. La. Oct. 26, 2000). One could argue that blonde hair color is extreme on black women because black women are less likely than white women to be natural blondes. Several questions arise from this argument, however. First, many black women who are admired for their appearance, including Beyonce, Mary J. Blige, and Tyra Banks, dye their hair blonde. Would these women lose their job or not be hired because of their hair color choice while a star such as Christina Ricci or Angelica Huston would not, despite an "unnatural" look on them, simply because they are white? Second, and more importantly, if the likelihood of natural blonde hair is viewed here as determinative, why shouldn't the likelihood of having a certain structure and texture of hair be determinative in braids or locks cases? The *Rogers* court determined that there was no discrimination against black women due to American Airlines's prohibition of braids because black and white women were both subject to the policy. If receiving the exact same treatment, regardless of any substantive meaning, is paramount in *Rogers*, why shouldn't the same principle apply in *Santee*? Third, even if the employer's regulation was to label all dyed hair as "extreme," how would the enforcement of that regulation not disproportionately affect black women? One can easily imagine a situation in which black women with anything but black hair would be required to prove that their hair color is natural, while white women would routinely be presumed to be wearing their natural color, except when they are wearing truly extreme colors such as pink or purple. The irony of *Santee* is that the plaintiff was completely conforming to the normative ideal for women: straight, blond hair.

<sup>101</sup> One court described the disorder in more detail:

Pseudofolliculitis barbae . . . is a facial skin condition that afflicts certain persons with curly or kinky hair follicles. After shaving, the curved hair follicles cause the already curly hair to curve back into contact with the skin surface, and pierce and re-enter the skin, forming a pseudofollicle. The pseudofollicle becomes inflamed, and painful papules and pustules result. In severe cases, abscesses develop around the pseduofollicles and, if untreated, cause scarring, hyperpigmentation, and disfigurement. Once a person is afflicted by PFB, it lasts the person's lifetime.

There is no cure for PFB. A person afflicted by the condition, however, may induce remission by growing a beard one-quarter inch in length. Such 'beard therapy' is the standard medical treatment for PFB. The remission obtained through beard therapy is nearly complete. The condition will redevelop if a person resumes shaving. PFB is an immutable condition that, with few exceptions, afflicts only male blacks.

*Richardson v. Quick Trip Corp.*, 591 F. Supp. 1151, 1153-54 (S.D. Iowa 1984).

“unique or at least almost unique to blacks.”<sup>102</sup> For example, in *Woods v. Safeway Stores, Inc.*, the district court held that the employer’s grooming restriction on beards did not violate Title VII, even though the plaintiff suffered from PFB and did not shave due to the advice of a dermatologist, because the “no beard” policy applied equally to Blacks and Whites and therefore did not result in disparate treatment on the basis of race.<sup>103</sup> Additionally, although organizations such as the “United States Army permit[ted] blacks with PFB to wear beards because the army ha[d] concluded that PFB is a physical disability to which only blacks are susceptible,”<sup>104</sup> early courts initially refused to acknowledge such disparate impact claims on the ground that the contested grooming regulation did not touch upon any characteristic that is unique to Blacks. For instance, in ruling in favor of the employer in *EEOC v. Greyhound Lines, Inc.*, the court reasoned: “The wearing of beards is not a characteristic that is peculiar to any race. Nor can the incidence of beard-wearing among black workers be attributed to a long history of inferior education in segregated schools, unlike the uneven test score issues at *Griggs v. Duke Power Co[mpany]*.”<sup>105</sup>

Within a short period of time, however, courts began to recognize such facial hair cases as raising viable racial discrimination claims, assuming there were no legitimate business purposes, such as safety, for the grooming requirements.<sup>106</sup> Although these lawsuits involved disparate impact claims, not disparate treatment claims, the courts’ reasoning in these later cases often drew a connection between hair and biology. They indirectly acknowledged race as a social construction, highlighting hair as just one of many characteristics that are used to define race.<sup>107</sup> For instance, in *EEOC v. Trailways, Inc.*, the court acknowledged the black male plaintiff’s disparate impact claim as race discrimination, asserting that the employer had to have a legitimate business purpose for its grooming prohibition on beards in light of proof that PFB affects twenty-five percent of the black male population.<sup>108</sup> The judge reasoned: “I wholeheartedly agree that the wearing of beards is not a characteristic peculiar to any race, but on the proof made in this case, the characteristic which must be thought about is susceptibility to pseudofolliculitis barbae—not the wearing of beards—and that physical characteristic is peculiar to blacks.”<sup>109</sup> In essence, in these cases, courts recognized claims of race discrimination based on the unique texture and structure of black hair, which makes black men susceptible to PFB.<sup>110</sup> They understood and acknowledged that hair, just like skin color, is just one proxy for

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<sup>102</sup> *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 56 (D. Colo. 1981).

<sup>103</sup> 420 F. Supp. 35, 42–43 (E.D. Va. 1976). The court also found no disparate impact on the basis of race because the “slight racial impact” was not sufficient to override the employer’s legitimate business purpose of cleanliness. *Id.* Alternatively, the court held that the “no beard” policy served a legitimate business purpose even if there was some discriminatory impact. *Id.* at 42–43.

<sup>104</sup> *Trailways, Inc.*, 530 F. Supp. at 56–57.

<sup>105</sup> 635 F.2d 188, 190 n.3 (3d Cir. 1980).

<sup>106</sup> See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1121 (11th Cir. 1993) (denying a discrimination claim by a black man suffering from PFB on the grounds of safety).

<sup>107</sup> See generally Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of Hudgins v. Wright*, in *RACE LAW STORIES* 147 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (identifying physical characteristics as an important component of racial identity); see also Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 705 (1996) (same).

<sup>108</sup> 530 F. Supp. 54, 56 (D. Colo. 1981).

<sup>109</sup> *Id.* at 57 (emphasis added).

<sup>110</sup> See, e.g., *Johnson v. Memphis Police Dep’t*, 713 F. Supp. 244, 247–48 (W.D. Tenn. 1989) (recognizing a claim of race discrimination based on PFB).

race, a social construction. Indeed, in her dissent in *Greyhound Lines*, Judge Dolores Sloviter explicitly made this argument, declaring: “A ‘no beard’ policy is to be treated no differently than any other employment policy, and indeed should be subjected to exacting inquiry since the skin condition it affects results from an immutable physical characteristic.”<sup>111</sup>

In sum, in articulating PFB as a product of the immutable physical characteristic of black hair, these courts unknowingly placed the PFB cases in line with other cases that have exposed, even if unintentionally, the ways in which race is constructed by numerous factors such as hair, nose width, and skin color, the most common proxy for race. In fact, some authors contend that hair served as the true signifier of race in early racial trials; for example, Ayana Byrd and Lori Tharps wrote:

Curiously, the hair was considered the most telling feature of Negro status, more than the color of the skin. Even though some slaves . . . had skin as light as many Whites, the rule of thumb was that if the hair showed just a little bit of kinkiness, a person would be unable to pass as White. Essentially, the hair acted as the true test of blackness, which is why some slaves opted to shave their heads to try to get rid of the genetic evidence of their ancestry when attempting to escape to freedom.<sup>112</sup>

This history of constructing race by factors such as hair and nose width is long and varied, including cases such as the 1806 decision in *Hudgins v. Wrights*.<sup>113</sup> In *Hudgins*, the Supreme Court of Virginia relied on examinations of three women’s hair and nose width to determine that they were American Indian and free, rather than black and enslaved.<sup>114</sup> In its decision, the Supreme Court of Virginia declared that people of African descent had been stamped with three distinct characteristics that would not and could not disappear easily: (1) dark skin; (2) a flat nose; and (3) woolly hair, with the texture of the hair being the strongest “ingredient in the African constitution.”<sup>115</sup> The court also noted hair as a distinguishing characteristic for American Indians, referring to “giving . . . the jet black lank hair of the *Indian* a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native *Americans*.”<sup>116</sup> As Professor Ian Haney López declared in his article *The Social Construction of Race: Some Observations on Illusion, Fabrication, and*

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<sup>111</sup> EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 196 (3d Cir. 1980).

<sup>112</sup> AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 17–18 (2001); see also INGRID BANKS, HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN’S CONSCIOUSNESS 7 (2000) (citing Willie Morrow’s *400 Years Without a Comb*, which argued that “skin color and ‘curly or kinky hair’ are so intertwined that it is hard to separate the two when examining the forces that shape black people’s lives”); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 61 (1982) (“Hair type rapidly became the real symbolic badge of slavery, although like many powerful symbols it was disguised, in this case by the linguistic device of using the term ‘black,’ which nominally threw the emphasis to color.”); cf. DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 458 (1998) (“Think too of how easy it is to become invested in others’ hair, to see it as betraying distasteful facts. One antislavery writer denied that the woolly hair of Negroes was a badge of inferiority.”).

<sup>113</sup> 11 Va. (1 Hen. & M.) 134 (1806).

<sup>114</sup> *Id.* at 138–40.

<sup>115</sup> *Id.* at 139.

<sup>116</sup> *Hudgins*, 11 Va. (1 Hen. & M.) at 139 (emphasis added).

*Choice*, “[a]fter unknown lives lost in slavery, Judge Tucker freed three generations of women because Hannah’s hair was long and straight.”<sup>117</sup>

Though *Hudgins* itself embraces disturbing rationales, its lessons about the social construction of race should not be ignored. Regardless of public desire to become “post-racial,”<sup>118</sup> race continues to be defined by proxies such as skin color and hair in our society and continues to have significance within the workplace. Antidiscrimination law should acknowledge these realities. Indeed, it is worth noting that the same hair types that were constructed as signifiers of “freedom” or inclusion into “normal society” in *Hudgins* continue to be used as signifiers of the “norm” and the “acceptable” in Title VII grooming code cases.

### III. PERMANENT DAMAGE

But I thought that the boys were born with Afros and the girls were born with straight hair.

—A white female, high school friend, in response to my explanation about needing to touch up my relaxed hair

In past grooming code cases, plaintiffs have not argued that black female, natural hairstyles should be viewed as a racial characteristic based on biology. Instead, they have accepted the identification of these hairstyles as mutable, choosing to base their race discrimination claims on cultural connections. For example, the plaintiff in *Rogers* predicated her claim in part on her understanding of braided hairstyles as “part of the cultural and historical essence of Black American women.”<sup>119</sup> Caldwell also based her assessments on culture, maintaining that the *Rogers* court too narrowly “limit[ed] protection against discrimination to the physical manifestations of racial identity . . . and denying protection for identity-related choices of personal expression.”<sup>120</sup>

Although such culture-based arguments are appealing because of how they encompass responses to discrimination based on racial stereotyping,<sup>121</sup> lawyers also should consider

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<sup>117</sup> 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, 2 (1994).

<sup>118</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1591–93 (2009) (noting the increasing calls after Obama’s election that the United States is post-racial); see also Onwuachi-Willig, *supra* note 107, at 164–73 (analyzing contemporary lessons from *Hudgins*).

<sup>119</sup> *Rogers v. Am. Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (internal quotation marks omitted).

<sup>120</sup> Caldwell, *supra* note 35, at 571.

<sup>121</sup> See Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1247–75 (2000) (analyzing discrimination by proxy where actors use characteristics associated with a minority group—specifically Latinos, such as language and immigration status, to discriminate on the basis of race and ethnicity); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2007 WIS. L. REV. 1283, 1297–1312 (examining situations where individuals used factors such as names on résumés or voices over the phone to discriminate in the selection of job candidates or rental housing applicants); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1172–94 (2004) (analyzing how employers regulate race and gender under Title VII to postulate the existence of intentional discrimination where employers use appearance and grooming standards to shape identity performance). 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, 1360–94 (2008) (arguing for a judicial analysis in a

bringing intersectional discrimination claims based upon biological considerations. In fact, critics have presented two problems in relying solely on culture-based arguments for black female plaintiffs in grooming discrimination cases. First, culture-based positions present the problem of essentialism and definitional boundaries. In his book *Racial Culture: A Critique*, Professor Richard Ford contends that antidiscrimination law “should limit the formal acknowledgement of race to its most formal and culturally empty definition.”<sup>122</sup> According to Ford, centering legal protections around cultural or racially-correlated characteristics presents the practical problem of determining where to draw the boundaries.<sup>123</sup> For example, he asks, how would courts define which hair styles are culturally African American?<sup>124</sup> Additionally, Ford argues, cultural arguments highlight the dangers of essentialism.<sup>125</sup> For instance, he questions, how can braids be considered culturally African American if a significant segment of black women reject them as part of their culture?<sup>126</sup>

In addition to presenting challenges of defining boundaries and escaping essentialism, the *Rogers*-type of culture-based arguments have not fully unpacked the underlying basis for the discrimination at hand: the presumption and identification of white women’s hair as the baseline for women or, as the Equal Employment Opportunity Commission asserted with respect to an employer’s restriction on Afros, the measurement of black female plaintiffs “against a standard that assumes non-Negro hair characteristics.”<sup>127</sup> The problem with current case law is not that it does not understand race as a social construct—at least loosely speaking—but rather that it limits this understanding too narrowly.

Although the language in cases such as *Rogers* indicates that courts define race as skin color alone, the language in cases such as *Jenkins* suggests that courts’ understanding of race is actually much broader, acknowledging the way in which race is socially constructed and defined by many phenotypical factors such as hair, nose width, and skin color.<sup>128</sup> Were this implicit

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more historical and contemporary social context to ascertain whether the employers’ decisions perpetuate racial stigmatization); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803–64 (2004) (arguing for more focus on the dehumanizing meanings associated with race in antidiscrimination law); Angela Onwuachi-Willig & Mario L. Barnes, Lakisha and Jamal Go to Work: Analyzing Workplace Appearance and Grooming Standards as “Racial Stereotyping” (manuscript draft on file with the author) (arguing for a mixed-motive, racial stereotyping framework).

<sup>122</sup> RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 13 (2005); see also Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151, 1190 (2008) (“To Ford, denial of the “right” to wear cornrows at work falls in the domain of cultural self-expression.”).

<sup>123</sup> FORD, *supra* note 122, at 12.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 24–25. For a definition of race and gender essentialism, see Harris, *supra* note 37, at 585 (defining gender essentialism as a notion that there is “a unitary, ‘essential’ women’s experience . . . isolated and described independently of race, class, sexual orientation, and other realities of experience”).

<sup>126</sup> FORD, *supra* note 122, at 24–26.

<sup>127</sup> E.E.O.C. Dec. No. 71-244, 4 Fair Empl. Prac. Cas. (BNA) 18 (June 10, 1971) (determining that applying the employer’s “‘line of sight’ hair grooming policy to all employees, without regard to their racially different physiological and cultural characteristics, tends to adversely affect Negroes because they have a texture of hair different from Caucasians.”).

<sup>128</sup> See *id.* (holding that while an employer’s line of sight grooming policy was equally enforced, it adversely affected black employees who naturally have a different texture hair from white employees); see also *Jenkins v. Blue Cross Mutual Hosp. Ins.*, 538 F.2d 164 (7th Cir. 1976) (recognizing that the plaintiff had a valid Title VII claim where she alleged that her employer fired her because of her Afro hairstyle). It is important to note that race also has been defined, both in historical and contemporary terms, by performance. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109, 118–21 (1998)

understanding not the case, courts would have never recognized bans on Afros as racial discrimination at all. In fact, Ford acknowledges as much about the role of hair in defining race when he contends that protections from discrimination should revolve around race, not culture, noting that Danny Glover, a famous black actor, experienced difficulty in getting a taxi “not because he hailed [cabs] in a culturally distinctive manner but because of the color of his skin *and the texture of his hair.*”<sup>129</sup> What antidiscrimination law needs is for lawyers and courts to make explicit this understanding of race as a social construct and extend such racialized analysis for the protection of the Afro hairstyle—which is based on biology—to braids, locks, and twists for black women.

Admittedly, it is dangerous for lawyers to rest too much of any argument for Title VII protections upon “biological” immutability. As Caldwell contends, “[a] formalistic approach separates the fact of discrimination from the history, culture, and conditions of the society that produced and continues to produce inequality.”<sup>130</sup> However, my claim here is not that race is purely biological or that biological arguments are the only way—or even the best way—to grant black women protection from discriminatory grooming codes under Title VII. Instead, my argument here is much narrower and decidedly strategic. My claim is that, but for the courts’ incorrect assumptions about black women’s hair, black women would already be protected from employers’ prohibitions of braided, locked, and twisted hairstyles, just as black men (as well as black women) are protected from certain employer restrictions on Afro hairstyles. If courts carefully thought through and considered the nature of black women’s hair, they would view employer bans on natural hairstyles to be just as discriminatory as employer bans on brown skin, another proxy for race and another proxy that can be altered with money, time, effort, and damage to the psyche. In this sense, it is not immutability, but biology and the reasonableness of requiring people to make biological changes, that governs antidiscrimination law in the grooming code arena. Lawyers need to explain and courts need to recognize the implicit demands for changes in hair structure and texture that currently exist in employers’ prohibitions of black women’s natural hairstyles. Moreover, the law needs to move beyond viewing these required changes to black women’s hair structure and texture as reasonable.

#### IV. EXTENSIONS TO A HAIR PIECE

I remember I went to interview for a job and the guy wouldn’t hire me because I had an Afro. A white guy. He said, “It’s your hair. I don’t like your hairstyle. You’ve got to do something about your hair. . . . I think that both white and Black employers, especially men, expect African American women to have straight hairstyles as opposed to their own natural hairstyles.

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(detailing how determinations of race by juries during the nineteenth century often turned on witness testimony regarding hair color, hair texture, facial features, and social performances); *see also* Haney López, *supra* note 117, at 49–50 (“For example, seemingly inconsequential acts like listening to rap and wearing hip hop fashions constitute a means of racial affiliation and identification.”); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1479 (2003) (discussing how “scholars have shown [that] scientific notions of race such as genealogy or physical appearance have never been the courts’ sole or even preferred type of evidence for determining race”).

<sup>129</sup> FORD, *supra* note 122, at 8 (emphasis added).

<sup>130</sup> Caldwell, *supra* note 35, at 599.

In 1991, Professor Kimberlé Crenshaw applied her theory of intersectionality, which recognizes that power, privilege, disadvantage, and discrimination are influenced by interlocking spectrums of identity, to employment discrimination law.<sup>132</sup> Structural intersectionality describes the phenomenon when “overlapping dynamics of class, race, and gender, among others, can create a specific vulnerability, insight, and social disenfranchisement based on situated identities and social locations, dependent on the interaction of each structural dynamic.”<sup>133</sup> This feature of intersectionality concentrates on how power structures and institutions work to reinforce and perpetuate systems of subordination.<sup>134</sup> For example, as Professor Crenshaw highlighted in her article, because the identities of black men and black women differ along the intersection of race, class, and sex, black men and black women may have distinct vulnerabilities to violence and may actually experience discrimination differently from one another.<sup>135</sup>

This Part highlights the unique way in which black women are discriminated against at the intersection of race and sex through employers’ bans on natural black hairstyles such as braids, locks, and twists. Specifically, it argues that, when the sex-based grooming code cases that address hair length for men and women and the race-based grooming code cases that govern Afros and beards that cannot be worn due to PFB are viewed together and against each other, they reveal the way in which black women receive less protection from the law than both white women and black men in their attempts to satisfy society’s gendered expectations for

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<sup>131</sup> Weitz, *supra* note 11, at 681.

<sup>132</sup> See generally Crenshaw, *supra* note 6 (explaining that women of color are at the intersection of race and gender oppression). Section 15 of the Equal Employment Opportunity Commission Compliance Manual now includes a brief explanation of intersectional discrimination. It reads in its entirety:

Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex).” For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them “even in the absence of discrimination against Asian American men or White women.” The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute—e.g., race and disability, or race and age.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL § 15-IV(C) (2006), available at <http://eeoc.gov/policy/docs/race-color.pdf>.

<sup>133</sup> Beth Ribet, *Emotion, Power Relations, and Restorative Justice: A Review of Compulsory Compassion by Annalise Acorn*, 15 UCLA WOMEN’S L.J. 115, 127 n. 60 (2006) (discussing Crenshaw’s theory of structural intersectionality); see also Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The “High Tech Lynching” of a “Wise Latina”?* 20 (University of California, Davis Legal Studies Research Paper Series, Research Paper No. 188, 2009), available at <http://ssrn.com/abstract=1460932> (“Women of color . . . are generally speaking more disadvantaged in American social life than either white women or men of color—groups whose members generally possess only a single subordinating characteristic.”).

<sup>134</sup> See Ribet, *supra* note 133, at 127 n.60; see also Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 17 (1995).

<sup>135</sup> Crenshaw, *supra* note 6, at 139–41; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–96 (1991).

appearance.<sup>136</sup> Of course, there are problems underlying these appearance expectations, but this Essay leaves that discussion for another paper. In our society, individuals are constrained in their agency by societal expectations and rules within the workplace. Regardless of how one views appearance expectations in our society, it is fair to say that black women should not suffer the double whammy of being bound to these expectations and then deprived of any option for achieving them because of flawed understandings about how the structure and texture of their hair can impact the manner in which they can comply with grooming requirements.

Section A of this Part analyzes what the raced and gendered assumptions about women's hair in grooming discrimination cases reveal about biases against natural black hair. Section B shows how employers' bans on natural hairstyles intentionally discriminate against black women at the intersection of race and sex. Thereafter, it demonstrates how grooming policies that convey implicit demands for black women to relax or otherwise straighten their hair discriminate against them on the basis of race and gender by placing an undue burden on black women. Finally, section C explicates how bans on black women's natural hairstyles are discriminatory under traditional disparate impact theories because black women are more likely to be affected by policies that ban braids, locks, or twists, regardless of whether many choose to actually straighten their hair.

#### A. GOOD AND BAD HAIR: HAIR BIASES IN THE WORKPLACE

The fact that courts such as the *Rogers* court have assumed away the work for black women in straightening their hair is not surprising. As one black woman who recently began to wear her hair naturally through locks proclaimed, “[Black hair is] a tight, tight, tiny curl. It’s a curl that’s unfamiliar to other cultures, only because we’ve been pressing it for so long.”<sup>137</sup> Additionally, as Professors Ashleigh Shelby Rosette and Tracy Dumas have explained, there is a tendency and even an incentive for professional black women not to highlight the obstacles that they face in straightening their hair and keeping it straight because many black women have no desire to highlight their racial difference in a white corporate structure where conformity is often the key to success.<sup>138</sup> Furthermore, because black women are “[f]aced with a dominant culture that already defines them as less attractive and feminine than other women, they are more likely to seek out a style that looks ‘professional’ but still meets mainstream norms of femininity,” relying “on wigs or on expensive formulations for changing the natural texture of their hair and

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<sup>136</sup> See Rosette & Dumas, *supra* note 7, at 409–10 (“The expectation of hair straightening falls solely on Black women and not on Black men. In fact, Black men are expected to wear their hair in its natural state—though the expectation is for keeping it short and conservatively groomed. Accordingly, the hairstyle dilemma for Black women is both uniquely racialized and gendered.”). Ford asks, “[I]sn’t the desire for long, flowing hairstyles actually a symptom of the Eurocentric grooming norms that [the right to braids] is supposed to resist?” FORD, *supra* note 122, at 27.

<sup>137</sup> Hull, *supra* note 68.

<sup>138</sup> See Rosette & Dumas, *supra* note 7, at 412, 415 (“[W]e argue that Black women conform primarily because they seek to minimize the perception that they are different from their colleagues and because they want to avoid the pitfalls of stereotyping.”); see also Barbara J. Flagg, *Fashioning A Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2009–30 (1995) (creating two fictional, black sisters, Yvonne Taylor and Keisha Akbar, who perform their racial identities differently in their corporate workplaces, and detailing how Keisha, who “place[d] an emphasis on her African heritage,” would find it more difficult to advance an employment discrimination claim).

avoid[ing] . . . hairstyles that others might associate with radical political stances (such as dreadlocks or Afros).”<sup>139</sup>

On top of the absence of a full understanding about black women’s hair structure and texture as well as black women’s natural hairstyles is a general discomfort with natural black hairstyles. In a society where straight, long, fine (compared to black hair) hair is viewed not only as the norm but as the ideal for women, tightly coiled black hair easily becomes categorized as unacceptable, unprofessional, deviant, and too political. Image consultants routinely advise black women to remove hairstyles such as braids and locks. For instance, in 2007, Ashley Baker, an associate editor at *Glamour* magazine, told a room full of female attorneys at Cleary, Gottlieb, Steen, & Hamilton that Afro-styled hairdos and dreadlocks are *Glamour* don’ts.<sup>140</sup> Reportedly, Baker also said, “No offense, but those political hairstyles really have to go.”<sup>141</sup> Later, Baker caught flak for the comment after attorneys lobbied complaints and even lost her job, but the fact that she felt comfortable making this assertion to a room full of *attorneys* speaks volumes about the biases against black women’s natural hair, including Afros, which are protected as a racial characteristic under the law.<sup>142</sup>

Not only have non-Blacks internalized appearance norms that mark white, long hair as the normative ideal for women, but so have Blacks.<sup>143</sup> The internalization of these norms by black women begins at an early age. One author asserted that internalization of these standards begins around age three or four.<sup>144</sup> Famous comedian Chris Rock became inspired to create his award-winning documentary *Good Hair* when his young daughter asked him, “Why don’t I have good hair?”<sup>145</sup> Similarly, Whoopi Goldberg, who wears her hair in short, thick dreadlocks, became

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<sup>139</sup> Weitz, *supra* note 11, at 678 (citation omitted); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (2000) (describing how women and people of color attempt to alter their racial identities in order to prevent discrimination and preempt stereotyping in the workplace); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 892 (2002).

<sup>140</sup> Padgett, *supra* note 33.

<sup>141</sup> *Id.*

<sup>142</sup> *See supra* note 33.

<sup>143</sup> In my own personal experience, the most vocal protesters to my decision to lock my hair were Blacks, who viewed such a decision as a career-limiting gesture. *See also* Padgett, *supra* note 33 (noting that “most black women—especially those in high-ranking positions . . . chemically straighten their hair”). The empirics bear out, however, that black women who make \$100,000 a year or more are the most likely of any income group of black women to wear their hair naturally and unprocessed. MINTEL INT’L GROUP, BLACK HAIRCARE - US - AUGUST 2009 - MARKET RESEARCH REPORT, fig. 36 (“Frequency of relaxer treatments, by household income, June 2009”) (on file with author). Many of the most prominent black female faces are adorned by relaxed hair, and, in many cases, artificial, straight hair, otherwise known as weaves. For example, Oprah Winfrey and Michelle Obama both relax their hair, and model Tyra Banks is famous for her long weaves. In fact, Banks received nationwide fame for appearing on her talk show without a weave. *Tyra Banks to Reveal Her “Real Hair,”* USMAGAZINE.COM, Aug. 17, 2009, <http://www.usmagazine.com/moviestvmusic/news/tyra-banks-to-reveal-her-real-hair-2009178>. This Essay does not contend that such relaxed or chemically treated hairstyles are unacceptable or improper. They are suitable choices for black women. Rather, this Essay contends that the implicit demands in many employer dress codes and in society in general often leave black women with no choice but to relax or otherwise straighten their hair.

<sup>144</sup> Bellinger, *supra* note 115, at 66; *see also* White, *supra* note 2, at 301 (“I remember at an early age the weekly ritual of getting my hair pressed . . . This ritual took place on Saturday afternoons in order to look ‘presentable’ for church . . . I was told not to play ‘too hard’ so that my hair would not ‘go back’ (to its natural state). . . . At an early age, I internalized that my natural born hair was not good enough; it was not acceptable enough to make me worthy of being presentable.”).

<sup>145</sup> One author defined “good hair” within the black community as “hair which is long, straight, and has a silky feeling or when one had seemingly Caucasian hair.” Bellinger, *supra* note 115, at 67; *see also* BONNER, *supra* note

famous for her comedy routine, in which she draped a towel over her head, reminisced about her childhood, pretended to be a young black girl again, and bragged about her “long luxurious blonde hair.”<sup>146</sup> The skit resonated and continues to resonate strongly with black women, many of whom have recalled how they, too, threw towels over their heads as children to create long, luxurious hair.<sup>147</sup>

Perhaps the strictest adherents to these racialized beauty norms are black professional employers and educators. For example, Carl Dameron, a black owner of a public relations and advertising firm in California, tells his black female employees that “outside of short-cropped Afros, most ethnic hairstyles are a ‘no-no’ in his office.”<sup>148</sup> Even at Hampton University, which, like many historically black universities, has a proud history of educating many promising black students, the business school has grooming codes that ban natural hairstyles, such as braids, locks, and twists, as unprofessional. Hampton’s policy, which was implemented for students in its five-year Bachelor of Arts/Masters of Business Administration program, provides that “[b]raids, dreadlocks and other unusual hairstyles are not acceptable.”<sup>149</sup> Moreover, Hampton is not shy about expressing its rationale for the ban—that Blacks must learn to live and work in white corporate environments, where black hairstyles are not accepted.<sup>150</sup> Despite resistance from students, faculty, and staff on campus,<sup>151</sup> the dean of the business school, Sid Credle, insists

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65, at 1 (describing the standard definition of “good hair” within the black community as “[h]air that’s naturally straight, loosely curled or waved”); Rosette & Dumas, *supra* note 7, at 418 (explaining that a black woman’s statement that she straightened her hair to make it look “better” “implicitly assumes that the natural state of many Whites’ hair is indeed ‘better’ than the natural state of Blacks’ hair”); *cf.* Patton, note 26, at 38 (noting that “bad hair” has been associated with kinky hair).

<sup>146</sup> See Lanita Jacobs-Huey, *Enacting Racial and Gendered Authenticity in Black Hair Humor*, May 26, 2007, <http://www-rcf.usc.edu/~jacobshu/ALA07.pdf>. Here is Whoopi Goldberg’s routine in relevant part:

*((Swinging white shirt on her head))* This is my long and luxurious blonde hair. Ain’t it pretty? *((Audience: Yeah!))* I can put it in a ponytail. Wanna see? *((Goldberg turns around, grabs the shirt and swings shirt sleeves))*. . . My momma made me go to my room, cause she said this wasn’t nothing but a shirt on my head and I said, “Nuh unh, this is my long luxurious blonde hair.” She said, “Nuh unh, fool, that’s a shirt!” And I said, “You a fool. It’s my hair.” She made me go to my room. But I don’t care because when I get big, I’m a get fifty million trillion million million elephants and I’m a let ‘em go in the house so they can trample on everybody. And then she gonna want me to make ‘em stop but she ain’t even gonna know I’m there because I’m a have blonde hair, blue eyes, and I’m a be White. . . . I AM! Uh huh! And then I’m a have a dream house, and a dream car, and dream candy and a dream house and me and Barbie are gonna live with Ken and Skipper and Malibu Barbie.

*Id.*

<sup>147</sup> See, e.g., BONNER, *supra* note 65, at 8–9 (“I can really relate to Whoopi Goldberg’s joke about wearing a towel on her head, pretending it was her hair because I did that stuff, too.”).

<sup>148</sup> Padgett, *supra* note 33. In fact, “Latino and African-American men . . . seem more often than white men to link long hair with attractiveness for women of all ages.” Weitz, *supra* note 11, at 672.

<sup>149</sup> Ieesha McKinzie, *Hampton Business School Sticks by Requirement for “Conservative” Hairstyles*, BLACK COLLEGE WIRE, Mar. 27, 2006, available at [http://www.blackcollegewire.org/news/060327\\_hampton-hair/](http://www.blackcollegewire.org/news/060327_hampton-hair/).

<sup>150</sup> See Tamara Dietrich, *HU Policy on Hair Might Be Better with a Trim*, DAILYPRESS.COM, Apr. 23, 2006, available at [http://articles.dailypress.com/2006-04-23/news/0604230074\\_1\\_black-heritage-hampton-university-black-family](http://articles.dailypress.com/2006-04-23/news/0604230074_1_black-heritage-hampton-university-black-family) (quoting the dean of Hampton’s Business School).

<sup>151</sup> For example, Sean Linder, a former student in the business program, described the policy as “a way of making African Americans assimilate to the mainstream standards [of] ‘what is professional and what is not.’” McKinzie, *supra* note 149. Linder, who was initially asked to sit in the back of the classroom when he did not comply with

the policy is needed because a “more clean-cut look can be an asset to almost any student seeking advancement in the corporate world.”<sup>152</sup> He is not alone in his view that “braids and cornrows could set [a black applicant] back.”<sup>153</sup> For example, Chris Roy, a marketing student in the program, argued,

Even though we [Blacks] made a lot of progress as far as social norms, I still think dreads or a ’fro will make it more difficult to be viewed in the same light as an applicant that fits the mold . . . . Your hair has nothing to do with your intelligence, but there are preconceptions that people may have about you.<sup>154</sup>

Overall, the bias against natural hairstyles for black women is intense, so strong that *Huffington Post* author Keli Goff questioned how well Michelle Obama would have been received on the campaign trail if she had a natural hairstyle.<sup>155</sup> She wrote:

Just two years ago an editor at a major fashion magazine labeled afros a fashion “don’t,” (though the fallout from the incident is said to have cost her job.) *But while there may have been fallout the reality is that most black women striving to succeed in the mainstream workforce do feel compelled to go to great lengths not to wear our hair natural, i.e. in all its fro glory. Instead we endure the inconvenient and often painful process known as relaxing (or what we like to call “getting a perm.”)* . . .

So I ask you to consider for a moment, how well do you think Michelle Obama would have fared on the campaign trail had she been rocking an au-natural hairstyle, a la the infamous *New Yorker* cover (and I don’t mean the latest one.)<sup>156</sup>

Indeed, the biases against natural black hair, both conscious and unconscious, are so strong and invisible that courts have routinely dismissed the claims of black women who have protested bans against natural hairstyles without a hint of trying to understand why, as Caldwell asserted, black women would risk losing their jobs as a result of disputes over their hair.<sup>157</sup>

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Hampton Business School’s hairstyle policy by wearing his hair in twists, opted to complete extra work and assignments in order to make up missed seminars for classes he was not allowed to attend because of his violations of the policy. *Id.* (quoting Linder as saying “I noticed everyone back there [in the classroom] had ethnic hairstyles”).

<sup>152</sup> *See id.*; *see also* Dietrich, *supra* note 150 (noting that Dean Credle said the policy is “to help groom [the students] for the button-down, clean-cut corporate world to which they [are] headed”).

<sup>153</sup> *See* McKinzie, *supra* note 149.

<sup>154</sup> *Id.* Another commentator described his friend’s argument in favor of Hampton’s policy, stating, “[My friend] countered that the business world does not see either [tastefully styled braids or dreadlocks] as standard-issue hairstyles. When in the business world, she added, you do as the business people do. *That’s how you get a job and it’s how you get ahead.*” Allen Johnson, *A Hair-Raising Debate*, NEWS-RECORD.COM, Apr. 13, 2006, [http://blog.news-record.com/staff/outloud/archives/2006/04/a\\_hairraising\\_d.shtml](http://blog.news-record.com/staff/outloud/archives/2006/04/a_hairraising_d.shtml) (emphasis added).

<sup>155</sup> Keli Goff, *Michelle Obama: Wonder Woman*, HUFFINGTON POST, Mar. 11, 2009, [http://www.huffingtonpost.com/keli-goff/michelle-obama-wonder-wom\\_b\\_173886.html?view=print](http://www.huffingtonpost.com/keli-goff/michelle-obama-wonder-wom_b_173886.html?view=print).

<sup>156</sup> *Id.* (emphasis added); *see also* Jenee Desmond-Harris, *Why Michelle’s Hair Matters*, TIME, Sept. 7, 2009, at 55–56 (discussing how the “obsession” with Michelle Obama’s hair has become “a catalyst for a conversation . . . [about] African-American women’s status in terms of beauty, acceptance and power”).

<sup>157</sup> Caldwell, *supra* note 10, at 390.

## B. BROKE AND HARRIED

Just as the Afro is protected under Title VII as a hairstyle that supports the natural growth of black hair, so, too, should natural hairstyles such as braids, locks, and twists be protected under the statute. Plaintiffs' lawyers can prove how such bans on natural hairstyles for black women constitute disparate treatment discrimination under Title VII in two ways.

First, lawyers can use the burden-shifting framework from *McDonnell Douglas v. Green*<sup>158</sup> to prove that such requirements discriminate against black women by treating them less favorably than white women. Under this framework, a plaintiff usually can prove discrimination through three different steps. In the first step, the plaintiff must establish a *prima facie* case of discrimination by proving the following four factors: (1) that she belonged to a minority group; (2) that she was qualified for the position or was adequately performing her duties in that position; (3) that she suffered an adverse employment action; and (4) that she was treated less favorably than others outside of her group or that there are circumstances that give rise to an inference of discrimination.<sup>159</sup> Once the plaintiff proves each of these factors, the court then draws an inference of discrimination and moves to the second step, where the employer must merely articulate a legitimate explanation for rejecting the plaintiff's applications.<sup>160</sup> If the employer satisfies this burden, the court then moves to the third step, where the plaintiff has to prove that the employer's stated reason was a pretext for discrimination in order to win the case.<sup>161</sup> The plaintiff may prove pretext by demonstrating that the proffered reason had no basis in fact, did not actually motivate the employer's challenged conduct, or was insufficient to warrant the challenged conduct.<sup>162</sup>

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<sup>158</sup> 411 U.S. 792, 802 (1973); *see also* *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979))). A number of scholars have argued that *Desert Palace v. Costa*, 539 U.S. 90 (2003), will result in the treatment of most Title VII intentional discrimination claims as mixed motive cases and have maintained that the *McDonnell Douglas* framework is no longer viable. *See, e.g.*, William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1566 (2005); Jeffrey A. Van Detta, "*Le Roi est Mort; Vive Le Roi!*": An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case after *Desert Palace, Inc. v. Costa* into a "Mixed Motives" Case, 52 DRAKE L. REV. 71, 72–73 (2003); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004). *But see* Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed Motive*, 36 ST. MARY'S L.J. 395, 405 (2005) ("[N]othing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*."). Many courts, however, still apply the *McDonnell Douglas* framework in analyzing discrimination cases. *See, e.g.*, *Strate v. Midwest Bankcentre, Inc.* 398 F.3d 1011, 1017 (8th Cir. 2005).

<sup>159</sup> *McDonnell Douglas*, 411 U.S. at 802; *see also* *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

<sup>160</sup> *McDonnell Douglas*, 411 U.S. at 803–04; *see also* *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254–56 (1981) (noting that the defendant's burden is only one of production, not persuasion).

<sup>161</sup> *McDonnell Douglas*, 411 U.S. at 803–04; *see also* *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

<sup>162</sup> *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003). Even upon proof of pretext, a jury may still ultimately rule in favor of the defendant if it believes that a non-discriminatory factor was at play. *See* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (holding that a plaintiff who proves pretext in the third stage does not necessarily win because the factfinders may still find that there was no discrimination). As Professor Martin Katz has explained:

In dress code cases, however, this framework for evaluating discrimination claims is slightly modified—at least with respect to sex-based grooming discrimination cases, where this appearance code discrimination law has largely developed.<sup>163</sup> In these cases, courts acknowledge employers’ rights to have different appearance standards based on sex.<sup>164</sup>

In order to assert a valid disparate treatment claim based upon a grooming code under this modified standard, a plaintiff first has to make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory—that it targeted her gender in an unfair way, treated her less favorably, or was premised on a stereotype—or that the different standards impose an unequal burden upon her group.<sup>165</sup> “An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.”<sup>166</sup>

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its action. However, in a grooming code case with different requirements for different groups, an employer can justify its requirements only by showing that they are bona fide occupational qualifications (BFOQ).<sup>167</sup> A BFOQ is a qualification that is reasonably necessary to the normal operation or essence of an employer’s business.<sup>168</sup> Unlike for sex, there is no BFOQ for race, so a plaintiff would win under this modified standard simply by proving a prima facie case where race was involved.

In the intersectional race and gender claims based on natural hairstyle bans, any black female plaintiff should be able to prove a prima facie of intentional discrimination. Assuming that the plaintiff is qualified, or is meeting job expectations, and is like many black women who have fallen prey to natural hairstyle bans through a refusal to hire or a decision to terminate, she will easily be able to show that she was treated less favorably than others outside of her group.<sup>169</sup> After all, bans on natural hairstyles simply do not have the same substantive meaning for black and white women. Because of the unique curliness of black hair, black women are unable to wear their hair down and in its natural state, unless it is weighed down by locks, twists, or braids. The current law on dress codes and hair assumes “non-Negro characteristics” of hair for black women or rather presumes that only straight hair that hangs down is the most professional way for all women to wear their hair. As it stands now, due to the structure of black women’s hair shafts and follicles, black women must artificially straighten their hair with a relaxer or hot comb

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If the defendant’s proffered reason is wrong, the factfinder can conclude either that the defendant lied or that the defendant made a good faith mistake (a nondiscriminatory reason). Or if the defendant lied, the factfinder can conclude that the lie was either a cover-up or a lie for a benign reason (a second possible nondiscriminatory reason). Or, if the defendant engaged in a cover-up, the factfinder can conclude that what was being covered up was either a discriminatory motivation or a nondiscriminatory one (a third possible nondiscriminatory reason).

Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 172 (2007). “The[se] presumptions and shifting burdens are merely an aid—not ends in themselves.” *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985). The ultimate burden of persuasion rests with the plaintiff at all times. *Burdine*, 450 U.S. at 253.

<sup>163</sup> See 110 CONG. REC. 2550 (1964) (expressly rejecting race as a BFOQ).

<sup>164</sup> *Jespersen v. Harrah’s Operating Co.* 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc); *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000).

<sup>165</sup> *Jespersen*, 444 F.3d at 1108–09; *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 673 (9th Cir. 1980).

<sup>166</sup> *Frank*, 216 F.3d at 854.

<sup>167</sup> *Jespersen*, 444 F.3d at 1109.

<sup>168</sup> See POST, *supra* note 4, at 17–18.

<sup>169</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

just to get to the baseline for satisfying the workplace rules and policies for many employers, and that baseline is straight hair that hangs down, hair that most white women, and very few black women, naturally grow.<sup>170</sup> Both of these processes—chemical relaxers and pressing from a hot comb—are costly, time intensive, and painful,<sup>171</sup> resulting in considerably less favorable treatment of black women than white women under such codes.

After proof of the *prima facie* case, however, it is not clear which of the two burden-shifting frameworks—the traditional *McDonnell Douglas* framework or the modified dress code one—would actually apply to intersectional race and gender grooming discrimination claims by black women. Because courts have never actually gone beyond the point of deciding that hairstyles such as braids, locks, and twists are not immutable characteristics and thus not protected under Title VII as race, no court has actually applied any burden-shifting framework to these types of grooming cases. Nevertheless, the cases that highlight the protection of Afro hairstyles under Title VII<sup>172</sup> seem to suggest that courts would apply the modified grooming code framework that is used in sex discrimination cases to such intersectional claims. After all, in those cases, once courts identify and explain Afros as a racial characteristic, there is no more discussion or analysis by the courts, simply a finding of discrimination. In that event, any black female plaintiff would win her intersectional claim at this point, simply by proof of her *prima facie* claim.

Even if the traditional *McDonnell Douglas* framework, instead of the modified dress code framework, applied in these intersectional cases, a black female plaintiff could still prevail on her race and sex discrimination claim (depending upon the reason asserted by the defendant). A plaintiff may prove pretext by demonstrating that the proffered reason is not true, did not actually motivate the employer's challenged conduct, or was insufficient to warrant the challenged conduct.<sup>173</sup> For example, if the plaintiff's employer explained its actions simply by stating that it did not know that such styles were the only ways for black women to wear their hair in its natural state, a statement that would seem to disprove any intent to discriminate, the plaintiff's lawyer could offer evidence to show (1) that the reason had no basis in fact because she explained to her employer her reasons for wanting to wear her hair natural and the fact that her hairstyle was one of only a few ways that she could wear her hair long and in its natural state, or (2) that the employer was really motivated by a preference for white hair and hairstyles as evidenced by his inconsistent application of his grooming requirements to Whites who did not abide by regulations, for example, a white female employee who arrives at work with her hair wet from washing and ungroomed. Moreover, it is not clear that an employer could even provide such a reason as a legitimate, non-discriminatory explanation for its actions. After all, so long as the employer understood that there are real differences in the textures and structures of black and white hair, it would be improper to give him a pass simply because he did not take the time to fully think through the implications of those differences. Such failure should not be sufficient to warrant the challenged grooming restrictions.

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<sup>170</sup> Rosette & Dumas, *supra* note 7, at 411–16.

<sup>171</sup> See *infra* notes 177–210 and accompanying text.

<sup>172</sup> There are very few of these cases. See E.E.O.C. Dec. No. 71-244, 4 Fair Empl. Prac. Cas. (BNA) 18 (June 10, 1971) (holding that while an employer's line of sight grooming policy was equally enforced, it adversely affected black employees who naturally have a different texture hair from white employees); *Jenkins v. Blue Cross Mutual Hosp. Ins.*, 538 F.2d 164, 168 (7th Cir. 1976) (recognizing that the plaintiff had a valid Title VII claim where she alleged that her employer fired her because of her Afro hairstyle); see also *Rogers v. Am. Airlines*, 527 F. Supp 229, 232 (S.D.N.Y. 1981) (asserting that a code that prohibits “the ‘Afro/bush’ hairstyle might offend Title VII”).

<sup>173</sup> *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003).

In addition to showing intentional discrimination under the burden-shifting frameworks described above, plaintiffs' attorneys could try to prove discrimination with a proposal that courts apply the undue burden test to black female plaintiffs' intersectional claims based on hair grooming codes. Again, once the plaintiff established this undue or unequal burden on black women as a result of the grooming requirements, she would automatically win her intersectional claim because race, which is integral to her claim, can never be a BFOQ. Specifically, these lawyers could offer evidence to show how the implicit demands for black women to straighten their hair with a relaxer or hot comb impose an undue burden on them in terms of time, money, and mental and physical health. Although courts have not applied the undue burden test to race discrimination cases, applying the test only to gender discrimination cases such as *Jespersen*, that omission is solely because courts have incorrectly assumed, as Caldwell stated, that black women and white women have the same motivations for wearing hairstyles such as braids; in other words, they have failed to acknowledge hair as a defining feature of race for Blacks.<sup>174</sup> In so doing, they have presumed that no black hairstyles outside of the Afro would support a legitimate claim of interracial, disparate treatment within gender. Specifically, courts have ignored the biological nature of black women's hair that makes it hard work for black women to obtain and maintain straightened hair or that may motivate them to forego any hair straightening process. When such biology is noted and considered, it becomes clear that the unwritten, raced and gendered norms for hair by many employers place a significantly greater burden on black women than white women. Hairstyles such as "Afros, braids, twists, and dreadlocks are the primary style choices that release Black women from the financial and physical burdens of hair straightening."<sup>175</sup>

First, lawyers could offer evidence regarding the costs of hair straightening and maintenance by black women. The financial costs alone of paying for repeated perms and touch-ups are burdensome. To straighten a black woman's hair through a relaxer costs approximately \$60 to \$300 for each full permanent or \$40 to \$100 dollars for each touch-up in between full relaxers, with either full relaxers or touch-ups occurring every four to eight weeks or sooner.<sup>176</sup> Recall again that such actions only get black women to the baseline; styling or any other processes such as coloring that women routinely engage in to do their hair must still occur. The end-result is a "billion-dollar industry built on products and companies that promise to eliminate curls from

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<sup>174</sup> Caldwell, *supra* note 10, at 378–80. Ironically, courts routinely dismiss Section 1981 claims brought by black women who have filed charges against white salons that charge black women more than white women for a "wash and set" or other services because their hair is more "labor intensive." See Constance Dionne Russell, *Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons*, 24 HARV. BLACKLETTER L.J. 189, 206–17 (2008).

<sup>175</sup> Rosette & Dumas, *supra* note 7, at 411.

<sup>176</sup> Hull, *supra* note 68, at 1E (noting that black women's curly hair normally requires a touch-up every six weeks); *Straight Talk on Hair—Straightening Treatment*, ABC NEWS, Aug. 13, 2004, <http://abcnews.go.com/print?id=124236> (noting that Carmine Minardi, one of New York City's top stylists, charges \$300 for a relaxer, which he does in two hours); see also Shamontiel, *Hair Care Advice for African-American Women: How To Take Care of Your Natural Hair Without a Beauty Salon*, ASSOCIATED CONTENT, Nov. 3, 2008, [http://www.associatedcontent.com/article/1167232/hair\\_care\\_advice\\_for\\_africanamerican.html](http://www.associatedcontent.com/article/1167232/hair_care_advice_for_africanamerican.html) (asserting that touch-ups occur once a month).

textured ethnic hair.”<sup>177</sup> In fact, black women spend nearly fifty million dollars a year on relaxers alone and spend an estimated three times more than white women on hair care.<sup>178</sup>

In addition to the financial costs of relaxers and other hair straighteners, lawyers also could provide testimony and data regarding the burdens in time spent on straightening and maintaining straightened hair at the beauty shop or at home. Maintaining relaxed hair can be a lengthy daily task. For instance, in her article, *‘Oel My Hare Gaan Huistoe’: Hair-Styling as Black Cultural Practice*, Zmitri Erasmus listed the seventeen individual steps that she took as a teenager to maintain “good hair” or straight hair, which together amounted to several hours in a day.<sup>179</sup> Furthermore, although purchasing a hot comb is inexpensive, straightening black hair with a hot comb requires an exorbitant amount of time, often necessitating two to three hours of work every few days, just for straightening without any styling. Additionally, the time that many black women spend worrying about rain, pools, or other forms of water that may counteract the effects of any applied relaxer or hot pressing is further limiting.<sup>180</sup> As Lanita Jacobs-Huey, author of *From the Kitchen to the Parlor: Language and Becoming in African-American Women’s Hair Care*, has asserted, “[i]f you can’t dance ‘cause you’re worried about sweating out your hair, can’t swim . . . can’t go out in the rain, life is limiting.”<sup>181</sup>

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<sup>177</sup> Lolly Bowean, *When Words Wound: Chicagoans Speak Out About Radio Host’s Hurtful Remarks*, CHI. TRIB., Apr. 11, 2007, at 1; see also BONNER, *supra* note 65, at 2 (noting that “[b]lack hair care is a billion dollar business”).

<sup>178</sup> MIDGE WILSON & KATHY RUSSELL, *DIVIDED SISTERS: BRIDGING THE GAP BETWEEN BLACK WOMEN AND WHITE WOMEN* 92 (1996); Judy Foster Davis, *New Hair Freedom? 1990s Hair Care Marketing and the African-American Woman*, 10 CONF. ON HIST. ANALYSIS AND RES. IN MKTG. (CHARM) 31 (2001), available at <http://faculty.quinnipiac.edu/charm/CHARM%20proceedings/CHARM%20article%20archive%20pdf%20format/Volume%2010%202001/31%20davis.pdf>; Sara Mason, *Global Report Hair Care 2: Care for Black Hair* 171 GLOBAL COSMETIC INDUSTRY 1, at 42–43 (2003) (noting that \$47 million was spent by blacks on chemical treatments or relaxers in 2002); Rosette & Dumas, *supra* note 7, at 411; Patton, *supra* note 26, at 37; Catherine Saint Louis, *Black Hair, Still Tangled in Politics*, N.Y. TIMES, Aug. 27, 2009 (stating that in 2008, “sales of home relaxers totaled \$45.6 million (excluding Wal-Mart)”). Although “blacks make up 13 percent of the U.S. population, they account for more than 30 percent of industry spending in a \$4 billion dollar hair care market.” Mason, *supra*, 42. In fact, in a report, *Packaged Facts*, a market research firm, documents that in the ethnic haircare category, African Americans spent \$360 million dollars on relaxers in 2007. PACKAGED FACTS, *ETHNIC HAIR, BEAUTY, AND COSMETICS PRODUCTS IN THE U.S.* 49 (6th ed., Nov. 2008) (on file with author).

<sup>179</sup> Zmitri Erasmus, *‘Oel My Hare Gaan Huistoe’: Hair-Styling as Black Cultural Practice*, 32 AGENDA: RACE, IDENTITY AND CHANGE 11, 11–12 (1997).

<sup>180</sup> In fact, a recent study by USA Swimming revealed that almost twice as many black children as white children could not swim, 58% for black children compared to 31% of white children. See *Black Children 3 Times More Likely to Drown*, USA TODAY, Jan. 5, 2008, [http://www.usatoday.com/news/health/2008-05-01-swimming-minorities\\_N.htm](http://www.usatoday.com/news/health/2008-05-01-swimming-minorities_N.htm). The percentage of Latino children was 56%. Overall, black girls had weaker swimming skills than black boys and were less comfortable at pools. *Id.* The consequences of such poor skills are severe, resulting in three times more drowning deaths for black children than for white children. *Id.* Although concerns about hair for black girls alone do not explain the discrepancy in swimming percentages between black and white children, they are likely part of the equation—that is, if the views of adult black women are indicative. Even black female movie stars such as Nia Long and Lauren London, who have access to money and pools, admit that, even as they may have swimming pools in their backyards, they do not go swimming in order to avoid messing up their hair. *Sisters, Don’t Be Held Hostage by ‘Good Hair’ Ideal*, BLACK AMERICA WEB, Aug. 13, 2009, [http://www.blackamericaweb.com/?q=print/news/baw\\_commentary\\_news/11749](http://www.blackamericaweb.com/?q=print/news/baw_commentary_news/11749). One commentator noted that black women are “so obsessed with preserving our hair in its weaved and straightened state that we miss out on too many other adventures that life has to offer.” *Id.*

<sup>181</sup> Tanika White, *With Weaves, Stars Let Their Hair Down: Those Long, Artificial Tresses May Be Popular and Easy, But They May Also Have Health-Related Drawbacks*, BALT. SUN, June 3, 2007, at 9U. One author proclaimed the following about the freedom that her braids gave her: “It’s a wash-and-wear thing. I don’t have to comb it every

Furthermore, lawyers could offer a plethora of evidence regarding the physical harm caused by the chemicals from relaxers. Even if one could argue that the costs in money and time (at least in the initial stages) for black women in wearing natural hair are the same as those in obtaining and maintaining artificially straightened hair,<sup>182</sup> the burdens of employer bans on braids, locks, and twists extend beyond time and money. One especially burdensome cost for black women is the damage to the health of their hair and scalp.<sup>183</sup> Relaxers cause significant damage to black women's hair over time, resulting in dryness that turns into breakage and hair loss.<sup>184</sup> Even without relaxers, black hair is dryer than white hair. Sebum is the oily, waxy substance that lubricates the hair, working its way from the hair shaft.<sup>185</sup> If a person's hair is straight, the sebum flows down easily, wetting the hair, but if the hair is curly, the sebum has to work its way around each twist and curl, often never reaching the ends of each individual hair.<sup>186</sup> Relaxers make the dryness even worse because they alter the protective shingles and make the hair shaft dryer.<sup>187</sup>

Additionally, relaxers can result in great damage to the scalp, including chemical scalp burns that may require the attention of dermatologists.<sup>188</sup> The chemicals used in relaxers are extremely strong. For example, lye or sodium hydroxide, which is often a main ingredient in relaxers, is the same chemical that people use to strip paint or to make soap.<sup>189</sup> Similarly, no-lye relaxers

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day, and I can swim, shower, and get caught in the rain without worrying about it. Talk about liberation!" Andrea Benton Rushing, *Hair-Raising*, 14 FEMINIST STUDS. 325, 325 (1988). The impact of race on hair and liberation affects other women of color, too. For example, some Asian Pacific American women, who tend to have incredibly straight hair, perm their hair—meaning curl it—to look less Asian. In discussing the restraints that her perm placed on her, one Asian Pacific American woman stated that “[b]ecause her hair straightens out when it gets wet, she always carries an umbrella, never swims with friends, and dries her hair after showering before letting anyone see her.” Weitz, *supra* note 11, at 676.

<sup>182</sup> Hull, *supra* note 68 (including one black hairdresser's comment that “[g]oing natural isn't necessarily less expensive than having a relaxer, especially in the early stages”).

<sup>183</sup> Caldwell, *supra* note 10, at 369 (noting that one reason why black women choose natural hairstyles such as braids is “concern for the health of [their] hair, which many [black women] risk losing permanently after years of chemical straighteners”).

<sup>184</sup> Hull, *supra* note 68 (relating the dangers that relaxers present in terms of dryness and breakage); *Straight Talk*, *supra* note 176 (“Relaxers, peroxide, hot combs, flat irons and even blow-dryers can leave hair brittle and prone to break.”).

<sup>185</sup> See BONNER, *supra* note 65, at 18.

<sup>186</sup> See *id.* at 18.

<sup>187</sup> See *id.*

<sup>188</sup> Hull, *supra* note 68.

<sup>189</sup> Krissah Thompson, *A Gentler Way to Relax Hair: Women Push for Products that Are Less Caustic*, WASH. POST, Jan. 6, 2009, at F1, F4; see also Caldwell, *supra* note 10, at 369 (pointing out that some black women may choose natural hairstyles such as braids because they “fear that the entry of chemical toxins into [their] bloodstreams through [their] scalps will damage [their] unborn or breastfeeding children”). Indeed, in his autobiography, Malcolm X told a vivid story about his burning his scalp as he attempted to “conk” or straighten his curly locks. He wrote:

The congolene [the straightening chemicals] just felt warm when Shorty started combing it in. But then my head caught fire.

I gritted my teeth and tried to pull the sides of the kitchen table together. The comb felt as if it was raking my skin off.

My eyes watered, my nose was running. I couldn't stand it any longer; I bolted to the washbasin.

contain calcium hydroxide, which is used to treat water and sewage; they also include guanidine carbonate, which, among other things, is used for hair removal.<sup>190</sup> A black female journalist described the often painful process of relaxing:

For those of you unfamiliar with the complexities of black hair care, straightening is a process in which a stylist sections your hair and applies a cream that starts out cool but becomes unbearably hot. The cream contains sodium hydroxide, commonly found in drain and oven cleaners, and so corrosive that stylists have to use rubber gloves. When you absolutely can't stand the heat anymore, the stylist rinses it out. Straight hair, and sometimes scabs, result. The longer the cream stays in, the more you burn, but the straighter your hair gets; walk into a black salon and the most common thing you'll see is a woman gripping the armrests of a chair to manage her pain.<sup>191</sup>

According to the Environmental Working Group, chemical relaxers, which have a pH of approximately twelve—similar to household ammonia—are one of the most caustic products on the market. Along with hair dyes, chemical relaxers receive the most complaints from customers for damage.<sup>192</sup> In fact, black women are often discouraged from using relaxers when they are pregnant.<sup>193</sup> Perhaps the strongest evidence of the damage that is caused to black women's hair through relaxers is the length and rapidity at which black women's hair grows when it is kept in its natural structure and texture.<sup>194</sup>

Indeed, a number of black hairdressers have even begun to direct their customers away from traditional relaxers to plant-based products.<sup>195</sup> Although there is a growing movement among black female consumers to push manufacturers to produce these types of "gentle" relaxers, such relaxers still contain strong chemicals and come with their own set of drawbacks. The actual product itself is three times the costs of the traditional relaxer product, making the financial burden of implicit requirements for straightened hair even higher.<sup>196</sup> Likewise, processes such as thermal reconditioning (TR) are not only significantly more expensive and time-consuming, but also have been reported to cause severe damage and hair loss for some women.<sup>197</sup> TR straightens hair by the application of a chemical, the ironing of the hair piece by piece, a rinse, and a blow dry. But it also takes more than four hours, if uninterrupted, and costs \$800 for each treatment.<sup>198</sup> In sum, even the less caustic straightening chemicals place an undue burden on

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MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 54 (1964).

<sup>190</sup> Thompson, *supra* note 189, at F4.

<sup>191</sup> Francie Latour, *Welcome to the Dollhouse: The Line the New Black Barbies Won't Cross*, BOSTON GLOBE, Oct. 25, 2009, at K3. The journalist also explained that the new line of black Barbies, designed to look more like black girls, have straightened hair and come with their own relaxing kit. *Id.*

<sup>192</sup> Thompson, *supra* note 189, at F1.

<sup>193</sup> Caldwell, *supra* note 10, at 369. Concerns about the health effects of relaxers even prompted researchers to examine their potential relationship between breast cancer and its higher incidence of occurrence in black women under the age of forty-five, even though they ultimately found no link between the two. Thompson, *supra* note 189, at F4.

<sup>194</sup> See Hull, *supra* note 68 (describing how a black woman's hair grew back stronger and longer when she stopped getting perms).

<sup>195</sup> Thompson, *supra* note 189, at F1.

<sup>196</sup> *Id.*

<sup>197</sup> *Straight Talk*, *supra* note 176.

<sup>198</sup> *Id.*

black women, because they are more time-consuming and more expensive than ordinary relaxers.

Furthermore, attorneys could present testimony and data to show that restrictions on natural hairstyles for black women arguably impact the physical health of black women. Research shows that many black women avoid exercise because the sweat from working out may destroy their hairstyles.<sup>199</sup> Researchers at Wake Forest University School of Medicine found that one third of black women do not exercise or exercise less than they would like due to the complications of hair care.<sup>200</sup> Why the resistance to working out? Perspiration from exercise can make the roots of hair wet, reverting black women's hair back to its tightly coiled and coarse structure and texture.<sup>201</sup> Dr. Amy J. McMichael, Associate Professor of Dermatology, explained:

Many African American women with coarser hair use either heat straighteners or chemical products to straighten their hair. Depending on how coarse or fragile their hair is, they can't just wash their hair after exercise without having to go through the whole process again, and that can take hours. Over-washing fragile hair can make it break off easily.<sup>202</sup>

The effects of lack of exercise for black women are especially threatening to black women, as seventy-seven percent of them are overweight, placing black women at higher risk for hypertension, diabetes, and other serious illnesses.<sup>203</sup>

In addition to the undue burden imposed by implicit demands made on black women for relaxed hair, lawyers could show that the alternative presented by American Airlines in *Rogers*—the use of a “hair piece”—can carry significant consequences for the health of black women's scalp and hair and is enormously expensive. In *Rogers*, the health consequence for the plaintiff was severe headaches.<sup>204</sup> For many black women, however, wearing weaves or similar hairpieces can cause great damage to their scalp. Because of the way in which weaves are generally either sewn into or glued onto the scalp, they suffocate the scalp, essentially causing the hair to die underneath the artificial extension.<sup>205</sup> Additionally, hair weaves can be expensive; in fact, black men and women “spend \$225 million annually on hair weaving services and products.”<sup>206</sup> As the movie *Good Hair* revealed, even black women who are on limited budgets, such as school teachers, are investing \$1000 for just one weave, which may last two or three

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<sup>199</sup> See Press Release, Wake Forest Univ. Baptist Med. Ctr., Dermatologic Barriers to Exercise in Black Women (Jan. 3, 2008), available at <http://www1.wfubmc.edu/News/NewsArticle.htm?ArticleID=2238>; see also Julie Zeveloff, *Hair over Health: For Many Black Women, Style Trumps Exercise*, COLUM. NEWS SERV., Apr. 1, 2008, available at <http://jscms.jrn.columbia.edu/cns/2008-04-01/zeveloff-obesityhairdo.html>.

<sup>200</sup> Wake Forest Univ. Baptist Med. Ctr., *supra* note 199.

<sup>201</sup> Monae Everett, *How To Maintain Your Hair During Exercise for African American Women*, EHOW, at [http://www.ehow.com/how\\_5177077\\_maintain-exercise-african-american-women.html](http://www.ehow.com/how_5177077_maintain-exercise-african-american-women.html) (last visited Jan. 27, 2010).

<sup>202</sup> Wake Forest Univ. Baptist Med. Ctr., *supra* note 199.

<sup>203</sup> *Id.*

<sup>204</sup> *Rogers v. American Airlines*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

<sup>205</sup> White, *supra* note 181.

<sup>206</sup> BYRD & THARPS, *supra* note 112, at 177.

months.<sup>207</sup> Some weaves cost as much as \$5000, and at least one black woman in the film spent approximately \$18,000 a year on weaves.<sup>208</sup>

Finally, lawyers could offer testimony showing that the burden of these implicit demands is bad for black women's psychological health. The inescapable message that is sent to black women through the reinforcement of raced and gendered norms that "assume non-Negro characteristics" is that their hair is not good enough and not presentable in its natural state. In her article *A Hair Piece*, Caldwell vividly speaks of the negative psychological consequences that have flowed and can continue to flow from black women's attempts to fit their hair within a white female beauty norm.<sup>209</sup> In detailing her desires about her relationship with her hair, she wrote:

I want to know my hair again, the way I knew it before I knew Sambo and Dick, Buckwheat and Jane, Prissy and Miz Scarlett. Before I knew that my hair could be wrong—the wrong color, the wrong texture, the wrong amount of curl or straight. Before hot combs and thick grease and smelly-burning lye, all guaranteed to transform me, to silken the coarse, resistant wool that represents me. I want to know once more the time before I denatured, denuded, denigrated, and denied my hair and me, before I knew enough to worry about edges and kitchens and burrows and knots, when I was still a friend of water—the rain's dancing drops of water, a swimming hole's splashing water, a hot, muggy day's misty invisible water, my own salty, sweaty perspiring water.<sup>210</sup>

In sum, bans on natural hairstyles for black women result in disparate treatment discrimination not only because they result in less favorable treatment of black women at the intersection of race and gender but also because they impose an undue burden on black's women's finances, time, and health, both psychologically and physically.

#### C. IT'S NO LYE!: THE EFFECTS ARE DISPARATE

At the very least, a black female plaintiff should be able to establish a traditional disparate impact claim under Title VII based on an employer ban of braided, locked, and twisted hairstyles. To establish a prima facie case of disparate impact discrimination, a plaintiff must show that a specific employment practice produced an adverse effect on the basis of a protected

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<sup>207</sup> GOOD HAIR (HBO Films 2009); see also Catherine Saint Louis, *Black Hair, Still Tangled in Politics*, N.Y. TIMES, Aug. 27, 2009, at E1; Dr. Susan Taylor's Brownskin.net, <http://www.brownskin.net/hairweaves.html> (last visited Nov. 18, 2009).

<sup>208</sup> GOOD HAIR, *supra* note 207.

<sup>209</sup> Caldwell, *supra* note 10, at 369 ("Some of us choose the positive expression of ethnic pride not only for ourselves, but also for our children, many of whom learn, despite all of our teachings to the contrary, to reject association with black people and black culture in search of a keener nose or bluer eye."); see also Green, *supra* note 34, at 655–56 (describing how employers mask their discrimination by claiming that employees don't "fit" in the work environment); Weitz, *supra* note 11, at 679 (acknowledging an "ideology that defines minority women's appearances as inferior and that encourages minority women to engage in time-consuming and painful disciplines to conform to dominant appearance norms").

<sup>210</sup> Caldwell, *supra* note 10, at 365; see also Yoshino, *supra* note 139, at 894.

status, such as race.<sup>211</sup> A plaintiff generally can prove such causation by comparing the rates of majority and minority employees or applicants who are affected by the rule and then showing that the disparity is statistically significant or violates the four-fifths rule.<sup>212</sup> In applying disparate impact theory, “statistical significance establishes that the challenged practice likely caused the disparity, and the four-fifths rule establishes that the disparity is large enough to matter.”<sup>213</sup> Under the four-fifths rule, a disparity is actionable when one group’s pass (non-impacted) rate is less than four-fifths (eighty percent) of another group’s pass (non-impacted) rate.<sup>214</sup> “Under statistical significance tests, a disparity is actionable when we can be confident at a specified level—generally ninety-five percent—that the observed disparity is not due to random chance.”<sup>215</sup>

The Supreme Court has rejected a “rigid mathematical formula” for disparate impact, asserting simply that statistical disparities must be “sufficiently substantial” that they give rise to an inference of causation.<sup>216</sup> Once a plaintiff establishes a “sufficiently substantial” disparity, the burden then shifts to the defendant to rebut the plaintiff’s statistics or to show that the challenged practice is “job related” and consistent with “business necessity.”<sup>217</sup> If the employer succeeds, the plaintiff then must show that other tests or selection processes would serve the employer’s interest without creating the undesirable discriminatory effect.<sup>218</sup> This standard is difficult to meet, though, because “[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether [the alternatives] would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”<sup>219</sup>

In establishing a prima facie case of disparate impact, a plaintiff first must identify a specific employment practice to be challenged, and then, through relevant statistical analysis, must prove that the challenged practice has an adverse impact on a protected group.<sup>220</sup> In

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<sup>211</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 777 (2009).

<sup>212</sup> Peresie, *supra* note 211, at 777.

<sup>213</sup> *Id.* at 776.

<sup>214</sup> The four-fifths rule provides:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4(D) (2009); *see also* *Isabel v. City of Memphis*, 404 F.3d 404, 409 (6th Cir. 2005).

<sup>215</sup> Peresie, *supra* note 211, at 774.

<sup>216</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988); *see also* Peresie, *supra* note 211, at 777

<sup>217</sup> *Watson*, 487 U.S. at 995 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); *see also* 42 U.S.C. § 2000e-2(k)(1)(A) (2006). Discrimination occurs when an employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .” § 2000e-2(k)(1)(A)(I).

<sup>218</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *see also* Peresie, *supra* note 211, at 777.

<sup>219</sup> *Watson*, 487 U.S. at 988.

<sup>220</sup> *Johnson v. U.S. Dep’t. of Health and Human Servs.*, 30 F.3d 45, 48 (6th Cir. 1994); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 518 (2003) (noting a tension in disparate impact law where one side sees disparate impact as an “evidentiary dragnet designed to discover hidden instances of intentional discrimination,” and the other side views the doctrine as a “more aggressive attempt to dismantle racial hierarchies”).

making these comparisons, a plaintiff must demonstrate disparate impact with respect to the pool of qualified persons in the relevant labor market for the given position.<sup>221</sup>

For the purposes of this Essay, imagine that we are looking at one work environment, and imagine that that employer is a hypothetical company called Vitatech in Atlanta, Georgia with the following demographics: 200 employees, of whom 34% are white men (68), 37% are white women (74), 14% are black men (28), and 15% are black women (30). At Vitatech, ninety-seven percent of the women who identify as black in the workplace have tightly coiled and kinky hair, while the remaining three percent—which is one black woman—have hair that hangs in big corkscrew curls that tend to hang down, rather than grow up. Approximately sixty-three percent of the black women, a total of nineteen, relax their hair, including the one black woman with corkscrew curls.<sup>222</sup> The remaining thirty-seven percent, eleven total, wear their hair in either short Afros (1), braids (7), locks (2), or twists (1)—what they refer to as “natural hairstyles.” Ninety-seven percent of the women who identify as white have straight hair, while the remaining three percent have wavy hair; none have tightly coiled and kinky hair (or pink, purple, or green hair). Vitatech decides that it wants its employees to look their “personal best” in the workplace and decides to impose a grooming code that bans “unusual,” “unprofessional,” or “extreme” hairstyles.<sup>223</sup> In explaining its policy, Vitatech identifies mohawks; strange-colored hair, such as pink, green, or purple hair; braids; locks; and twists as examples of prohibited “extreme,” “unprofessional,” or “unusual” hairstyles.

Based on the facts above, a black female plaintiff who challenged the employer’s practice of banning braids, locks, and twists could show that black women are significantly more affected in a negative way by the ban than white women, regardless of whether one narrows or broadens the relevant comparison groups. First, if one defines the group broadly by classifying the black and white female groups according to biological make-up of hair—those for whom braids, locks, and twists are the only way for them to wear their hair hanging down and long in its natural texture and structure (in other words, those who wear natural hairstyles as well as those who may desire to wear natural hairstyles for biological reasons but are discouraged from doing so because of the implicit demands to wear straightened hair), then the group of negatively affected black women includes twenty-nine out of thirty women or 96.7%, and the group of negatively affected white women includes zero out of seventy-four women or 0%. In other words, nearly all black women, 96.7%, versus no white women would be negatively impacted by the policy, which is both a statistically significant difference (not the result of mere chance) and a difference that fails the four-fifths test, with a non-impacted rate of 3.3% for black women and a non-impacted rate of 100% for white women.

Even if one were to define the comparison groups more narrowly, comparing only those black women who currently have the banned natural hairstyles with those white women who

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<sup>221</sup> See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977). “Most often, plaintiffs present statistics from the actual applicant pool for the position.” Peresie, *supra* note 211, at 777; See, e.g., *Waisome v. Port Auth.*, 948 F.2d 1370, 1372 (2d Cir. 1991). Plaintiffs might also choose to use national population statistics, see, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977); state data, as in *Griggs*, see, e.g., 401 U.S. at 430 n.6; or data from a smaller geographic area, see, e.g., *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1277 (11th Cir. 2000).

<sup>222</sup> Approximately two-thirds of all black women relax their hair. BYRD & THARPS, *supra* note 112, at 177.

<sup>223</sup> This fact—the decision by the employer to enforce or create a strict grooming code—is borrowed from the *Jespersen* case. *Jespersen*, 444 F.3d at 1107; *Jespersen v. Harrach’s Operating Co.*, 392 F.3d 1076, 1077–78 (9th Cir. 2004).

currently have the banned natural hairstyles—the specific employment practice in question, then the group of negatively affected black women includes eleven out of thirty (excluding the one black woman with a short Afro) or 36.7%, and the group of negatively affected white women again includes zero out of seventy-four or 0%. In other words, more than one-third of black women versus no white women would be negatively impacted by the policy, which is both a statistically significant difference (not the result of mere chance) and a difference that fails the four-fifths test, with a non-impacted rate of 63.3% for black women and a non-impacted rate of 100% for white women.<sup>224</sup>

Additionally, were one to focus solely on the negative consequences of financial and temporal costs in relaxing and maintaining straightened hair, a black female plaintiff could show a disparate impact there as well. By definition, there would always be a disparate impact. Although many women spend significant amounts of money and time on their hair, black women would always be spending more than white women because one would always have to add to their styling, coloring, and other costs the very costs of getting to the baseline—of straightening and then maintaining that straightened hair.

Furthermore, no claims of business necessity could justify such disparate impacts. Although employers certainly have the right to regulate employee appearance in presenting a preferred business image, they do not have a right to do so in a racially discriminatory way. Additionally, courts have consistently held that customer discrimination—customer desire—is not an acceptable reason to discriminate on the basis of race.<sup>225</sup>

Although the need to keep hair from falling in food is a reason that would satisfy the business necessity defense, it factually would not pass muster in the case of employer bans on braids, locks, and twists. First, the employer could require the employees to wear hair nets, just as they currently do for white employees, whose hair nonetheless drops into food at times. Moreover, braided, locked, or twisted hair is less likely than relaxed hair to fall into food. In fact, the dead hair that falls from people’s heads is not likely to fall anywhere at all when a black woman is wearing braids, locks, and twists because the hair falls into the braid, lock or twist. Indeed, that is exactly the process by which locks form. Relaxed hair, on the other hand, is much more likely to break than natural hair because its natural structure and texture have been weakened by the chemical process. Finally, even those reasons which have been deemed legitimate reasons in other instances would fail as legitimate in this hypothetical (and would also be unlikely to be deemed reasonably necessary to achieve an important business objective or to be considered a

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<sup>224</sup> The same analysis would apply if one were looking more broadly outside of one particular workplace. Similar percentages of black women would be affected whether by town, city, county, or state. Professor Elaine Shoben highlights that some disparate impact cases have been proven entirely without regard to statistics. *See Sullivan, supra* note 34, at 989 n.326 (citing Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 606 (2004)). For example, Shoben cites *Garcia v. Woman’s Hospital of Texas*, 97 F.3d 810, 814 (5th Cir. 1996), where the Fifth Circuit held that accepting the testimony of its plaintiff’s proposed expert witness “that no pregnant woman would be advised by her doctor to lift 150 pounds . . . would have been sufficient to establish causation between the hospital’s lifting requirement and the disparate impact.” *Id.*; *cf. Flagg, supra* note 138, at 2040 (suggesting that one can identify facially neutral criteria as having “foreseeable disparate effects” where the criteria are “associated with whites to a greater extent than with nonwhites”). A black female’s disparate impact claim based upon an grooming ban of braids, locks, and twists is arguably such a case.

<sup>225</sup> *See, e.g., Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (rejecting customer preference as a justification for discrimination against a black woman); *EEOC v. St. Anne’s Hosp. of Chi.*, 664 F.2d 128, 133 (7th Cir. 1981) (holding that race discrimination is not justified by customer preference).

minimum qualification to perform the job successfully). For example, were an employer to claim that natural hairstyles were banned because they do not look good, that employer would encounter difficulty in showing that such a reason is not racially tinged, especially if the employer views relaxed hair as suitable. After all, it is a perversion to assert that black women's hair is not presentable in its natural structure and texture and that black women's hair is only presentable when it is physically altered to look like white women's hair. Furthermore, in many of the cases or anecdotes involving black women who have suffered because of employer bans on black-female natural hairstyles, the employers concede that the women's hairstyles are well-groomed; the employers simply view them as unpresentable.

Overall, in a world where our gender norms establish long, flowing hair as the normative ideal for women, black women must have a choice that does not require them to change the structure and texture of their hair. The key factor to avoiding intersectional racial and gender-based discrimination through hair in employer dress codes is to ensure that black women have the same opportunities to wear their hair in its natural state as white women and in a way that fits the gendered expectations that are upheld by the law. That action must include the provision of choices that do not automatically prevent black women from wearing their hair long in both its natural structure and texture, even though many black women may ultimately choose to relax their hair. Again, think back to the imaginary white female plaintiff in the Introduction. She was subject to the same dress code restrictions as all other women, regardless of race, but she faced discrimination based on race because the choices presented to her for wearing her hair—one of many factors that have been used in determining racial identity—did not fit the structure and texture of her hair.<sup>226</sup>

## V. HAIR RAISING

Many employers express shock that black women who refuse to unbraid their hair take such a strong stance, one that could cost them their jobs, in defense of a hairstyle.

—Paulette Caldwell, *A Hair Piece*<sup>227</sup>

The termination of Mablean Ephriam, formerly of *Divorce Court* on Fox Network, is particularly illustrative of how the raced and gendered norms for women's hair—that of straight hair that hangs down—detrimentally affect black women within the workplace. Judge Mablean, a black woman, was fired from her successful television show after seven years in part because of her unwillingness to agree to the network's demand for her to cover her hair with a wig.<sup>228</sup> Her experience not only demonstrates the resistance to and marginalization of any hairstyle

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<sup>226</sup> One black female journalist exclaimed, “But imagine what’s [sic] like to grow up in a culture where you are never, ever supposed to wear your hair in its natural state.” Leslie Gray Streeter, *How Some Other Black Women ‘Got Their Groove Back,’* PALMBEACHPOST.COM, Aug. 14, 2008,

[http://www.palmbeachpost.com/accent/content/accel/epaper/2008/08/13/a1e\\_stellagroove\\_web\\_0814.html](http://www.palmbeachpost.com/accent/content/accel/epaper/2008/08/13/a1e_stellagroove_web_0814.html).

<sup>227</sup> Caldwell, *supra* note 10, at 390; *see also* Bellinger, *supra* note 115, at 65 (“Straight hair is still the North American norm and is often needed to secure employment for African American women.”).

<sup>228</sup> E-mail from Christine Jones, Associate Professor of Law, University of the District of Columbia David A. Clarke School of Law, to Angela Onwuachi-Willig, Professor of Law, University of Iowa College of Law (June 14, 2006, 14:42:00 CST) (on file with author) (forwarding e-mail from the judge); Tanya Kersey, *Judge Mablean To Leave ‘Divorce Court’; Money and Hair Issues Were the Real Reasons For Her Departure*, BLACKTALENTNEWS.COM, Apr. 10, 2006, <http://www.blacktalentnews.com/cgi-bin/artman/exec/view.cgi?archive=3&num=561>.

outside of the unspoken raced and gendered hair norms, but also reveals the temporal, financial, and health costs to black women by the perpetuation and reinforcement of those norms.

Unlike the black female plaintiffs in cases such as *Rogers*, Judge Mablean was willing to perm or straighten her hair, but Fox Network reportedly objected to her plan on the ground that it would be too “time consuming.”<sup>229</sup> As this Essay has detailed, the process of straightening and maintaining black women’s hair can be long and arduous as well as expensive. Judge Mablean explained these difficulties herself in a press conference about her termination:

Why is my hair an issue[?] Why, I ask?

Because of my ethnicity—African American, Black, Negro, whatever term you prefer to use. Because of my genetics (short, curly, hair) which requires the use of chemicals and/or a hot pressing comb to straighten and curlers to style. It cannot be styled by a wash, blow dry and set.<sup>230</sup>

In fact, Fox Network wanted the judge to continue wearing the wig that she had begun to wear only after she had damaged and lost her own hair through “a misapplication of a chemical [straightening] process.”<sup>231</sup> The judge explained the following about the events that forced her toward the wig that the network wanted her to continue to use. She stated:

Due to a misapplication of a chemical process, I lost a substantial amount of hair in season six. Out of my desire to maintain continuity and the image I had created (for the last five years), I elected to wear a wig last year for continuity. Had Fox asked me to maintain a short hairstyle for continuity and for image, it would have been a different issue. But they are saying I must continue to wear the wig because that would expedite the hair styling process. However, my hair has now grown.<sup>232</sup>

What was surprising about Fox’s reaction to Judge Mablean’s plan was that she had never imposed the burdens of her hair straightening and styling on the network, choosing instead to internalize the costs on her time and money. Judge Mablean was willing to absorb the uneven application of her employer’s grooming desires by first straightening her hair, a process that is more burdensome in time and money than for white women. She described how she avoided imposing any “additional” costs or time to the network, stating:

The fact that it takes more time to style my hair than my Caucasian sisters, in general, should not be an issue. What is more interesting about this demand is that I never caused time to be an issue because of my hair. I have been conscious and aware of the fact that it does take more time to style my hair. Therefore, I set my call time earlier than any of the other staff to assure that I was ready in time for the schedule. More importantly, I had the chemical work done off set at my expense. The only thing that had to be done on the set was the pressing and styling. It has worked for seven years.<sup>233</sup>

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<sup>229</sup> Kersey, *supra* note 228.

<sup>230</sup> *Id.* (internal quotation marks omitted).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> E-mail from Christine Jones, *supra* note 228.

Why all the fuss about Judge Mablean’s hair then? The fuss relates to one of the complexities of discrimination in our post-Civil Rights era, where palatable outsiders are now included in the workplace but only so long as they meet unwritten demands to cover.<sup>234</sup> Judge Mablean failed to satisfy those demands by insisting that her hair—her race—be visible, rather than invisible. Although Judge Mablean had managed to make her differences from the norm invisible for seven years by absorbing the costs in time and money on her own, she could no longer shelter her employer from such difference once the employer was exposed to it through the loss of her hair and her use of a wig. Once exposed, there was no going back for Judge Mablean. As with many black women, Judge Mablean had an employer that required her to downplay her disfavored identity—her status as a black woman and thus her hair.<sup>235</sup> Once the process of relaxing hair was revealed as an occasionally unreliable method for covering or for achieving a look “identical” to white women, her employer could no longer accept that method for downplaying difference, even if Judge Mablean continued in her efforts to make such actions invisible. The wig, with its proven reliability, became the only choice for satisfying the chosen workplace norms. Like so many employers, and even courts such as that in *Rogers*, Fox Network would have rather had Judge Mablean “cover” her own hair rather than deal with the complexities and realities of black hair.

More so, underlying Judge Mablean’s termination was a general resistance to factors that have been determined to be outside of the norm, without any acknowledgment or recognition that that particular norm for women’s hair is both raced and gendered—that is, specifically based on white women. As one commentator noted, “society is uncomfortable with ethnic hair, and it is uncomfortable about race.”<sup>236</sup> Indeed, we see such resistance in other cases such as *Hollins v. Atlantic Co.*, where the employer essentially forced its black female employees to obtain approval for every shift in any hairstyle while not imposing any such requirement on white women.<sup>237</sup> In *Hollins*, Eunice Hollins sued her employer for race discrimination based upon the unequal application of its grooming policy to her.<sup>238</sup> The company’s policy read in relevant part:

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<sup>234</sup> Devon Carbado, Catherine Fisk, & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 83 (2008) (describing the forms of workplace discrimination that can occur after a person is hired and noting that such discrimination “include[s] a range of subtle institutional practices and interpersonal dynamics that create systemic advantages for some employees and disadvantages for others”). See generally Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007) (highlighting the immense pressures that Blacks generally have to perform their identity in racially palatable ways). Covering is defined as downplaying identity, and reverse covering is defined as behaving in a way that purposely conforms to stereotype. See Yoshino, *supra* note 139, at 837, 902; see also Carbado & Gulati, *supra* note 139, at 1262 (describing how women and people of color attempt to alter their racial identities in order to prevent discrimination and preempt stereotyping in the workplace). Their claim is that “the social meaning of, for example, a black person’s racial identity is a function of the way in which that person performs (presents) her blackness” such that Blacks can choose to accept or reject societal expectations of behaving “conventionally”—that is, in accordance with predominant stereotypes. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1771–72 (2003) (reviewing FRANCISCO VALDES, ET AL., *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)).

<sup>235</sup> See Green, *supra* note 34, at 655–56; see also Flagg, *supra* note 138, at 2009–29.

<sup>236</sup> Padgett, *supra* note 33.

<sup>237</sup> See 188 F.3d 652, 656 (6th Cir. 1999); see also Padgett, *supra* note 33 (“As long as ‘hair is neat and put together, there is no natural hair texture that is inappropriate for corporate America’ . . .” but “[c]orporate America is still conservative and demands a certain look[.]”).

<sup>238</sup> *Hollins*, 188 F.3d at 656–57.

Women should have a neat and well groomed hair style. Rollers and other hair setting aids are not permitted. For safety, women may be required to have their hair tied back. . . .

When it comes to your appearance as part of our Company, there are certain standards important to our operation which you must follow. We don't ask just some of our people to follow these standards, but that everyone follow them.<sup>239</sup>

The policing of Hollins's hair began on August 17, 1994, when Hollins arrived at work with her hair styled in "finger waves."<sup>240</sup> One of her supervisors informed Hollins that her hairstyle was unacceptable, later testifying that, although her hair was neat and well groomed, it was "too different" and "eye-catching."<sup>241</sup> Soon thereafter, Hollins received instruction to seek advance approval for her hairstyles by presenting pictures of any styles that she wished to try to a supervisor.<sup>242</sup> Although approving a few hairstyles, her supervisors disapproved of many, including one hairstyle "with her hair pulled back in a 'ponytail'" even though "[f]ive white women on her shift working under the same supervisors wore the same style on many occasions."<sup>243</sup> Hollins's supervisors even chastised her when she wore previously approved hairstyles.<sup>244</sup> In fact, while noting that Hollins's neat and well groomed hairstyle "caught his attention *because* he was aware of [her] civil rights claims," one supervisor testified that he and other supervisors "agreed that the 'grooming standards are such that an [employee's] hair should not in itself call attention to [the employee].'"<sup>245</sup>

The Sixth Circuit reversed the district court's grant of summary judgment for the employer,<sup>246</sup> highlighting "that a separate 'calls attention' grooming prohibition that [was] not mentioned in Atlantic's policy was formulated and applied specifically to Hollins" and that there was evidence from which a jury could conclude that white women with "*identical* hairstyles . . . received different treatment."<sup>247</sup> Although Hollins was more successful in her Title VII claim than plaintiffs in cases such as *Rogers*, her case, as well as the experience of Judge Mablean, highlight important factors regarding how white and gendered norms about the appearance of women's hair affect and determine the reception of black women's natural hairstyles in the workplace. In particular, they expose how the unwritten norms about acceptable women's hair and assumptions about the relative ease with which black women can satisfy these norms set up natural hairstyles such as braids to be perceived as "eye-catching" or "too different" within the workplace. Moreover, they reveal an underlying distrust of black women's ability to look professional. In this sense, black women are treated much like the female employees in *Carroll v. Talman Federal Savings and Loan Ass'n of Chicago*, where the employer required women to

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<sup>239</sup> *Id.* at 655.

<sup>240</sup> *Id.* Finger waves involve "a method of setting hair by dampening with water or wave solution and forming waves or curls with the fingers and a comb." Merriam-Webster OnLine, <http://www.merriam-webster.com/dictionary/finger+wave>.

<sup>241</sup> *Hollins*, 188 F.3d at 655.

<sup>242</sup> *Id.* at 656.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 656–57.

<sup>245</sup> *Id.* (emphasis added).

<sup>246</sup> *Id.* at 662–63.

<sup>247</sup> *Id.* at 660–61.

wear a uniform while giving men the freedom to pick their own work clothes within the bounds of its grooming policy.<sup>248</sup> There, the employer explained its policy, noting:

[D]ress competition among women is reduced and they do not have to be concerned about wearing something that is appropriate business attire because the career ensemble is acceptable. (D)ress competition exists among women employees on glamour days (b)ut in the case of men employees there is little difficulty getting them to adhere to the dress and grooming code requirements. And there is little dress competition among male employees . . . .<sup>249</sup>

Counsel for the employer further described the business's reason for the difference in how men and women were treated, stating:

[T]he selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm . . . problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent . . . . They tend to follow those (fashions) and they don't seem to equate that with a matter of business judgment.<sup>250</sup>

The Seventh Circuit held that the company discriminated against women based on “offensive stereotypes prohibited by Title VII,” explaining that the different sex-based rules suggested “that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can.”<sup>251</sup> In many ways, cases such as *Hollins* and *Rogers* reveal a similar lack of trust in black women's judgment, suggesting that, without the appropriate guidance, black women would not present themselves in acceptable ways or, in some cases, that the natural features of black women are simply unpresentable.

## CONCLUSION

In her hit song from 2006, “I Am Not My Hair,” singer India Arie described her lifelong trials and tribulations with her hair, describing her move from a press and curl to a Jheri curl<sup>252</sup> to a relaxer to locks and then to a shaved head as well as lamenting the difficulties of obtaining a corporate job with natural hairstyles, such as locks.<sup>253</sup> She also proclaimed this refrain repeatedly:

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<sup>248</sup> 604 F.2d 1028, 1029 (7th Cir. 1979).

<sup>249</sup> *Id.* at 1033.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1033 & n.17.

<sup>252</sup> A Jheri curl is created by a chemical process that gives black people's hair a glossy, loosely curled look. It requires curl activator to stay moist and loosely curled. The most famous person to wear a Jheri curl likely was the late Michael Jackson during the mid-1980s.

<sup>253</sup> INDIA ARIE, *I Am Not My Hair feat. Akon*, on TESTIMONY: VOLUME 1, LIFE & RELATIONSHIP (2006). In describing her transitions in hair, Arie wrote:

Little girl with a press and curl

I am not my hair  
I am not this skin  
I am not your ex-pec-tations no no (hey)  
I am not my hair  
I am not this skin  
I am a soul that lives within<sup>254</sup>

Despite Arie's words, although hair does not represent a person's personality or dignity, it, along with skin color, is often a factor used to determine one's racial identity in this country.<sup>255</sup> For Arie, her declaration about her hair was a celebration of what she saw as her authentic self. Although many black women relax their hair and prefer to do so, many other black women such as Rogers are prevented from being their authentic selves through natural hairstyles because of the unspoken and unwritten white and gendered norms that define black hair as unacceptable within the workplace.

This Essay has exposed the manner in which black women are discriminated against at the intersection of race and gender through the enforcement and legal recognition of employer dress codes that ban natural hairstyles worn by black women. Caught in a society that identifies long, flowing hair as the normative ideal for women and has antidiscrimination laws that reinforce that ideal, black women find themselves with very limited choices for their hair—that is, compared to white women. Black women are even more limited than white women in the extent to which they can wear their hair as it just grows naturally out of their head, without any styling. Although white women generally could, for instance, grow their straight hair out to their shoulders, black women with Afros are not permitted under many employer dress codes to grow their natural hair out equally as long. Black women have no real choices under many employer grooming codes if they want to wear their hair long and hanging down in its natural state. Unlike the hair of most white women, which grows down as it grows long, black women's natural hair grows up into an Afro as it lengthens, unless straightened with a relaxer or hot comb

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Age eight I got a Jheri curl  
Thirteen then I got a relaxer  
I was a source of so much laughter  
Fifteen when it all broke off  
Eighteen when I went all natural . . .  
'97 dreadlocks all gone

*Id.*

In describing job difficulties with natural hairstyles, Akon, with whom Arie performed the song, wrote:

Then I hit by the barber shop (real quick)  
Had the mini little (twist) and it drove them crazy (drove 'em crazy)  
And then I couldn't get (no job)  
Cause corporate wasn't hiring (no dreadlocks) (oh no) . . .  
Hate to say it but it (seems so flaw)  
Success didn't come 'til I (cut it all off) (uh huh)

*Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See *supra* notes 112–117 and accompanying text; see *supra* Part II.B (describing cases where an Afro style is acknowledged as a racial characteristic)

or weighed down by braids, locks, or twists. Of course, black women who want to keep their hair natural could all just wear their hair in short Afros, but such a restriction by the law impinges on their freedom in a way that the law does not for similarly situated white women. Recall, again, the imaginary white female plaintiff in this Essay's introductory hypothetical. No court would find such a code to be non-discriminatory. Providing black women with only two choices for their hair—either relaxed hair or a short Afro—similarly should not be condoned.

Courts have rejected employer restrictions on Afro hairstyles as discriminatory,<sup>256</sup> reasoning that such restrictions measure Blacks “against a standard that assumes non-Negro hair characteristics.”<sup>257</sup> For the same reason, current antidiscrimination law must be modified to recognize black women's natural hairstyles, such as braids, locks, and twists, as black-female equivalents to Afros. As it is, the law is unfairly based upon an assumption that black women's hair structure and texture are the same as those of white women or, worse, an assumption that it is reasonable for an employer to make implicit demands on black women to relax or straighten their hair—in other words, to place requirements on black women to change the physical structure and texture of their hair.<sup>258</sup> Such implicit requirements are no more acceptable than implicit requirements to change nose width or skin color. Additionally, the law cannot continue to ignore the biological nature of black women's hair in a way that places an undue burden on black women with respect to their finances, hair and scalp health, physical health, and mental health.

The issues regarding black women's natural hairstyles are primed and ready for re-evaluation. These concerns about hair and race will not go away, but instead will become even more important as more and more black women are transforming from relaxed hair to natural hair.<sup>259</sup> It is time for the law to apply in a way that makes “good hair” days possible for all women, regardless of their natural hair structure and texture.

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<sup>256</sup> See E.E.O.C. Dec. No. 71-244, 4 Fair Empl. Prac. Cas. (BNA) 18 (June 10, 1971); see also *Jenkins v. Blue Cross Mutual Hosp. Ins.*, 538 F.2d 164, 168 (7th Cir. 1976).

<sup>257</sup> E.E.O.C. Dec. No. 71-244. The court in *EEOC Decision No. 71-2444* also noted that “the wearing of an Afro-American hair style by a Negro has been so appropriated as a cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice or a necessary abridgement of first amendment rights.” *Id.*

<sup>258</sup> Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 409–10 (2006) (“[I]t is inappropriate and potentially stigmatic to give society's predominantly white managers, supervisors, and customers unfettered discretion to define socially desirable behavior, grooming, and appearance standards.”).

<sup>259</sup> *Ethnic Hair Care Focuses on Organic*, DRUG STORE NEWS, Sept. 10, 2007, at 74, 74 (quoting MINTEL INT'L GROUP, BLACK HAIRCARE - US (2007)), available at [http://findarticles.com/p/articles/mi\\_m3374/is\\_11\\_29/ai\\_n21053109/](http://findarticles.com/p/articles/mi_m3374/is_11_29/ai_n21053109/) (“A continued trend toward more natural styles and demand for less damage to hair through chemical processing have resulted in lower sales in relaxers even as demand for moisturizing and styling products used to maintain unrelaxed hair grows.”); David France, *The Dreadlock Deadlock*, NEWSWEEK, Sept. 10, 2001, at 54, 54 (“[T]oday dreadlocks, twists or braids are at the height of fashion, nearly as common as Afros were 30 years ago.”); Hull, *supra* note 68 (referring to one black hair dresser's comment that “[t]hree years ago, most of her clients sought perms” but “now . . . the numbers are reversed, and she applies three or four perms a week out of 30 styles”).