Remedying Trait-Based Employment Discrimination: Lessons From the CROWN Act

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INTRODUCTION

For decades, several scholars have discussed what has been characterized as "trait discrimination" against Black[1] people in the United States.[2] Trait discrimination is bias against people who possess traits and characteristics that are culturally, commonly, or historically associated with a particular race.[3] Clothing, speech patterns/accent, and certain beliefs are often cited as examples of these traits and characteristics. Trait discrimination in the context of employment occurs when an employer might be willing to hire or promote Black people who conform to white norms or "cultural whiteness,"[4] but excludes applicants or employees who are "too Black" such as those who speak African American Vernacular English, wear clothing that has African fabric, or support the Black Lives Matter movement on their social media.[5] Accordingly, legal scholars have

1 I capitalize "Black" in agreeance with Professor Kimberlé Crenshaw who has explained that "Black[] [people], like Asian[], Latino[], and [people of] other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 (1988).

2 *See* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 8 (2005); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 652 (2005); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 366 (2006); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1358 (2008).

3 Green, *supra* note 2, at 652–53.

4 I use the term "cultural whiteness" to describe characteristics, traits, customs, and cultural practices that are commonly associated with white Americans, including, but not limited to, skin color, physical features, facial expressions, food, music, habits, names, mannerisms, religion, political beliefs, place of residence, and clothing. A feature of cultural whiteness is that it is treated as invisible because it is the normative standard by which all non-white people are judged. The denial that cultural whiteness exists is one of the tools that allows it to continue to "enforce hidden signs of racial superiority, cultural hegemony, and dismissive 'othering.'" *See* AnnLouise Keating, *Interrogating "Whiteness," (De)Constructing "Race,"* 57 COLL. ENG. 901, 905 (1995); *see also* Julissa Reynoso, *Race, Censuses, and Attempts at Racial Democracy*, 39 COLUM. J. TRANSNAT'L L. 533, 539 (2001); Perea, *supra* note 2, at 835 (quoting GORDON ALLPORT, THE NATURE OF PREJUDICE 9 (25th Anniversary ed. 1979)).

5 Green, *supra* note 2, at 646–48 ("Even the most basic similarity-attraction theory suggests that we tend to favor those who are like us. Whether male engineers developing expected displays of competence at the high-tech firms studied by McIlwee and Robinson, or white workers developing interactional styles and appearance rules in work teams or informal gatherings, there is reason to expect that the dominant group—white males

long considered the ways in which employment discrimination law should respond to trait discrimination.[6]

Discrimination against Black people with "natural hairstyles"[7] and anti-Black colorism are two forms of trait discrimination that stem from employers' preferences for white aesthetics. In this article, I have chosen to focus on natural hair discrimination and colorism because both relate to an individual's physical appearance and, thus, have similar implications in the workplace. Additionally, as discussed below, I argue that the legislative remedy of the CROWN Act, in combatting discrimination against employees who wear natural hairstyles, can serve as a model for crafting a legislative remedy to combat anti-Black colorism in the workplace. Accordingly, this article will focus on both discrimination against employees with natural hairstyles and anti-Black colorism in the workplace.

The CROWN[8] Act is a law that expands the definition of race in discrimination laws to include an individual's hair texture or hairstyle, if that hair texture or hairstyle is commonly and/or historically associated with a particular race or national origin.[9] The Act, therefore, has the effect of prohibiting race-based discrimination against employees with hair textures and hairstyles that fall within the ambit of the Act. National CROWN Day is celebrated in July in support of the right of Black people in the United States to be able to wear their natural hair without fear of discrimination.[10] This celebration takes place on the anniversary of the passage of the 2019 CROWN Act in California, the first state to pass the Act. Since the Act passed in California, more than twelve other states have signed the Act—or "CROWN Act-like" language—into law and the Act has passed in the United States' House of Representatives.[11] Additionally, over twenty cities and

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more often than not—will create a work culture that disadvantages women and people of color."); *see* Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. Mich. J.L. Reform 637, 644–46 (1998).

6 *See, e.g.*, Perea, *supra* note 2; Flagg, *supra* note 2; Carbado & Gulati, *supra* note 2; Ford, *supra* note 2; Greene, *supra* note 2; Yuracko, *supra* note 2, at 366–67.

7 The phrase "natural hairstyle" is commonly used in the Black community and colloquially to refer not only to Black hair styled in its natural form/texture but also to styles that are commonly associated with natural textured hair (hair that is not straightened and remains in its natural curl pattern) and Black hair generally. Accordingly, throughout this article, "natural hairstyles" refers to styles including, but not limited to, afros, single braids, cornrows, twists, Bantu knots, and locs.

8 CROWN is an acronym for "Create a Respectful and Open World for Natural Hair." The Crown Act, https://www.thecrownact.com/ (last visited July 20, 2021).

9 *See, e.g.*, Cal. Educ. Code § 212.1 (West 2022).

10 *Celebrating Black Hair Independence*, The Crown Act, https://www.thecrownact.com/crown-day-2021 (last visited July 20, 2021).

11 H.R. 2116, 117th Cong. (as passed by House, Mar. 18, 2022).

counties around the country have passed the Act.[12] Accordingly, on National CROWN Day, social media timelines were flooded with hashtags such as #crownday21, #crowndaychallenge, and #nationalcrownday in addition to pictures of Black people of all genders with natural hairstyles such as afros, single braids, cornrows,[13] twists,[14] Bantu knots,[15] and locs.[16] Of note, while the Act does not limit the prohibition of hairstyle discrimination to only discrimination against Black hairstyles, based on the overwhelming data and research that has recorded the disparate impact of hair discrimination on Black people in the United States, this Article will focus on traditionally Black natural hairstyles, protective hairstyles,[17] and hairstyles associated with people of African descent.[18]

The need for the CROWN Act stems from the systemic failure of United States jurisprudence, and in certain instances some federal courts' unwillingness, to appropriately reconceptualize the meaning of race beyond the legal status quo and recognize race and racism in their myriad forms. Absent an understanding that anti-Black race discrimination encompasses

12 *See infra* Section III.C.

13 Braids that are braided to the scalp. Del Sandeen, *A Step-by-Step Guide to Braiding Cornrows*, Byrdie (Feb. 23, 2022), https://www.byrdie.com/how-to-braid-cornrows-400296.

14 A natural and protective hairstyle that is achieved by twisting two sections of hair around one another from the hair at the scalp to the ends of the hair. Del Sandeen, *The Complete Guide to Two-Strand Twist Hairstyles*, Byrdie (Feb. 16, 2022), https://www.byrdie.com/all-about-twists-or-two-strand-twists-hairstyles-400274.

15 "[A] hairstyle where the hair is sectioned off, twisted, and wrapped in such a way that the hair stacks upon itself to form a spiraled knot." Bianca Lambert, *A Step-by-Step Guide to Creating Bantu Knots*, Byrdie (Feb. 28, 2022), https://www.byrdie.com/Bantu-knots-5075639.

16 Locs are also commonly known as "dreadlocks" or spelled as "locks." They are formed through a number of different methods that cause hair to form into rope like strands when the hair locks into itself. Del Sandeen, *What to Know About Dreadlocks: A Guide*, Byrdie (Feb. 22, 2022), https://www.byrdie.com/locs-or-locks-400267. I use the term "locs" rather than "dreadlocks" throughout this article to reflect the current movement to disassociate the hairstyle with the words "dread" and "dreadful." *See* Gabrielle Kwarteng, *Why I Don't Refer to My Hair as 'Dreadlocks*,*'* Vogue (July 16, 2020), https://www.vogue.com/article/locs-history-hair-discrimination (citing Ayana D. Byrd & Lori L. Tharps, Hair Story: Untangling the Roots of Black Hair in America (2d ed. 2014)).

17 Any hairstyle that allows the ends of one's hair to be tucked away. These styles protect the hair from breakage because the ends of the hair are the most fragile and oldest part of a hair strand. Protective styles include, but are not limited to, braids, locs, and twists. Devri Velázquez, *What Are Protective Hairstyles?*, Naturally Curly (Aug. 2, 2017), https://www.naturallycurly.com/curlreading/protective-styles/what-are-protective-styles.

18 *See* Christy Z. Koval & Ashleigh S. Rosette, *The Natural Hair Bias in Job Recruitment*, 12 Soc. Psych. & Pers. Sci. 741 (2021).

workplace preferences for physical features that are in closer proximity to whiteness, United States jurisprudence cannot be truly anti-racist or even non-discriminatory. Accordingly, this Article critically examines the historical shortcomings of federal jurisprudence related to hair discrimination claims in the workplace while discussing the promise of the CROWN Act in serving as a model to assist in shifting the United States' legal system from one that is merely facially neutral to one that is truly anti-racist and non-discriminatory. This Article also examines the historical shortcomings of jurisprudence related to colorism claims brought by dark-skinned,[19] Black plaintiffs[20] as another space where "CROWN Act-like" legislative intervention is necessary. Colorism is defined as discrimination based on skin tone and phenotype.[21] Because of the interplay between skin color and facial features such as hair texture, the shape and size of one's nose, the shape and size of one's lips, and one's eye color in judging whether a person is of African descent or European descent, social psychologist Keith Maddox has determined that "racial phenotypicality bias" is a more accurate term for colorism.[22] Thus, the CROWN Act can be seen as remedying a piece of the broader problem of colorism because its aim is to protect natural hair. While colorism is a form of racism based on skin color, it is distinct in that colorism, in the context of Black people, favors Black people with lighter skin-tones and more Eurocentric features—lighter eye color, longer, straighter, and finer hair, narrower nose, and thinner lips—over those with darker skin-tones and Afrocentric features—darker eye color, kinkier hair, broader nose, and fuller lips. In the workplace, this has meant that, even though all Black people

19 This article focuses on dark-skinned, Black plaintiffs because of the overwhelming data that demonstrates that dark-skinned, Black Americans are subjugated to greater discrimination in the workplace than their lighter-skinned Black counterparts. While this article focuses on colorism claims brought by dark-skinned, Black litigants, for an understanding of colorism claims more generally, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. Rev. 1705, 1709 (2000), where she explores courts' willingness to acknowledge skin tone discrimination for white ethnic Latin-x/a/o plaintiffs, but not for Black plaintiffs. For an example of a light-skinned, Black litigant bringing a colorism claim, see Walker v. Sec'y of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989).

20 While colorism also impacts non-Black people of color in the United States, this article will focus on the impact of colorism on Black people within the workforce. Additionally, although this article focuses on anti-Black colorism in the United States, it should be noted that colorism has a global reach. *See, e.g.*, Tanya Katerí Hernández, *Colorism and the Law in Latin America–Global Perspectives on Colorism Conference Remarks*, 14 Wash. U. Glob. Stud. L. Rev. 683 (2015).

21 *See* Banks, *supra* note 19, at 1713.

22 Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 Personality & Soc. Psych. Rev. 383, 383 (2004).

are disadvantaged as compared to their white counterparts, Black people with darker skin and/or Afrocentric features are disadvantaged to an even greater degree than those with lighter skin and/or Eurocentric features.

Accordingly, Part I of this article discusses America's racial hierarchy and the existing legal theories of liability for natural hair discrimination and colorism claims under federal law. Part II examines the courts' history in adjudicating colorism claims made by dark-skinned, Black plaintiffs and discusses how colorism remains unbridled by employment discrimination law and jurisprudence. Part III sets forth the current posture of federal jurisprudence related to workplace hair discrimination claims to illustrate the courts' shortcomings in addressing such claims. Part III also discusses the origins of defining race within the United States' legal system. This section then discusses New York City's Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair and a decision by Chicago's Commission on Human Relations, both of which clarify that race includes traits that are historically and commonly associated with race. Part III then analyzes the viability of the CROWN Act for remedying the jurisprudential shortcomings related to hair discrimination claims by assessing the strengths and areas for potential improvement in the CROWN Act language that has been passed in various jurisdictions. Based on the model set forth by the CROWN Act, Part IV then recommends statutory language under the existing framework of Title VII to provide an avenue for clarity and consistency with respect to colorism claims brought by dark-skinned, Black plaintiffs.

I. BACKGROUND

A. *America's Racial Hierarchy and its Impact on Today's Workforce*

The understanding that race is a social construction is a paradigm shift that has only taken place in recent American history.[23] Prior to the twentieth century, race was used as a biological explanation for what were actually social and cultural differences between varying groups of people.[24] White people were considered biologically superior and, therefore, socially superior.[25] Additionally, white skin and white features, such as straight hair,

23 W.E.B. Du Bois was one of the first scholars to advance a historical-sociological definition of race. *See* W.E.B. Du Bois, *The Conservation of Races*, *in* The American Negro Academy Occasional Papers, No. 2. (Washington, D.C., 1897).

24 *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 22–24 (3d ed. 2015).

25 *See id.*

were considered to be the norm.[26] Conversely, Black skin and Black features, such as coarse hair, were viewed as physical manifestations of inferiority and were explained and spoken of in terms relative to whiteness as the norm.[27] During enslavement, this racial hierarchy was used to enforce the social stratification that placed enslaved Africans in the role of laborers who were subjected to subhuman conditions.[28]

Although it is now commonly accepted in most scholarly fields that race is a social construction, racial stratification continues to be used to allocate resources and to determine who gets access to the best jobs, schools, houses, healthcare, and so on.[29] Of course, today's stratification and subordination of Black people is not explicit and formal; however, it remains "material." As Professor Kimberlé Crenshaw has explained:

> Material subordination . . . refers to the ways that discrimination and exclusion economically subordinated Black[] [people] to white[] [people] and subordinated the life chances of Black[] [people] to those of white[] [people] on almost every level. This subordination occurs when Black[] [people] are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Black[] [people] that is five to six years shorter than for white[] [people].[30]

Thus, as Professor Derrick Bell pointed out, the traditions and practices of racial subordination "are deeper than the legal sanctions."[31] In other words,

26 *See id.*

27 *Id.* at 23, 111 ("Perceived differences in skin color, physical build, hair texture, the structure of cheek bones, the shape of the nose, or the presence/absence of an epicanthic fold are understood as the manifestations of more profound differences that are situated *within* racially identified persons: differences in such qualities as intelligence, athletic ability, temperament, and sexuality, among other traits. Through a complex process of selection, human physical characteristics ('real' or imagined) become the basis to justify or reinforce social differentiation. Conscious or unconscious, deeply ingrained or reinvented, the making of race, the "othering" of social groups by means of the invocation of physical distinctions, is a key component of modern societies."); Charles W. Mills, *Racial Liberalism,* 123 Publ'ns Mod. Language Ass'n Am. 1380, 1382 (2008) ("So the inferior treatment of people of color is not at all incongruent with racialized liberal norms, since by those norms nonwhites are less than full persons.").

28 *See* Omi & Winant, *supra* note 24, at 107.

29 *See* Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 12–13 (3d ed. 2017).

30 Crenshaw, *supra* note 1, at 1377.

31 Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 191–92 (1987).

racial subordination continues to survive even though, theoretically, it is no longer legally permissible. Those who push back against the current reality of material subordination argue that not all Black people are "at the bottom of the social order" based on factors such as class and gender.[32] However, the existence of classism and misogyny does not contravene the fact that as a social group, Black people are in a subordinate position in America's racial hierarchy.[33]

Further, as subordination shifted from being formal to informal, race discrimination itself also shifted to a more complex form, including discrimination against traits and characteristics that are culturally, commonly, historically, or statistically associated with a particular race.[34] As a result, upward mobility for Black people has often depended on proximity and assimilation to whiteness, both with respect to physical appearance and "cultural whiteness." [35] Thus, the offer of inclusion has been described as a "Faustian bargain" where Black people are offered acceptance, but for the "price of deracination."[36]

Discrimination against Black employees with natural hairstyles is an overt example of forced bargaining to gain inclusion. For instance, a company that bans braided hairstyles under the guise of a standard for "professionalism" is essentially telling Black employees who wear these styles "you can have this job, but only if you shed a piece of your Blackness for it." The result of this bias—whether conscious or unconscious—is material subordination with respect to access to employment. This has been confirmed by a compilation of four studies published in 2021 conducted by researchers at Michigan State University and Duke University who found that Black women with natural hairstyles such as afros, braids, and twists are "perceived to be less professional, less competent, and less likely to be recommended for a job interview than Black women with straightened hairstyles and [w]hite women with either curly or straight hairstyles."[37] Thus, "natural hairstyle bias may be a subtle yet consequential cause for negative

32 *See* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 470 (1997).

33 *See id.*

34 *See id.*; Yuracko, *supra* note 2, at 366.

35 *See* Reynoso, *supra* note 4, at 539.

36 *See* OMI & WINANT, *supra* note 24, at 23. A Faustian bargain, as used in this Article, is a "pact whereby a person trades something of supreme moral or spiritual importance . . . for some worldly or material benefit." Brian Duignan, *Faustian Bargain*, BRITANNICA (July 19, 2016), https://www.britannica.com/topic/Faustian-bargain/additional-info#contributors.

37 *See* Koval & Rosette, *supra* note 18, at 741.

workplace outcomes faced by Black women."[38] The study also found that Black women with natural hairstyles received more negative evaluations when applying for jobs within industries that have stronger conservative appearance and dress norms.[39]

Anti-Black colorism in the workplace is also a clear example of acceptance that must be "bargained for." As with discrimination against employees with natural hairstyles, the preference is for a white aesthetic—lighter skin and Eurocentric features. The negotiation for the employer is "I will hire Black people as long as they are not too dark." However, as discussed below, discrimination against dark-skinned, Black employees is almost always carried out covertly, as most employers understand that it would be illegal for them to explicitly state that they prefer lighter-skinned, Black employees. The covert nature of colorism in the workplace, however, has not prevented the striking impact it has had on employment outcomes for dark-skinned, Black people. Although historically understood by scholars, the pervasiveness of colorism in the workplace was first confirmed by a 2009 study that found, amongst Black job applicants, lighter skin complexion was "more salient and regarded more highly than one's educational background and prior work experience."[40] The study also found that light-skinned, Black men who had only a Bachelor of Arts degree, less prior work experience, skill, and overall knowledge of a position were favored over dark-skinned men with a Master of Business Administration degree and past managerial experience.[41] The findings of the 2009 study built upon the work of a 1990 study that found that the impact of skin color on socioeconomic status amongst Black Americans is as great as the impact of race—Black-white—on socioeconomic status in the United States.[42] Specifically, lighter skin was associated with more education, increased income, higher occupational prestige, and higher socioeconomic status of spouse.[43] More recently, using data from the 2012 American National Election Study, researchers found that Black and Latin-x/a/o people with lighter skin were several times more likely to be seen as intelligent by white interviewers as compared to those with the darkest skin.[44] Although the focus of this article is workplace

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38 *Id.* at 749.

39 *Id.* at 741, 746.

40 Matthew S. Harrison & Kecia M. Thomas, *The Hidden Prejudice in Selection: A Research Investigation on Skin Color Bias*, 39 J. Applied Soc. Psych. 134, 134–35 (2009).

41 *Id.* at 151.

42 Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 Soc. Forces 1105, 1105 (1990).

43 *Id.* at 1109–12.

44 Lance Hannon, *White Colorism*, 2 Soc. Currents 13 (2015).

discrimination, it should also be noted that a number of studies have shown that defendants who have darker skin are treated more harshly in the criminal justice system—such as in police stops, arrests, and sentencing—than defendants with lighter skin.[45] Further, darker skin has been found to be an important risk factor for worse physical health amongst Black people.[46]

Accordingly, since natural hair bias and anti-Black colorism both have a tremendous impact on employment outcomes, protecting employees from discrimination based on these two types of traits should not be viewed as a *de minimis* issue. Additionally, as a number of scholars have argued, protection against natural hair discrimination and colorism should be recognized as appropriate goals of federal discrimination law.[47]

B. *Federal Theories of Discrimination: Section 1981 & Title VII*

Two federal laws protect private employees from racial discrimination, Title VII of the Civil Rights Act and 42 U.S.C. 1981 (Section 1981). Title VII explicitly prohibits discrimination on the basis of race, color, religion, or national origin.[48] Section 1981 guarantees all citizens the same rights as white citizens.[49] Thus, litigants who bring hair discrimination

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45 *See, e.g.*, Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, 42 ETHNIC & RACIAL STUD. 1593 (2018).

46 Ellis P. Monk, Jr., *Colorism and Physical Health: Evidence from a National Survey*, 62 J. HEALTH & SOC. BEHAV. 37, 47 (2021).

47 *See, e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Banks, *supra* note 19, at 1705, 1707–08; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987 (2017).

48 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

49 Civil Rights Act of 1991, 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and

claims and colorism claims often rely on these two statutes.[50]

Courts typically analyze legal claims brought under these two statutes in a very similar way and have determined that the same set of facts can be pursued under both statutes, at the same time.[51] Of note, one difference between the two statutes is that only Title VII prohibits disparate impact discrimination; thus, a litigant may not bring a disparate impact claim under Section 1981.[52] Litigants may, however, bring disparate treatment claims under both statutes.[53]

Disparate impact discrimination is categorized as employers' practices, procedures, policies, tests, and criteria that are neutral on their face but unintentionally deprive individuals from protected groups of employment opportunities.[54] To prove disparate impact, a plaintiff must present evidence that an employer's practice, procedure, policy, test, or criteria has a statistically significant harmful impact on a protected class.[55]

Conversely, disparate treatment claims allege that an employer has acted in an intentionally discriminatory way.[56] Because of the rarity of smoking gun evidence or direct evidence of discriminatory animus in disparate treatment cases, courts utilize the well-known *McDonnell Douglas* burden shifting test to analyze seemingly neutral actions to determine if the actions "hide intentional discrimination."[57] Under this framework, where the employment conduct is failure to hire, a plaintiff must make out a prima facie case that: (1) she is a member of a protected class; (2) she was qualified for and applied for an available position; (3) although she was qualified, she was rejected for the position; and (4) the position remained available after the plaintiff's rejection and the employer continued to seek applicants

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exactions of every kind, and to no other.").

50 *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) ("The statutory bases alleged, Title VII and section 1981, are indistinguishable in the circumstances of this case, and will be considered together."); Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

51 Robinson v. Caulkins Indiantown Citrus Co., 685 F. Supp. 233, 235–36 (S.D. Fla. 1988).

52 Adams v. Local 198, United Ass'n of Journeymen, 495 F. Supp. 3d 392, 396–97 (M.D. La. 2020).

53 *See* Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 669 (7th Cir. 1996).

54 *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

55 *See id.*

56 Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

57 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973), *modified*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. Davis L. Rev. 769, 799 (1987); *see, e.g.*, Joseph v. Lincare, Inc., 989 F.3d 147 (1st Cir. 2021).

from people of plaintiff's qualifications.[58] If a plaintiff makes her prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action.[59] The plaintiff must then demonstrate that the reason proffered by the employer was pretext for discrimination.[60]

Courts have modified the *McDonnell Douglas* test to cover a range of employment actions including discriminatory discharge and discrimination in awarding promotions.[61] In the discriminatory discharge context, a plaintiff can make her prima facie case by showing that "she is a member of a protected class, was qualified for the position held, and was discharged and replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained . . . ."[62] In the failure to promote context, a plaintiff must demonstrate: "(1) [s]he is a member of a protected class; (2) [s]he applied and was qualified for a position for which the employer was seeking applicants; (3) [s]he was not selected for the position; and (4) the failure to promote occurred under circumstances giving rise to an inference of discriminatory intent."[63]

As discussed in section II, the elements needed to make a prima facie case in failure to promote and discriminatory discharge cases are of particular importance to the discussion of anti-Black colorism. This is because courts have used the existence of a Black employer/decision maker or other Black employees at a workplace to infer a lack of discriminatory animus.[64] In doing so, some courts have failed to properly scrutinize plaintiffs' claims that other Black employees are favored because of their lighter skin and/or Eurocentric features.[65]

II. Historical and Legal Overview of Colorism Against Dark-Skinned, Black Litigants

An understanding of the history of colorism in the United States is necessary to comprehend its impact on the make-up of America's

58 *McDonnell Douglas*, 411 U.S. at 802.

59 *Id.*

60 *Id.* at 804.

61 *See* Lee v. Russell Cnty. Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982); Mitchell v. Baldrige, 759 F.2d 80, 84–86 (D.C. Cir. 1985); Hunt v. Con Edison Co. N.Y.C., No. 16-CV-0677, 2017 WL 6759409, at *6 (E.D.N.Y. Dec. 29, 2017), *on reconsideration*, 2018 WL 3093970 (E.D.N.Y. June 22, 2018).

62 *Lee*, 684 F.2d at 773.

63 *Hunt,* 2017 WL 6759409, at *6.

64 *See, e.g.*, Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543 (N.D. Ill. 1986).

65 *See, e.g., id.*

workforce. Like most issues of anti-Black racism in the United States, colorism dates back to enslavement. The skin color of enslaved people was used by enslavers to determine the labor assignments.[66] Enslaved people that were darker-skinned were often given more rigorous work while those that were lighter-skinned were often given less rigorous work.[67] This differential treatment created tension amongst Black people themselves, and the idea that lighter-skinned, Black people were "better" became internalized in Black society.[68] Some examples of this include: "blue vein societies,"[69] elite groups for upwardly mobile Black people that only accepted Black people whose skin tone was light enough for their veins to show; and "the brown paper bag" test, a test where only Black people whose skin tone was the same or lighter than a paper bag could gain entry into some affluent Black clubs and even some churches.[70]

In spite of this history, colorism claims that involve darker-skinned, Black litigants have not fared well under current employment discrimination law.[71] As previously noted, in asserting colorism claims in the employment context, litigants have relied on Section 1981 and Title VII.[72] Of note, Section 1981 does not define the words "race" or "color."[73] Of further significance, Title VII—which specifically prohibits employment discrimination based on both "color" and "race"—does not define either term.[74] In spite of

66 Harrison & Thomas, *supra* note 40, at 136–37.

67 *See id.*

68 *See id.*; Tayler J. Matthews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 Race, Gender, & Class J. 248, 252–53 (2015).

69 Admission into a blue vein society was dependent on both "class" and skin color. In many cases members came from Black families who had been free for generations prior to the Civil War. These exclusive clubs were utilized to "maintain the old hierarchy." In other words, these societies were exclusive to those who had closer proximity to whiteness with respect to class, free status, and physical characteristics. "An applicant had to be fair enough for the spidery network of purplish veins at the wrist to be visible to a panel of expert judges. Access to certain vacation resorts . . . [were] even said to be restricted to blue-vein members." Kathy Russell et al., The Color Complex: The Politics of Skin Color Among African Americans 25 (Anchor Books 1993).

70 *See, e.g.*, Harrison & Thomas, *supra* note 40, at 136–37; Monk, *supra* note 46, at 39; Maxine S. Thompson & Verna M. Keith, *The Blacker the Berry: Gender, Skin Tone, Self-Esteem, and Self-Efficacy*, 15 Gender & Soc'y 337, 337 (2001).

71 *See* Banks, *supra* note 19, at 1713, 1727, 1730; Taunya L. Banks, *Multi-Layered Racism: Courts' Continued Resistance to Colorism Claims*, *in* Shades of Difference: Why Skin Color Matters 213, 216–22 (Evelyn N. Glenn ed., 2009).

72 *See* 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 1981(a); Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

73 *See* 42 U.S.C. § 1981.

74 *See* 42 U.S.C. § 2000e-2(a).

the existence of this statutory language, it was not until 2015 that federal appellate courts explicitly recognized color claims.[75] Additionally, although the United States Equal Employment Opportunity Commission (EEOC) has been successful in reaching a number of settlements for some Title VII color claims,[76] courts have dismissed a great number of color claims.[77]

An often-cited example of a colorism claim that was adjudicated under Section 1981 is *Sere v. Board of Trustees of University of Illinois*.[78] Edward Sere was a dark-skinned, Nigerian man who brought an employment discrimination claim under both Title VII and Section 1981.[79] He sued his employer based on race and national origin discrimination.[80] His Title VII claim was dismissed by the Illinois Department of Human Rights because of his failure to file a timely charge of discrimination with the EEOC.[81] The federal court also struck down his national origin discrimination claim by determining that national origin claims are not cognizable under Section 1981.[82] Thus, only his race discrimination claim under Section 1981 remained. Sere alleged that he suffered race discrimination because his light-skinned, Black supervisor "refused to renew his contract after unsuccessfully pressuring him to give up his job in favor of a less qualified" candidate.[83] Sere was replaced with a light-skinned, Black-American, who Sere alleged was less qualified.[84] The court determined that Sere failed to establish a race discrimination claim because his supervisor was Black and because his replacement was Black.[85] Even though the court acknowledged that discrimination based on skin color can occur amongst people of the same

75 Benjamin L. Riddle, *"Too Black": Waitress's Claim of Color Bias Raises Novel Title VII Claim*, NAT'L L. REV. (Feb. 25, 2015), https://www.natlawreview.com/article/too-black-waitress-s-claim-color-bias-raises-novel-title-vii-claim (discussing "the first time that a 'color' claim under Title VII succeed[ed] as a separate and distinct claim from 'race' in Federal Court at the appellate level").

76 *Significant EEOC Race/Color Cases (Covering Private and Federal Sectors)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors (last visited July 19, 2021).

77 *See* Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881, 928 (2020) (citing Banks, *supra* note 19, at 1727).

78 *See, e.g.*, Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543 (N.D. Ill. 1986); *see also* Damon Ritenhouse, *Where Title VII Stops: Exploring Subtle Race Discrimination in the Workplace*, 7 DEPAUL J. FOR SOC. JUST. 87, 102 (2013) (citing *Sere* as an often-cited example of a colorism claim).

79 *Sere*, 628 F. Supp. at 1546.

80 *Id.* at 1543, 1546.

81 *Id.* at 1544.

82 *Id.* at 1546.

83 *Id.*

84 *Id.*

85 *Id.*

race, the court refused to "create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."[86] While the court was correct in refusing to partake in measuring skin tone on its own, by dismissing Sere's case the court failed to realize that the composition of the skin-tones of the parties involved was a material issue of fact that should have been resolved at trial by a fact finder.[87]

A similar case, *Ohemeng v. Delaware State College*, was brought under both Title VII and Section 1981.[88] Emmanuel Ohemeng was a Black naturalized American citizen who had immigrated from Ghana.[89] Ohemeng's employer, Delaware State College—a historically Black college—terminated his employment instead of considering him for two positions that he claimed he was qualified for.[90] The college instead hired two Americans, one who was Black and one who was white.[91] In asserting his claim, Ohemeng argued that he was discriminated against because "he belonged to a subset of the Negroid race having a distinct ancestry or distinct ethnic characteristics."[92] In other words, Ohemeng contended that he was discriminated against because of his distinct Afrocentric features.[93] The court denied the employer's motion for summary judgment on the plaintiff's race discrimination claims under both Title VII and Section 1981.[94] However, the court questioned whether Ohemeng could truly establish a prima facie case for race-based discriminatory discharge because, as noted above, one of the requirements for discriminatory discharge is that after the discharge the employer assigned the work to members who were not members of plaintiff's racial minority to perform the work.[95] The court questioned this because one of Ohemeng's replacements was Black.[96] However, the court made no mention of the skin tone or features of Ohemeng's replacement, missing a critical piece of the

86 *Id.*

87 *See* Sonika R. Data, *Coloring in the Gaps of Title VI: Clarifying the Protections Against the Skin-Color Caste System*, 107 Geo. L.J. 1393, 1420 (2019); Walker v. Sec'y of Treasury, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (stating that measuring skin color and determining skin pigmentation in colorism claims is a genuine and substantial issue and constitutes a question of fact that must be determined by the fact finder).

88 Ohemeng v. Del. State Coll., 676 F. Supp. 65, 66 (D. Del. 1988), *aff'd*, 862 F.2d 309 (3d Cir. 1988).

89 *Id.*

90 *Id.* at 66–67.

91 *Id.* at 67.

92 *Id.* at 69 n.2.

93 *See id.*

94 *Id.* at 69.

95 *Id.* at 68 n.1.

96 *Id.*

analysis.[97]

The courts' statements in both *Sere* and *Ohemeng* demonstrate that, similar to the courts' perceptions in the natural hairstyle discrimination cases outlined below, the judicial view of race is limited in its failure to recognize that race discrimination must encompass an employer's preference for characteristics and norms of white people, including skin tone and features that are in closer proximity to whiteness. Additionally, these cases highlight the courts' limited understanding of colorism. This limited understanding stems from their conflation of the evidence that should be accepted to make a prima facie showing in a colorism claim with the evidence that is accepted when a plaintiff alleges that an employer treats white employees more favorably than Black employees.[98] Thus, as Professor Cynthia E. Nance has proffered, only plaintiffs with rare "smoking gun" colorism claims are likely to prevail, particularly when such claims are brought under a disparate treatment Title VII claim.[99]

Surprisingly, one such smoking gun case arose in the Fifth Circuit in 2015. In *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, Esma Etienne, a Black waitress and bartender, sued her employer under Title VII and alleged that the company's general manager failed to promote her because of her race and color.[100] A sworn affidavit provided evidence that

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97 *See id.*

98 Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435, 464–65 (2005). *But see* Friedman v. Lake Cnty. Hous. Auth., No. 11 C 785, 2011 WL 4901280, at *2 (N.D. Ill. Oct. 14, 2011) (correctly stating that the plaintiff conflated her color discrimination claim with her race discrimination claim and failed to state a claim for color discrimination because she did not include any facts in her complaint to distinguish her color discrimination claim from her race discrimination claim in that she did not allege any facts relating to how "the color of her skin, specifically, motivated [her employer's] alleged discriminatory treatment" and because she did not refer to the "particular hue of her skin."). *See also* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 384 (1995) ("[T]o the extent that the courts construct a discrimination paradigm based solely or primarily on discriminatory intent or motive, the reach of Title VII will be limited to the rare number of obvious 'smoking gun' cases involving unsophisticated employers. Such a paradigm of discrimination takes what can be a very complex matter and whittles it down to a claim requiring proof that the employer's conduct was of the 'I did not hire you because you are [B]lack (or a woman or Latino[a/x] or Asian),' which fails to address and provide a remedy for other more subtle forms of discrimination and the associated biases, stereotypes, and proxies which exist in the 'real world.' Moreover, the 'smoking gun' paradigm provides no remedy for the past and current effects of 'societal discrimination' and does not address or provide remedies for subordination or racial castes. This development is not and should not have been unanticipated.").

99 Nance, *supra* note 98, at 445.

100 Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C., 778 F.3d 473, 474–75 (5th Cir.

the general manager allocated responsibilities to the employees according to the color of their skin and would not let dark-skinned, Black employees handle any money.[101] The manager also stated to another employee, on several occasions, that "Esma Etienne was too [B]lack to do various tasks at the casino."[102] Additionally, the individual who was hired for the position that Etienne sought was white.[103] Even with these facts, the district court granted summary judgment in favor of the employer and held that Etienne failed to make out a prima facie case of discrimination.[104] The Fifth Circuit vacated and remanded, finding that the comments made by the manager constituted direct evidence of racial discrimination related to the challenged employment decision.[105] While the Fifth Circuit reached the correct decision in this case, it is troubling that, even in a "smoking gun" case, the trial court did not. Significantly, the Fifth Circuit noted that "the district court seemed to pass over Etienne's claim that she was discriminated against on the basis of both race *and* her dark color because, when granting summary judgment, it relied heavily on the fact that most of the managers at Spanish Lake were of the Black race."[106] Thus, like in *Sere* and *Ohemeng*, the district court did not understand that a claim of colorism cannot be remedied merely by the presence of other Black people within the workplace without scrutinizing the make-up of skin tones within the work place. The Fifth Circuit further noted that this was the first time it had explicitly recognized "color" as a separate basis for discrimination, even though the text of Title VII unequivocally prohibits employment discrimination based on an individual's color.[107]

Two cases, however, provide hope that courts will not always strike down a plaintiff's colorism claim when there is no "smoking gun." In *Ofudu v. Barr Laboratories, Inc.*, the court went out of its way to preserve Agwukwu Ofudu's color claim, which was brought under Title VII, even though he failed to check the box on his EEOC complaint to indicate that he was making a color discrimination claim and presented no facts that he was discriminated against based on his color.[108] However, in preserving Ofudu's claim the court misstated the law by conflating his color discrimination claim with his race discrimination claim when it determined that "his allegations of race and color discrimination are not only reasonably related

2015).
101 *Id.* at 475.
102 *Id.*
103 *Id.* at 474 n.1.
104 *Id.* at 475.
105 *Id.* at 476–77.
106 *Id.* at 475 n.2.
107 *Id.* at 475.
108 Ofudu v. Barr Lab'ys, Inc., 98 F. Supp. 2d 510, 515–16 (S.D.N.Y. 2000).

but indistinguishable."[109]

A more legally sound conclusion was reached in *Arrocha v. The City of New York*, where Jose Arrocha, a Panamanian adjunct instructor with "a dark complexion" alleged that his department discriminated against "Black Hispanic[] [people]" in violation of Title VII and Section 1981.[110] Even though Arrocha only alleged race discrimination, the court determined that "discrimination based upon skin coloration [was] a more accurate description of the claim since it [alleged] that light-skinned Hispanic[] [people] were favored over dark-skinned Hispanic[] [people]."[111] Accordingly, the court determined that the fact that other "Hispanic[] [people]" were hired in the department was irrelevant since the discrimination claim was based on Arrocha's dark skin color.[112] *Arrocha*, therefore, provides hope that courts can and will identify a colorism claim even when a plaintiff has not specifically pleaded one.

A. *Scholarly and Administrative Solutions*

Based on the flaws in how courts have adjudicated colorism claims, a number of legal scholars have made recommendations for a shift in courts' and litigants' perspectives on how they view colorism claims. Some scholars have focused on the courts' historical failure to recognize non-ethnic, intra-racial discrimination, such as a colorism claim between a Black plaintiff and Black defendant. Professor Cynthia E. Nance, for instance, argues, that courts should not be concerned with the source of the employer's bias but instead should focus on "whether an adverse employment decision was made based on the impermissible basis of skin color."[113] This same argument was made by Sandi J. Robson who has stated that claims should "focus on the defendant's discriminatory motive alone, without reference to the plaintiff's status in any definable group."[114] Further, in response to courts' apprehension in being involved with "measur[ing] the skin tone," Robson has offered that measuring skin tone itself is unnecessary and that courts should only focus on the plaintiff's proof.[115] Thus, if a plaintiff proves

109 *Id.* at 515.

110 Arrocha v. City Univ. of N.Y., No. CV021868, 2004 WL 594981, at *1–2, 7 (E.D.N.Y. Feb. 9, 2004) (the plaintiff also sued under 42 U.S.C. § 1983 and section 296 of the New York State Human Rights Law).

111 *Id.* at *6.

112 *Id.*

113 Nance, *supra* note 98, at 474.

114 Sandi J. Robson, *Intra-Racial, Color-Based Discrimination and the Need for Theoretical Consistency After* Walker v. Internal Revenue Serv., 35 VILL. L. REV. 983, 1004 (1990).

115 *Id.* at 1001.

that she was discriminated against because of skin color, it is irrelevant how many shades apart the plaintiff and defendant are.

Moreover, Sonika R. Data has proposed five recommendations to clarify and improve the way colorism claims are adjudicated and understood.[116] Data advocates for:

> (1) the U.S. Department of Education to increase data collection and tracking on colorism; (2) civil rights advocacy organizations to bring forth adequately pleaded color discrimination claims; (3) courts to properly tease apart color and race claims when they are alleged; (4) courts to refrain from inserting their own biases when determining whether there is a material issue of skin color; and (5) courts to accept cultural evidence to understand the full nature of a complaint.[117]

Like Professor Nance and Robson's recommendations, Data's recommendations (2)-(5) focus on conceptual shifts that must be made by litigants and courts. Although Data's recommendations relate to Title VI rather than Title VII, they are instructive for claims brought under Title VII based on the similar intent of Title VI to prohibit discrimination on the basis of race and color.[118]

Along these same lines, the EEOC has engaged in efforts to identify and implement new strategies to strengthen its approach to combat racism and colorism.[119] In 2007, the EEOC launched an initiative called Eradicating Racism and Colorism from Employment (E-RACE).[120] In announcing the formation of E-RACE, the EEOC noted that it had observed a significant increase in employment discrimination charge filings based on color.[121] The EEOC also discussed a study conducted by a Vanderbilt University professor that found that those with lighter skin tones earn an average of eight to fifteen percent more than immigrants with the darkest skin tone.[122] Some of E-RACE's goals and objectives include

116 Data, *supra* note 87, at 1416.

117 *Id.*

118 42 U.S.C. § 2000d (prohibiting discrimination based on race, color, and national origin on programs or activities that receive federal funding).

119 Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace (Feb. 28, 2007), https://www.eeoc.gov/eeoc/newsroom/release/2-28-07.cfm.

120 *Id.*

121 *Id.*

122 *Why Do We Need E-RACE?*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/initiatives/e-race/why-do-we-need-e-race (last visited July 20, 2021).

improving data collection to track allegations of discrimination, "developing strategies, legal theories and training modules to address emerging issues of race and color discrimination," and engaging "the public, employers, and stakeholders to promote voluntary compliance to eradicate race and color discrimination."[123] Thus, importantly, the EEOC has taken on a data driven and educational approach to improve the quality and consistency of adjudicating color discrimination claims.

My recommendation in part IV builds upon the recommendations of the above scholars and the EEOC by advising that the legislative process be used to clarify the kind of harm that employment discrimination law should prevent with respect to colorism claims. Just as proponents of the CROWN Act have pushed jurisdictions to define race to include natural hairstyles, the term color should also be defined in such a way that courts consistently understand what the right to be free from discrimination based on color actually means. Of course, Title VII already protects people from discrimination based on color, however, as noted above, Title VII does not define the term color. Without a definition for "color," employers, particularly unsophisticated employers, will continue to fail to understand what color discrimination is. Thus, defining the term is also essential to prevent employers from participating in discriminatory practices before a claim reaches the courts.

III. A HISTORY OF FEDERAL HAIR DISCRIMINATION JURISPRUDENCE

An understanding of the legal history of hair discrimination claims and the inception of the CROWN Act is necessary to understand the recommendation that I have proposed in Part IV. One of the first documented hair discrimination cases offered a glimmer of hope with respect to the way courts would treat employees with Black hair in workplace discrimination cases. In *Jenkins v. Blue Cross Mutual Hospital Insurance*, the Seventh Circuit upheld a Title VII race discrimination claim against an employer where the employee claimed that she was discriminated against after working for the company for three years.[124] The plaintiff alleged that after she changed her hairstyle to an afro, she was denied a promotion because her supervisor said that she could not represent the company with an afro.[125] Of significance, the court stated that "Title VII is to 'be construed and applied broadly.'"[126] The

123 *E-RACE Goals and Objectives*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/e-race-goals-and-objectives (last visited July 20, 2021).

124 538 F.2d 164, 168–69 (7th Cir. 1976).

125 *Id.* at 165, 167.

126 *Id.* at 167 (quoting Motorola, Inc. v. McLain, 484 F.2d 1339, 1344 (7th Cir. 1973)).

court further noted that "grooming requirements" that apply particularly to Black people could constitute a sufficient charge of racial discrimination.[127] Unfortunately, since *Jenkins*, the court has only suggested, in dicta, that Title VII may prohibit employers from banning afros because afros are Black hair in its natural form.[128]

Accordingly, this section discusses the current posture of federal jurisprudence related to workplace hair discrimination claims to illustrate the courts' shortcomings in addressing such claims. Additionally, this section analyzes the origins of defining race within the United States' court system as a means to understand federal courts' current limited definition of the term. This section then concludes by examining laws and policies adopted by states, cities, municipalities, and administrative agencies that have expanded the definition of race to include hairstyles commonly associated with Black people.

A. *Striking Down Black Women's Claims of Race-Based Hair Discrimination*

Since *Jenkins*, courts have routinely rejected the cultural, political, and legal significance of Black hair styles, which makes these styles an intrinsic part of Black people's identity. While there is no shortage of legal scholarship that makes the point of *rightfully* critiquing the courts' general jurisprudence related to hair discrimination claims, a discussion of the case law is necessary to set the foundation for an understanding of the significance of the CROWN Act's expansion of the definition of race to include traits historically associated with race, such as traditionally Black hairstyles.[129] *Rogers v. American Airlines Inc.* is commonly cited to illustrate the courts' limited view on the definition of race in race discrimination claims. In *Rogers*, the plaintiff, Renee Rogers, a Black woman, challenged an American Airlines' policy that prohibited employees from wearing cornrows.[130] The plaintiff asserted her claims under Title VII and Section 1981.[131] The court struck down the plaintiff's complaint and rejected the plaintiff's argument that cornrows have a special significance for Black women and are "reflective of [the] cultural, [and] historical essence of the Black women in American

127 *Id.* at 168.

128 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("Plaintiff may be correct that an employer's policy prohibiting the 'Afro/bush' style might offend Title VII and section 1981.").

129 *See, e.g.*, Cal. Educ. Code § 212.1 (West 2021).

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

131 *Id.*

society."[132]

Of note, the court stated that American Airlines' policy concerned a matter of "relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII."[133] The court also determined that the policy applied equally to members of all races because the hair style is not worn exclusively by Black people.[134] In an attempt to bolster this opinion, the court commented that the plaintiff first began wearing cornrows at work soon after a white actress in the film "10" "popularized" the style.[135] The court further stated that while banning a Black person from wearing their natural hair[136] may constitute discrimination on the basis of an immutable characteristic, banning an all-braided hairstyle would not constitute discrimination because a braided hairstyle is an "easily changed characteristic."[137] As noted by Professor Ronald Turner, the court placed an unnecessary and peculiar burden on the plaintiff in *Rogers* to present evidence that demonstrated that all, almost all, or only Black Americans wore braided hair to support her claim of discrimination while simultaneously pointing to a single instance of a white woman wearing a braided hairstyle in a movie to conclude that the grooming policy applied equally to members of all races.[138]

The court's above analysis, particularly its statement that American Airlines' policy concerned a matter of "relatively low importance of the constitutional interests protected," amounts to gaslighting and is a result of a lack of understanding of Black women's hair.[139] This statement is particularly problematic where, in the United States, Black women face one of the highest unemployment rates, one that is nearly twice as high as white men.[140] Additionally, while Black women can wear their natural hair in an afro, for many Black women, low hair manipulation protective styles such as twists, single braids, cornrows, Bantu knots, and locs are the only option to prevent hair damage. As an alternative to these natural hairstyles Black women can straighten their hair by using chemicals or heat straighteners. However, these options present the risk of hair breakage.[141] With respect

132 *Id.* at 231–32.
133 *Id.* at 231.
134 *Id.* at 232.
135 *Id.*
136 Here, natural hair means Black hair as it grows from the scalp in its natural texture.
137 *Rogers*, 527 F. Supp. at 232.
138 Ronald Turner, *On Locs, "Race," and Title VII*, 2019 WIS. L. REV. 873, 896–97 (2019).
139 *Rogers*, 527 F. Supp. at 231.
140 *See* Koval & Rosette, *supra* note 18, at 749.
141 *See* Nonhlanhla P. Khumalo et al., *'Relaxers' Damage Hair: Evidence from Amino Acid Analysis*, 62 J. AM. ACAD. DERMATOLOGY 402, 402–08 (2010); Amy J. McMichael, *Hair Breakage*

to the use of extensions or hair weave,[142] these options can be expensive or may cause scalp irritation.[143] Moreover, all Black hair is not the same. While one hair style option may work for one Black woman, it may not be a viable option for a Black woman who has a different hair texture, certain financial constraints, or certain sensitivities to heat, products, or hair extensions. Accordingly, for Black women, deciding on a hairstyle is often a health choice rather than just a stylistic choice. Thus, the court in refusing to recognize these nuances, has in some instances, placed a crushing burden upon Black women by forcing them to choose between the health of their hair and their jobs.

Further, Professor Paulette M. Caldwell and Professor Angela Onwuachi-Willig have offered well-known analyses of the court's flawed decision in *Rogers*. Caldwell's critique of the court's decision focused on the court's inability to acknowledge the intersection of race and gender in that *Rogers* involved negative stereotypes about a Black woman's appearance; however, the court analyzed the plaintiff's sex and race discrimination claims separately and independent of one another.[144] Caldwell further opined that it is imperative to consider this intersection because attempting to combat discrimination through only the lens of racism *or* sexism has historically failed Black women.[145] Of importance to the analysis of the CROWN Act below, Caldwell pointed out that the court's reasoning was problematic particularly because it conceived of race and protection from discrimination only in biological terms, thereby separating braids from Black culture.[146] She further argued that employment discrimination laws should not only be focused on fixed and immutable concepts of race and gender, but also on behavioral manifestations of the negative associations and stereotypes related to those characteristics, especially as they relate to Black women. [147]

Professor Angela Onwuachi-Willig's analysis of *Rogers* proffered that under the court's own rationale, the court reached the wrong decision because "it's rationale was based on a flawed understanding of [B]lack hair . . . ."[148] Specifically, Onwuachi-Willig pointed to the court's "unspoken

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in Normal and Weathered Hair: Focus on the Black Patient, 12 J. Investigative Dermatology Symp. Proc. 6, 7 (2007).

142 Artificial or natural hair extensions that are attached into human hair by sewing, gluing, or with clips. *Weaves 101: Everything You Need to Know About Weaves*, Unruly, https://unruly.com/weaves-101-everything-need-know-weaves/ (last visited July 22, 2021).

143 Onwuachi-Willig, *supra* note 47, at 1118–19.

144 *See* Caldwell, *supra* note 47, at 371–81.

145 *See id.*

146 *Id.* at 378.

147 *Id.* at 387, 395–96.

148 Onwuachi-Willig, *supra* note 47, at 1088–89, 1093.

preference" for white women's hairstyles in suggesting that the plaintiff could, as an alternative to wearing a braided hairstyle, pull her hair into a bun and wrap a hairpiece around the bun during working hours.[149] As noted by Onwuachi-Willig, and what is understood by all Black women who adorn their crowns with their natural hair, pulling natural hair back into a bun can be very difficult and takes a great amount of effort to do so because of the texture of Black women's hair.[150] Importantly, the district court categorically excluded braided hairstyles from its definition of a natural hairstyle in spite of the fact that within the Black community braided hairstyles are considered natural hairstyles because often times they are the only means by which Black women are able to wear their hair "down" and in longer styles without the use of heat straighteners or chemical relaxers (also known as perms).[151] "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 [B]lack women."[152] Thus, while Professor Onwuachi-Willig agrees that race is a social construct, she simultaneously advanced the argument that practitioners can effectively argue that discrimination against natural hairstyles is discrimination on the basis of biological characteristics.[153] More specifically, practitioners can argue that African descendants' curly or coily hair texture, which is more conducive to locs, braids, and twists, are biological traits that many if not most African descendants possess.[154] Thus, when Black women are compelled to straighten their hair as a condition of employment, an employer places an undue burden on them, and therefore is discriminating against Black women on the basis of sex and race.[155]

More recently, the *Equal Emp. Opportunity Commission v. Catastrophe Management Solutions* case demonstrated that the courts' short-sighted view of what constitutes race has not changed.[156] In that case, the EEOC brought a claim under Title VII on behalf of a plaintiff whose job offer was rescinded because she refused to cut off her locs.[157] Before rescinding the plaintiff's job offer, the defendant's human resources manager told the plaintiff that the company could not hire her with locs because "they tend to get messy" and then told the plaintiff about a male applicant who was asked to cut off his

149 *Id.*
150 *Id.*
151 *Id.* at 1085, 1093.
152 *Id.*
153 *See id.* at 1086–87.
154 *See id.* at 1086–87, 1094, 1103–04.
155 *See id.* at 1120.
156 *See* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).
157 *Id.* at 1020.

locs in order to work for the company.[158] The defendant's grooming policy was as follows: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"[159] The Eleventh Circuit court upheld the district court's dismissal of the plaintiff's complaint on the ground that the plaintiff "did not plausibly allege intentional racial discrimination" by the defendant.[160] The circuit court also upheld the district court's denial of the EEOC's motion to amend its complaint to, amongst other things, include arguments that: (1) "race is a social construct and has no biological definition;" (2) "the concept of race is not limited to or defined by immutable physical characteristics;" (3) "the concept of race encompasses cultural characteristics related to race or ethnicity;" and (4) though some non-Black people do have hair texture that allow their hair to lock, locs are a racial characteristic, just as skin color is a racial characteristic.[161] The EEOC also sought to include the below explanation of Black hair in its amended complaint:

> The hair of [B]lack persons grows "in very tight coarse coils," which is different than the hair of white persons. "Historically, the texture of hair has been used as a substantial determiner of race," and "[locs] are a method of hair styling suitable for the texture of [B]lack hair and [are] culturally associated" with [B]lack persons. When [B]lack persons "choose to wear and display their hair in its natural texture in the workplace, rather than straightening it or hiding it, they are often stereotyped as not being 'teamplayers,' 'radicals,' 'troublemakers,' or not sufficiently assimilated into the corporate and professional world of employment.[162]

In response to the proposed amendments, the court stated that the EEOC failed to allege that locs are an immutable characteristic, and therefore the district court did not err in denying the EEOC's motion to amend its complaint.[163] Of importance, the EEOC advanced its arguments under a disparate treatment theory rather than making a disparate impact

158 *Id.* at 1021–22.
159 *Id.* at 1022.
160 *Id.* at 1020, 1035.
161 *Id.* at 1022, 1035.
162 *Id.* at 1022.
163 *Id.* at 1030.

argument.[164] Accordingly, the court did not consider the EEOC's arguments that it deemed related to disparate impact only.[165] This included the EEOC's arguments that expert testimony regarding "the racial *impact* of a [loc] ban" should have been allowed and that "the people most adversely and significantly *affected* by a [loc] ban…are African-Americans."[166] Based on the EEOC's filings, it is unclear why the EEOC did not advance a disparate impact discrimination claim.

The grooming policy set forth in *Catastrophe Management Solutions* is of particular importance because unlike in *Rogers*,[167] where the defendant had a grooming policy that categorically banned all braided hairstyles, the policy in *Catastrophe Management Solutions* was expressed in terms of what the company considered "professional" and "businesslike."[168] Thus, by forcing its employees to cut off their locs the company signaled its opinion that locs are not professional nor business like. What was implied in *Rogers* became explicit in *Catastrophe Management Solutions*, the courts have been willing to subscribe to the assumption that the standard for professionalism and appearance expectations in the workplace can be based on the characteristics and norms of white people. The court therefore signaled its endorsement of material subordination of the plaintiff in *Catastrophe Management Solutions* through the mechanism of trait discrimination.

B. *The Origins of Defining Race within the United States Legal System*

As noted above, Title VII does not include definitions for "race" or "discrimination."[169] The statute does, however, include definitions for "religion" and discrimination "because of sex" or "on the basis of sex"—although these definitions are incomplete.[170] Thus, the interpretation of

164 *Id.* at 1024.

165 *Id.* at 1024–25.

166 *Id.*

167 *Id.* at 1022.

168 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

169 42 U.S.C. § 2000e.

170 *See id.* § 2000e(j)-(k) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business . . . . The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in

what constitutes race discrimination has generally been left to the courts to decide. Congress' objective in enacting Title VII, as evinced by its plain language, was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[171] However, as noted above, the decisions reached in *Rogers*, *Catastrophe Management Solutions*, and a number of other cases that fail to protect Black workers against racial discrimination stem from the courts' reasoning that Title VII only provides protection from racial discrimination based on immutable characteristics and characteristics that the court deems "difficult to change."[172] Therefore, it is the courts' view that employment policies that involve mutable characteristics, or characteristics that can be "easily" altered—as judged by white normative standards—are non-discriminatory. Accordingly, courts have essentially strayed from the broad mandate of Title VII.

The Eleventh Circuit Court of Appeals set forth its opinion regarding the definition of race in *Catastrophe Management Solutions* when it stated:

> It appears more likely than not that "race," as a matter of language and usage, referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time. Although the period dictionaries did not use the word "immutable" to describe such common characteristics, it is not much of a linguistic stretch to think that such characteristics are a matter of birth, and not culture.[173]

The court's definition was offered in response to the EEOC's argument that

their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, [t]hat nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

171 Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

172 *See, e.g.,* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259, 266, 270 (S.D.N.Y. 2002) (upholding an employer's appearance policy that required its drivers with "unconventional" hairstyles, including locs, to wear hats); Pitts v. Wild Adventures, Inc., No. 7:06-CV-62, 2008 WL 1899306, at *1, *5–6 (M.D. Ga. Apr. 25, 2008) (citing *Rogers*, 527 F. Supp. 229, to conclude that an employee was not discriminated against when the amusement park employer introduced a new policy that "prohibited '[locs], cornrows, beads, and shells' that are not 'covered by a hat/visor'").

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

race is a social construct.[174] Instead of accepting the EEOC's argument, the court relied on an outdated and erroneous biological definition of race. The court defined race in this way by looking at dictionary definitions in existence at the time Title VII was enacted.[175] One of these definitions was from a "leading" 1961 dictionary that stated "RACE is anthropological and ethnological in force, usu[ally] implying a physical type with certain underlying characteristics, as a particular color of skin or shape of skull . . . although sometimes, and most controversially, other presumed factors are chosen, such as place of origin . . . or common root language."[176] In selecting this definition, the court used the rule of statutory construction that, in such cases, courts must discern the meaning of words by trying to determine their "ordinary, contemporary, common meaning."[177] The court's use of this constrictive definition of race in *Catastrophe Management Solutions* lends itself to the question, why does the court's understanding of race ignore social, historical, and cultural experiences and focus only on fixed physical appearance?

A look at the origin of defining race demonstrates that in many ways, the fixation on physical appearance rather than the social, historical, and cultural components of race was born from the courts' role in litigating the status—free or enslaved—of persons in America during the time that enslavement was legal. For instance, in 1806 in *Hudgins v. Wright*, Black hair took center stage in the Virginia Supreme Court of Appeals' definitions of and presumptions around race.[178] There, the plaintiffs were three generations of enslaved women who were of Black and "Indian" descent that sued for their freedom by arguing that they were descendants of a free "female ancestor."[179] The court was tasked with setting forth the burden of proof in "freedom cases,"[180] and determined that Black people had the burden of proving that they were free, while white people and indigenous people were presumed to be free.[181] Of note, in making this determination the court emphasized that hair was one of the most important characteristics—if not

174 *See id.* at 1022, 1027–28.

175 *Id.* at 1026–27.

176 *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1870 (unabr. 1961)).

177 *Id.* at 1026.

178 Hudgins v. Wright, 11 Va. 134, 139 (1806).

179 *Id.* at 134.

180 The Freedom cases are a litany of cases where enslaved persons sued enslavers for their freedom or made the claim that they had been wrongfully enslaved. *See* Luther Wright Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 523 n.61 (1995).

181 *Hudgins*, 11 Va. at 134, 139.

the most important characteristic—in distinguishing a Black person from any other race. It stated:

> Nature has stampt [sic] upon the *African* and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour [sic] either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the *African* constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or *Indians;* giving to 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.* Its operation is still more powerful where the mixture happens between persons descended equally from *European* and *African* parents. So pointed is this distinction between the natives of *Africa* and the aborigines of *America,* that a man might as easily mistake the glossy, jetty cloathing [sic] of an *American* bear for the wool of a black sheep, as the hair of an *American Indian* for that of an *African,* or the descendant of an *African.* Upon these distinctions as connected with our laws, the burthen of proof depends.[182]

In short, some of the earliest discussions about race within our legal system centered around the "fixed" characteristics and features of Black people, for the purpose of condemning Black people to enslavement.[183] Interestingly, *Hudgins*' emphasis on the texture of Black hair, however, leans towards supporting Professor Onwuachi-Willig's argument that African descendants' curly or coily hair texture, which is more conducive to locs, braids, and twists, is an immutable characteristic.[184]

In continuing to fixate on physical characteristics, the courts have ignored more contemporary legal scholarship related to what race is and how it should be defined. For instance, Professor D. Wendy Greene has

182 *Id.* at 139.

183 After enslavement ended, the courts continued to use racial classifications during the "separate but equal era" to determine where people could live, who they could marry, where they could attend school, where they could sit while using public transportation, etc. The courts relied heavily on distinctions in physical appearance between non-white people and white people to enforce obstructive racial statutes. *See* Wright, *supra* note 180, at 530; Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

184 *See* Onwuachi-Willig, *supra* note 47, at 1087, 1093–94.

called the court's immutability doctrine a legal fiction because the doctrine is not supported by the plain language of Title VII, and because "law and society have affixed and continue to affix racial meanings and associations to mutable and immutable characteristics."[185] Professor Greene has therefore advocated for the courts to adopt a broader understanding of race so that employment discrimination law reflects the nuances of racialization.[186]

Further, assuming *arguendo*, that the definitions the court in *Catastrophe Management Solutions* looked at were an accurate depiction of what race is, by focusing only on how race was defined in 1961—rather than what Title VII means by *race discrimination*—the court danced around the plaintiff's claim that the employer's loc policy, and statement that locs "tend to get messy," was based on an impermissible race-based stereotype. In other words, even if race has the "dictionary definition" that the court has prescribed to it, race-based employment discrimination is much more expansive. This was understood in 1971 by the court in *Rogers v. EEOC*, which, in discussing the scope of Title VII stated:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.[187]

185 *See* Greene, *supra* note 47, at 992, 1010, 1026.

186 *Id.* at 1010.

187 Rogers v. Equal Emp. Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *disapproved of by* Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54 (1984) (finding that an optometrist business discriminated against its only "Spanish surnamed American employee" by segregating its patients and rejecting the employer's argument that the plaintiff's allegation could not relate to an unlawful employment practice because plaintiff alleged discrimination against the employer's patients rather than the plaintiff).

Moreover, the Supreme Court has accepted that Title VII should apply against subconscious stereotypes and prejudices in race discrimination claims and in other kinds of discrimination claims. [188] Consequently, it should not have been a stretch to apply this same understanding with respect to the plaintiff's claim in *Catastrophe Management Solutions*. In their Brief of Amici Curiae, the NAACP Legal Defense & Educational Fund, Inc.; Legal Aid Society–Employment Law Center; Professor D. Wendy Greene; and Professor Angela Onwuachi-Willig wrote in support of the plaintiff/appellant's Petition for Rehearing En Banc and crystalized this point by arguing that the Eleventh Circuit did not give Catastrophe Management Solution's locs policy the scrutiny that is required by Title VII because the court did not identify that the ban was premised on the stereotype that Black people's inherent hair texture is extreme or messy when it is styled in a particular way.[189]

C. *State, City, Municipal, and Administrative Intervention*

The above history and analysis are what set the stage for states, cities, and municipalities to take a deeper look at redefining race to include discrimination against natural hairstyles in employment discrimination claims. Different jurisdictions have taken different approaches with respect to the language used, scope of coverage, and context provided in promulgating anti-hair discrimination laws, policies, and decisions.

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188 *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988) ("[E]ven if one assumed that any such discrimination can be adequately policed through disparate treatment analysis the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with 'a lot of money . . . for [B]lacks to have to count.' Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking [sic] has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ").

189 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant at 6–9, Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482), 2016 WL 7733072.

1. New York City's Commission on Human Rights Guidance

While California was the first state to pass the CROWN Act into state legislation, New York City was the first place in the country to set forth enforcement guidance related to discrimination on the basis of natural hairstyles.[190] The enforcement guidance, promulgated by the New York City Commission on Human Rights (the Commission), set forth that the "New York City Human Rights Law (NYCHRL) protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities. For Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."[191] This protection applies in a number of contexts, including employment.[192] The guidance specifically calls out what the court found to be non-discriminatory conduct in *Catastrophe Management Solutions* by stating that a grooming policy that requires employees to maintain a "neat and orderly" appearance that prohibits locs or cornrows "is discriminatory against Black people because it presumes that these hairstyles, which are commonly associated with Black people, are inherently messy or disorderly."[193] The guide additionally sets forth examples of violations of the NYCHRL, which include:

- A grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades which are commonly associated with Black people.
- A grooming policy requiring employees to alter the state of their hair to conform to the company's appearance standards, including having to straighten or relax hair (*i.e.*, use chemicals or heat).
- A grooming policy banning hair that extends a certain number of inches from the scalp, thereby limiting Afros.

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190 *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair 2019*, NYC Comm'n on Hum. Rts. (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf; Christine Kennedy, *The Strained Relationship Between Hair Discrimination and Title VII Litigation and Why It Is Time to Use a Different Solution*, 35 Notre Dame J.L. Ethics & Pub. Pol'y 401, 419 (2021).

191 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant, *supra* note 189, at 1.

192 *Id.* at 2; *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair 2019*, *supra* note 190.

193 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant, *supra* note 189, at 7.

- Forcing Black people to obtain supervisory approval prior to changing hairstyles, but not imposing the same requirement on other people.
- Requiring only Black employees to alter or cut their hair or risk losing their jobs.
- Telling a Black employee with locs that they cannot be in a customer-facing role unless they change their hairstyle.
- Refusing to hire a Black applicant with cornrows because her hairstyle does not fit the "image" the employer is trying to project for sales representatives.
- Mandating that Black employees hide their hair or hairstyle with a hat or visor.[194]

Of further note, while the substance of guidance focuses on Black people, the Commission makes clear that the guidance applies broadly to other impacted groups, such as Latin-x/a/o, Indo-Caribbean, and Native American people.[195] Given the expansive and thorough context and guidance set forth in the enforcement guidance, it serves as a model for cities to provide the maximum protection from prohibitions on natural hair and hairstyles within the workplace.

2. Chicago Commission on Human Relations Precedent

Guidance from Chicago's Commission on Human Relations on natural-hair discrimination, although not set forth as an enforcement guidance, predates New York City's Commission's guidance. While the Commission's ruling was made in the context of public accommodation law, rather than workplace discrimination, its ruling is instructive because of its finding that discrimination against hairstyles associated with Black people constitutes race discrimination.

In 2009, complainants Rafael Scott and Sheldon Lyke filed complaints with the Commission on Human Relations alleging that the owner of a club engaged in race discrimination by refusing to allow them into the club because of their braided hairstyles.[196] When Scott was denied

194 *Id.* at 7–8.

195 *Id.* at 1 n.2.

196 *See* Rafael Scott, Complainant v. Owner of Club 720, Respondent, CHR Nos. 09-P-02, 09-P-09, 1–2 (Chi. Comm'n. Hum. Rel. Feb. 16, 2011), 2011 WL 2132214 (final order on liability and relief). Although Scott and Lyke filed their complaints separately, the two cases were consolidated for purposes of the Commission's administrative hearing. It should be noted that Lyke also alleged religious discrimination in his complaint.

entry into the club, he asked if he could see the club's dress code policy in writing.[197] He was never allowed to see it.[198] He also saw women who had braids, and non-Black men who had spiked "Mohawk" hairstyles that were allowed to enter the club.[199] When Lyke was denied entry into the club he was stopped by two security guards who appeared to be Latino.[200] One of the security guards told him that the club did not allow people to enter the club with braided hair.[201] After his initial conversation with the security guards, Lyke was allowed into the club, but then was later told to leave because of the kufi he was wearing on his head.[202] When Lyke explained that he wore the kufi as a religious head covering related to his Muslim faith, the manager responded that he was not Muslim, and that if he did not take off the hat he would have to leave.[203] Lyke then gathered his belongings and left the club.[204] Of note, one of the security guard's hair was braided into pigtails.[205]

In adjudicating the complainants' claims, the Commission relied on Section 2-160-070 of the Chicago Human Rights Ordinance, which states that it is unlawful to discriminate against any individual concerning the full use of a public accommodation because of the individual's race.[206] The Commission determined that, in Scott's case,[207] the club's policy barring braids violated the Chicago Human Rights Ordinance based on the reasoning that (1) the policy had a clear and disparate impact on potential customers who are African American and (2) the policy disfavored a hairstyle associated with one racial group based on stereotypical assumptions about those who wear braided hairstyles.[208] Compellingly, unlike in *Rogers v. American Airlines Inc.*, where the court placed the burden on the plaintiff to present evidence that demonstrated that all, almost all, or only Black Americans wore braided hair to support her claim of discrimination, the

197 *Id.* at 3.
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 CHI. MUN. CODE § 2-160-070 (2021) (Chicago, IL).
207 With respect to Lyke, the Commission determined that the evidence did not establish a prima facie case of discrimination because he was allowed into the club and remained there without incident for two hours. The Commission did, however, determine that Lyke established a prima facie case for discrimination on the basis of religion because the club should have accommodated Lyke's religious practice by allowing him to remain in the club while wearing his kufi. *See Scott*, 2011 WL 2132214, at 5, 7.
208 *See id.*

Commission noted its authority to take administrative notice of facts which are "indisputable and capable of accurate and ready determination."[209] Consequently, the Commission took administrative notice of the fact that in Chicago cornrows and locs are overwhelmingly associated with and worn by Black people.[210] The Commission's decision to take administrative notice is significant, as taking on the task of proving what we in American society know and see daily with our own eyes (natural hairstyles such as braids, locs, and twists are commonly associated with Black people), would be unduly burdensome in terms of the time and cost of making such a showing.

Although the Commission's analysis was generally sound and it reached a favorable result with regard to the race discrimination claim, part of the Commission's reasoning raises an issue of classism within racism. The Commission stated that there was no "reasonable basis for associating the wearing of a braided hairstyle with the potential for criminal or disruptive conduct – in a large metropolitan area where African-Americans of all occupations and economic levels wear braided hairstyles."[211] This statement implies that if it were the case that only Black people of lower socio-economic status wore braids there may be reason to associate braided hairstyles with criminal or disruptive conduct. The Commission's statement highlights the "good Black" vs. "bad Black" dichotomy that tends to escape protection from discrimination law. Professors Devon Carbado and Mitu Gulati describe the issue by stating that while current employment discrimination law may reduce the possibility that employers will discriminate against all Black people, if an employer has a proclivity for race discrimination, that employer is likely to discriminate against a subgroup of Black people that the employer deems to be too Black in favor of Black people who act white enough for the employer's liking.[212] Under this reasoning, the implication of the Commission's statement is that if cornrows or braided hair were a style predominately worn by Black people of lower socio-economic status, braids may rightfully activate the stereotype of associating braids with criminality because working class Black people are too Black and therefore "bad Blacks." Thus, even where a judicial decision, statute, ordinance, etc., may reach a result that protects against discrimination, ensuring maximum protection entails scrutinizing subgroup bias that may be based on classism and/or performative differences of race.

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209 *See id.* at 5 n.9; Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981).

210 *Scott*, 2011 WL 2132214, at 5.

211 *Id.* at 6.

212 Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259, 1293–94, 1307 (1999).

3. Adopting the CROWN Act

The CROWN Act was first conceived by the CROWN Coalition, which is comprised of Dove,[213] Color of Change,[214] the National Urban League,[215] and the Western Center on Law & Poverty.[216] Dove's involvement in the coalition has been informed by its 2019 CROWN Research study which, amongst other data points, found that "Black women are 30% more likely to be made aware of a formal workplace appearance policy," "1.5 times more likely to be sent home from the workplace because of their hair," and "83% more likely to report being judged more harshly on their looks than other women."[217] In response to this data, the CROWN Act was first passed in California to prohibit employers from discriminating against employees who wear natural or protective hairstyles, such as braids, locs, and twists.[218] The CROWN Act achieved this by modifying the definition of race to include hair texture and hairstyles that are commonly associated with a particular race.[219]

While some states, such as California,[220] faced no documented political opposition in passing the CROWN Act, the Act has faced political opposition in a number of other states. For instance, in Colorado where the Act was eventually passed due to Democratic control at all levels of the state government, Republicans on the House Business Affairs and Labor Committee voted against it.[221] In opposing the Act, Republican

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213 Dove is a personal care brand that is owned by Unilever.

214 Color of Change is an organization that that aims to encourage decision makers in corporations and government "to create a more human and less hostile world for Black people in America." *About Color of Change*, Color Change, https://colorofchange.org/about/ (last visited July 9, 2021).

215 "The National Urban League is a historic civil rights organization dedicated to economic empowerment, equality, and social justice." *Mission and History*, Nat'l Urb. League, https://nul.org/mission-and-history (last visited July 9, 2021).

216 "Through a lens of economic and racial justice, Western Center on Law & Poverty fights in courts, cities, counties, and in the Capitol to secure housing, health care and a strong safety net for Californians with low incomes." W. Ctr. on L. & Poverty, https://wclp.org/ (last visited July 12, 2021).

217 JOY Collective, *The Crown Research Study: Creating a Respectful and Open Workplace for Natural Hair*, Dove 4 (2019), https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf.

218 *See* Cal. Educ. Code § 212.1 (West 2022).

219 *See id.*

220 S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

221 Erica Meltzer, *This Colorado Bill Bans Discrimination Against Ethnic Hairstyles. In Schools, Change Means Going Beyond the Dress Code*, Colo. Indep. (Feb. 10, 2020), https://www.coloradoindependent.com/2020/02/10/colorado-crown-act-hairstyle-

Representative Shane Sandridge stated, "where does a business-environment look end and racism begin?" He also compared appearance and grooming policies related to hair to workplace requirements that those in the financial service sector must wear a suit and tie.[222] Further, opposition in West Virginia led to the Act not being passed.[223] There, opponents stated that hair is not an important issue and that it did not seem necessary to pass a law that would protect it.[224] Moreover, although the Act was eventually passed in Nebraska, it was initially vetoed by Governor Pete Rickets who argued that the bill was not restricted to "immutable race characteristics."[225] The political opposition that has arisen in pushing to pass the Act mirrors the courts' reasoning in *Rogers*, *Catastrophe Management Solutions*, and a number of other court decisions that have failed to protect natural hairstyles. As evinced by the discourse in Colorado, West Virginia, and Nebraska, some law makers, like judges, have categorized such protection as unimportant and unrelated to a fixed racial characteristic.

As noted above, a number of states have signed the Act—or "CROWN Act-like" language—into legislation.[226] Additionally, several cities and counties around the country have passed the Act.[227] The language of the Acts which have been passed by different states, counties, and cities have varied, along with the legislative effort needed to pass them, as noted above. In certain jurisdictions, despite the progress made, potentially restrictive language remains that may impose hurdles on plaintiffs that bring hair discrimination claims.

Initially, one such jurisdiction was Montgomery County, Maryland.

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discrimination/.

222 *Id.*

223 Dave Mistich, *As Session Winds Down, House Judiciary Blocks Anti-Hair Discrimination, Medical Cannabis Proposals*, W. Va. Pub. Broad. (Mar. 3, 2020), https://www.wvpublic.org/news/2020-03-03/as-session-winds-down-house-judiciary-blocks-anti-hair-discrimination-medical-cannabis-proposals.

224 Jennifer Roberts, *UPDATE: CROWN Act 'Dethroned' in West Virginia, Bill Banning Hair Discrimination in the Schools and Workplace*, WVVA (Feb. 27, 2020), https://wvva.com/2020/02/27/beckley-student-motivation-for-crown-act-bill-banning-hair-discrimination-in-schools-and-workplace/.

225 Paulina Jayne Isaac, *The Crown Act Just Passed in Nebraska, Making Hair Discrimination Illegal*, Glamour (May 6, 2021), https://www.glamour.com/story/the-crown-act-passed-nebraska-hair-discrimination-illegal.

226 *See, e.g.*, S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019); S.B. 3945, 218th Leg., Reg. Sess. (N.J. 2019); H.B. 1048, 72d Gen. Assemb. 2d Reg. Sess. (Colo. 2020); H.B. 1514, 2020 Leg. Reg. Sess. (Va. 2020); H.B. 1444, 440th Gen. Ass., Reg. Sess. (Md. 2020); S.B. 192, 150th Gen. Assemb., Reg. Sess. (Del. 2021); B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021); L.B. 451, 2021 Leg., Reg. Sess. (Neb. 2021).

227 *See, e.g.*, Montgomery Cnty., Md., Cnty. Code § 27-6 (2019); New Orleans, La., Ordinance 33184 (2020); Columbus, Ohio, Ordinance 2280-2020 (2020).

Its CROWN Act provides that "*[p]rotective hairstyles* are those hairstyles necessitated by, or resulting from, the immutable characteristics of a hair texture associated with race, such as braids, locks, afros, curls, and twists."[228] This language was passed in Montgomery County before the state legislature passed and ratified the Act at the state level.[229] Fortunately, the language of the Act passed at the state level is somewhat broader and more expansive. It defines "protective hairstyles" as "includ[ing] braids, locks, and twists."[230] "Race" is defined as encompassing "traits associated with race, including hair texture, afro hairstyles, and protective hairstyles."[231] The Maryland bill does not include the phrase "immutable characteristics," eliminating a significant bar to potential recovery for future plaintiffs in that state.[232] As a result, with respect to hair discrimination claims, the legal fiction of immutability is no more.[233] Had the Maryland House of Delegates retained the phrase "immutable characteristics," Black people with finer textured hair or with hair textures more similar to that of non-Black people may have faced difficulty in bringing hair discrimination claims based on the argument that braids, twists, locs, and other natural hairstyles are not resultant from the immutable texture of their hair. Accordingly, Black men and women who wear braids, twists, locs, and other natural hairstyles as a cultural and stylistic choice rather than a choice associated with hair texture potentially would have lacked protection from discrimination.

Certain CROWN Act laws have also been limited by the syntax of the bills they have been passed with rather than by reference to a restrictive legal doctrine. For instance, the Delaware General Assembly limited its definition in the Delaware law by providing that "[p]rotective hairstyle includes braids, locks, and twists."[234] Although this specific listing of hairstyles is repeated in numerous Acts passed elsewhere, in those jurisdictions other language in the legislation provides that the list is non-exhaustive.[235] In Delaware there is no such caveat. Thus, courts there may view this as a free hand to limit hairstyle discrimination suits to only those brought based upon those specifically enunciated hairstyles.

Further, the laws in both Delaware and Broward County, Florida

228 MONTGOMERY CNTY., MD., CNTY. CODE § 27-6 (2019).

229 *Compare* B.30-19, 2019 Montgomery Cnty. Council (Nov. 5, 2019), *with* H.B. 1444, 440th Gen. Assemb., Reg. Sess. (Md. 2020).

230 H.B. 1444 § 1(F), 440th Gen. Assemb., Reg. Sess. (Md. 2020).

231 *Id.*

232 *See id.*

233 *See* Greene, *supra* note 47, at 1029–30.

234 S.B. 192, 150th Gen. Assemb., Reg. Sess. (Del. 2021).

235 *Compare id.*, *with* MORGANTOWN, W.V. ORDINANCES 153.02 (2021), *and* S.B. 3945, 218th Leg., Reg. Sess. (N.J. 2019), *and* S.B. 6209A, 242d Leg., Reg. Sess. (N.Y. 2019).

also include the phrase, "traits historically associated with race" in their definitions of race.[236] While this language aids in expanding the definition of race beyond the former parameters allowed by the immutability doctrine, historical association has previously been rejected as a basis for asserting a Title VII discrimination claim.[237] Additionally, plaintiffs may need to provide expert testimony to demonstrate that a trait is historically associated with a particular race. Such testimony could prove to be a costly measure for plaintiffs in these cases. Thus, like Professor Greene, I advocate that racial traits be viewed instead as "appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group."[238] Under this framework, courts could then get rid of the requirement that a plaintiff must prove that the racial characteristic in dispute—braids, locs, twists, etc.—is unique to Black people or only historically associated with Black people.[239]

In Pittsburgh, Pennsylvania, the CROWN Act was initially drafted in a robust and expansive form.[240] However, the broad and inclusive language of the earlier draft was eventually shaved down. The draft language initially included provisions allowing for hairstyle protection to extend to facial hair and "other forms of facial presentation."[241] This is significant because Black men who shave are prone to suffer from a painful skin condition known as pseudofolliculitis barbae (PFB), which may occur when skin in the beard area is irritated by ingrown hairs caused by shaving.[242] More specifically, the condition results from the hair curving as it grows back, making contact with the skin, and piercing the skin, which forms a pseudofollicle.[243] Of importance, PFB has been proven to be experienced almost exclusively by Black men.[244] Thus, grooming policies requiring that men be freshly shaven have disparately impacted Black men. Had the Pittsburgh Act been passed

236 Del. S.B. 192; Ordinance 2020-45.

237 Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

238 Greene, *supra* note 2, at 1385.

239 *See id.*

240 *See* Tom Davidson, *Pittsburgh Officials Change Language of Hairstyle Law to Remove Protection for Beards*, TribLIVE (Feb. 23, 2021), https://triblive.com/local/pittsburgh-officials-change-language-of-hairstyle-law-to-remove-protection-for-beards/; Pittsburgh, Pa., Ordinances ch. 659.01–04 (2020).

241 *See* Davidson, *supra* note 240.

242 Onwuachi-Willig, *supra* note 47, at 1098–99.

243 See *id.* at 1098–1100.

244 *Id.* at 1098.

in its original form, it would have represented a significant step towards correcting this harm at the city legislative level.

In other jurisdictions where the CROWN Act has passed, the language used has created broad and protective non-discrimination statutes. These versions of the Act have included language such as:

- *"cultural or religious headdresses* includes hijabs, head wraps or other headdresses used as part of an individual's personal cultural or religious beliefs;
- *protective hairstyles* includes such hairstyles as braids, locs, twists, tight coils or curls, cornrows, [B]antu knots, afros, weaves, wigs or head wraps; and
- *race* includes traits historically associated with race, including hair texture, length of hair, protective hairstyles or cultural or religious headdresses."[245]
- *"'Race'* is inclusive of ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles; and
- *'Protective hairstyles'* includes, but is not limited to, wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, [B]antu knots, afros and afro puffs."[246]
- *Hairstyles* includes "[h]air texture and styles of hair of any length, such as protective such as protective or cultural hairstyles, natural hairstyles, and other forms of hair presentation."[247]
- *"'Protective hair, natural and cultural hair textures and hairstyles'* include hairstyles and hair textures most commonly associated with race, including, without limitation, braids, cornrows, locs, [B] antu knots, Afros, and twists, whether or not hair extensions or treatments are used to create or maintain any such hairstyle, and whether or not the hairstyle is adorned by hair ornaments, beads or headwraps.[248]

New Mexico's law, which is inspired by the Act, is the most all-encompassing of any passed at the state level. Its inclusion of "weaves, wigs, or head wraps" in the definition of "protective hairstyles" is neither mimicked nor matched anywhere else among the state bills.[249] Further, the New Mexico

245 H.B. 29, 6655th Leg., 1st Sess. (N.M. 2021); S.B. 80, 55th Leg., 1st Sess. (N.M. 2021).

246 B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

247 Phila., Pa., Code § 9-1102 (2020).

248 St. Louis, Mo., Code of Ordinances ch. 15.21 (2021).

249 N.M. H.B. 29; N.M. S.B. 80.

Legislature included "cultural or religious headdresses."[250] This inclusion recognizes the multidimensional theory that Black and Muslim women often face discrimination against multiple aspects of their identity at once, and it protects against the layered discrimination that a Black Muslim woman with natural hair who elects to wear a hijab may face.[251]

Connecticut's Act is perhaps the most expansive of any state that passed the CROWN Act itself. Like New Mexico, it too protects wigs and headwraps, though weaves are not listed.[252] The Connecticut Act also protects "afro puffs," making it the only piece of legislation passed at any level to do so.[253]

At the local level, St. Louis's law offers a clear example of just how far an Act can reach. By using the language, "[p]rotective hair, natural and cultural hair textures and hairstyles" it explicitly pushed back on the notion that these hairstyles were "artifice," which the court describes as "hair that is not the product of natural hair growth."[254] The definition itself includes not only a lengthy listing of traditional Black hairstyles, but also importantly includes the language, "whether or not hair extensions or treatments are used to create or maintain any such hairstyle, and whether or not the hairstyle is adorned by hair ornaments, beads or headwraps."[255] Through this language, the Act also protects cultural hairstyles which make use of these ornaments and extends protection more forcefully not only to the hair, but to the cultural and ethnic expression made by that hair.

IV. A Need for "CROWN Act–Like" Intervention in Anti-Black Colorism Claims

As dissected above, the history of hair discrimination jurisprudence and the eventual conception and passage of the CROWN Act offer a number of lessons for consideration in crafting a legislative solution to combat anti-Black colorism. Based on these lessons, I propose five recommendations for constructing statutory language and a legislative history that advance protection against anti-Black colorism: (1) the language should take on a multi-dimensional approach and should not be limited to one particular

250 *Id.*

251 D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. Rev 333, 339, 341 (2013).

252 *See* B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

253 *See id.*

254 *See* St. Louis, Mo., Code of Ordinances ch. 15.21 (2021); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

255 St. Louis, Mo., Code of Ordinances ch. 15.21 (2021).

race; (2) in describing the trait protected, the language should avoid limiters such as the use of the term "historically associated" to avoid burdening complainants with the evidentiary hurdles related to this kind of phrase; (3) legislative reports and testimony should list examples of anti-Black colorism to assist in courts' and employers' understanding of how it shows up in the workplace; (4) legislative reports and testimony should set forth the impact of colorism on employment outcomes for dark-skinned, Black people such that courts and law makers will be less inclined to categorize colorism as a matter of low importance; and (5) the legislative language should be crafted in a flexible form that advances maximum protection against colorism generally.

The easiest way to provide consistency for courts, administrative agencies, and employers would be to amend Title VII to provide a definition for "because of color" and "on the basis of color" just as "because of sex" and "on the basis of sex" is defined within the statute.[256] However, as the struggle to pass the CROWN Act at the federal level[257] has demonstrated, a campaign amongst states and localities to define "because of color" where appropriate may prove to be swifter than waiting for federal legislation to pass. For purposes of this article, however, I will use the established framework of Title VII to set forth my proposed language for legislative reform, which is as follows:

> The terms "because of color" or "on the basis of color," include, but are not limited to, physical traits, historically, presently, and commonly associated with a particular racial group or racial subgroup; including, but not limited to, darker skin color, even

256 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 U.S.C. § 2000e–2(h)] shall be interpreted to permit otherwise . . . ").

257 A federal version of the CROWN Act was passed in the House of Representatives in September 2020, but then died in the Senate. The bill was reintroduced in Congress by a group of congressmembers in March of 2021. The bill was then passed again in the House of Representatives in March of 2022, but with no Republican support. *See Sen. Booker, Rep. Watson-Coleman Re-Introduce the CROWN Act*, Cory Booker (Mar. 21, 2021), https://www.booker.senate.gov/news/press/sen-booker-rep-watson-coleman-re-introduce-the-crown-act; Steven Benen, *House Passes CROWN Act, Bans Race-Based Hairstyle Discrimination*, MSNBC (Mar. 18, 2022), https://www.msnbc.com/rachel-maddow-show/maddowblog/house-passes-crown-act-bans-raced-based-hairstyle-discrimination-rcna20629.

> when the traits are not uniquely or exclusively attributed to a particular racial group or subgroup. Nothing herein shall preclude an employee from alleging discrimination because of color or on the basis of color even if the employee belongs to the same racial group or racial subgroup as the employer.

The "historically and presently, commonly associated with a particular racial group . . . " but "not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group" language above incorporates language crafted by Professor Greene in discussing *Rogers*, in the context of providing wording that would eliminate the requirement set forth in *Rogers* that a plaintiff must prove that a physical trait at issue is unique or exclusive to a particular racial group.[258] The emphasis on "darker skin" rather than skin color generally, while potentially controversial, reflects the fact that colorism impacts dark-skinned, Black people more negatively than light-skinned, Black people.[259] However, the caveat of "including, but not limited to" prior to the words "darker skin color" serves to not preclude claims legitimately brought by light-skinned plaintiffs. Of further note, the language above does not point to a particular race but instead takes a broader approach. This is because, as noted above, colorism impacts individuals from various races.[260] Finally, the second sentence proposed makes it abundantly clear that intra-group colorism claims[261] are permissible under Title VII.

Of note, only "darker skin color" is listed as a physical trait that is associated with a particular racial group or subgroup, even though traits like darker eye color, kinkier hair, broader nose, and fuller lips may also be associated with colorism claims. This is because including those terms may create a cause of action for individuals that colorism does not impact, e.g., a white woman with blonde hair and blue eyes who happens to have full lips. Thus, an explanation of how such features impact colorism claims may be better left for legislative reports to ensure that courts and employers understand the legislative intent in including "darker skin color" but leaving out other features. Additionally, and once again, the phrase "including, but not limited to" ensures that "darker skin color" can be considered in combination with other traits that are historically and commonly associated with a particular racial group or subgroup.

258 *See* Greene, *supra* note 2, at 1276, 1305.

259 *See* Harrison & Thomas, *supra* note 40, at 134.

260 *See* Nance, *supra* note 98, at 465, 474 ("The majority of the color discrimination cases have been brought by South-Asian employees.").

261 An intragroup colorism claim is a claim brought against an employer who is the same race as the defendant.

A. *Potential Opposition*

One of the biggest arguments against explicit recognition of colorism claims, particularly intragroup colorism claims amongst Black Americans is that they will distract and take away from race-based discrimination claims and the "bigger" problem of societal racism.[262] This argument, however, minimizes the substantial socioeconomic disadvantages that dark-skinned, Black people face due to colorism. This argument also ignores the fact that anti-Black colorism directly flows from anti-Black racism. Another argument against explicitly recognizing colorism claims is that light-skinned, Black plaintiffs will prevail in claims over dark-skinned, Black defendants, and receive even greater socioeconomic benefits and social capital, much like a white litigant prevailing in a "reverse discrimination" claim.[263] However, as Professor Banks has stated, these two circumstances are not analogous because reverse discrimination claims typically involve attacks on programs such as affirmative action in college admissions that are in place to increase diversity and remedy discrimination instead of individual cases of a person of color directing individual animosity at a person because they are white.[264] Accordingly, like Professor Banks, I argue that cases that involve skin-color based animus against an individual, even if that individual is light-skinned, should be permitted.[265]

Conclusion

The CROWN Act has been celebrated as a step in the right direction in the face of centuries of policing Black hair in the United States. It was conceived in response to decades of the courts' routine rejection of the cultural, political, and legal significance of Black hairstyles which makes these styles an intrinsic part of Black people's identity. An important feature of the Act is that it pushes back against the legal fiction of the immutability doctrine.[266] Although the direct impact of the Act is yet to be studied, it presents promise in its ability to counteract natural hair bias, which has had the impact of causing Black women to be perceived as "less professional,

262 *See* Banks, *supra* note 19, at 1741 (citing Recent Case, *Title VII-Discrimination on Basis of "Race" or "Color"–Federal Court Recognizes Cause of Action for Intraracial Bias.–*Walker v. IRS, *713 F. Supp. 403 (N.D. Ga. 1989)*, 103 Harv. L. Rev. 1403, 1408 (1990) and Bettye Collier-Thomas & James Turner, *Race, Class and Color: The African American Discourse on Identity*, 14 J. Am. Ethnic Hist. 5, 7 (1994)).

263 *See id.*

264 *Id.*

265 *See id.*

266 *See* Greene, *supra* note 47, at 992, 1025.

less competent, and less likely to be recommended for a job interview than Black women with straightened hairstyles and white women with either curly or straight hairstyles."[267] Although the courts and some politicians have relegated the issue of hair discrimination to a matter of low importance, proponents of the CROWN Act have recognized that the fight against natural hair discrimination is a fight for economic empowerment, cultural identity, and self-determination for Black people in the United States. Further, the CROWN Act serves as a remedy to one piece of the broader problem of anti-Black colorism in the United States, which has continued to thrive in part because of the courts' limited understanding of the intricacies of how colorism operates in its own distinct form. Although Title VII and Section 1981 provide avenues for discrimination claims based on "color," "CROWN Act-like" intervention is necessary to provide clarity and consistency with respect to colorism claims brought by dark-skinned, Black litigants.

267 *See* Koval & Rosette, *supra* note 18, at 741.