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**BETWEEN A LOC AND A HARD PLACE: A SOCIO-
HISTORICAL, LEGAL, AND INTERSECTIONAL ANALYSIS
OF HAIR DISCRIMINATION AND TITLE VII**

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TYRA ROBINSON**

Every year, Black people, including children, are reminded that they are inferior when they are turned away from jobs, have offers of employment rescinded, or are humiliated in front of family and friends due to the way their hair naturally grows out of their heads. When Black people bring claims of hair discrimination under Title VII, which are often intersectional claims, courts have created legal demarcations to separate afros from braids, locs, and twists.

We argue that grooming codes and hair bans must be situated in their socio-historical context for courts to truly understand how discriminating against someone on the basis of whether they are wearing braids, locs, or twists constitutes race discrimination under Title VII. Additionally, we argue that courts, which played a significant role in the legal and social development of race, should take an intersectional, socio-historical approach to analyzing grooming codes discrimination.

Part I discusses Title VII jurisprudence, including the “legal fiction” of immutability or the idea that racial characteristics are an “accident of birth.” Part II addresses the socio-historical and legal construction of what we now consider to be race, including the roots of white supremacy, the racialization of white people and the rampant

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* Trial Attorney, Department of Justice, Civil Rights Division. B.A., Colgate University, 2012. J.D., *cum laude*, University of Maryland Francis King Carey School of Law, 2017. I thank my family, Rhoenna Robinson, Dean Robinson, Agatha Robinson, and my partner, Tia Price, for their continued support and encouragement. I also thank the editorial staff at the Journal of Race, Religion, Gender and Class. I believe lawyers must be radical – we must seek to grasp things from the root – and that we must be on the hook for dismantling white supremacy and achieving Black liberation and collective liberation in our lifetime. This article is for all Black, Indigenous, Brown, and People of Color who were ever made to feel that they were not enough because of white supremacy, racism, and colonization. May we all follow the lessons of Octavia Butler and adrienne maree brown to “shape change,” and the call of Audre Lorde to use our anger as fuel. We will win. The ideas and views expressed in this article are my own and not those of the Department of Justice.

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*anti-Blackness that led to whiteness being considered the norm for all of humanity. Part III argues that this country's socio-historical development of race and whiteness impacts how our society views Black hair. It also discusses the seminal hair discrimination case of Rogers v. American Airlines, Inc., to illustrate the nuances of intersectional, race-based hair discrimination claims and how the courts continue to perpetuate white supremacy as they fail to truly reckon with race. Finally, Part IV outlines potential solutions to the courts failure to reckon with race, including taking a cue from the Supreme Court's recent decision in *Bostock v. Clayton County*.*

INTRODUCTION

“The Past Isn’t Dead. It Isn’t Even Past.” - Faulkner

Imagine walking into a job interview and being told that if you did not cut off your hair, your offer of employment would be rescinded.¹ Or, imagine, that you are in front of your friends and family getting ready to participate in a sporting event, and you are told you must cut off your hair in order to play.² This is a common occurrence for Black people across the United States and around the world.³ Since the inception of slavery, the United States’ original sin, Black people, specifically Black women, have had to risk losing opportunities like their jobs⁴ and

¹ Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY (Jul. 3, 2019), <https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue> (last visited Jan. 17, 2021).

² Michael Gold & Jeffery C. Mays, *Civil Rights Investigation Opened After Black Wrestler Had to Cut His Dreadlocks*, N.Y. TIMES, Dec. 22, 2018, at A20.

³ See Jameelah Nasheed, *Jamaica's High Court Gives Kingston School Right to Ban Locs*, TEEN VOGUE (Aug. 3, 2020), <https://www.teenvogue.com/story/jamaica-high-court-kingston-school-locs-ban>. Jamaica is the birthplace of Rastafarianism and the popularization of “dreadlocks,” “locks,” or “locs.” *Id.* Bans of locs in Jamaica, a majority-Black culture, show the breadth of anti-Blackness and how white supremacy has warped standards of what is considered beautiful. *Id.*

⁴ Christy Zhou Koval & Ashleigh Shelby Rosette, *The Natural Hair Bias in Job Recruitment*, SOC. PSYCHOL. AND PERSONALITY SCI. (Aug. 2020), <https://journals.sagepub.com/doi/10.1177/1948550620937937>.

education⁵ because of their hair. Additionally, Black women have suffered damage to their financial stability⁶ and their health and wellbeing⁷ due to being forced to kowtow to Eurocentric norms about professionalism and beauty. This article explores the social, cultural, historical, and legal implications of hair discrimination, and offers solutions for how the courts, namely the Supreme Court, can provide Black women with a legal remedy under Title VII.

I. A BRIEF PRIMER ON TITLE VII JURISPRUDENCE AND IMMUTABILITY

It is impossible to have a conversation about the state of Title VII jurisprudence as it relates to hair discrimination without first confronting race and white supremacy. Our legal system, including Title VII, are often ineffective remedies for addressing racial discrimination because our system is operating exactly as designed. That is, our current legal framework, indeed our entire society, operates to consistently perpetuate whiteness, including white people, white beauty, and white standards, as the norm. We see this reproduced across institutions and coded as “professional” or “businesslike,” especially in the workplace.⁸ Part I provides a brief overview of Title VII jurisprudence and the immutability doctrine.

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination in employment on the basis of the protected characteris-

⁵ See Janelle Griffith, *When Hair Breaks Rules: Some Black Children Are Getting in Trouble for Natural Hairstyles*, NBC NEWS (Feb. 23, 2019, 4:47 AM), <https://www.nbcnews.com/news/nbcblk/when-hair-breaks-rules-some-black-children-are-getting-trouble-n973346> (describing a schoolgirl who was sent home at the beginning of the school year for wearing braids) (last visited Jan. 17, 2021).

⁶ See Emma Axelrod, *The Effect of “Beauty” Standards in Professional America*, BROWN POL. REV. (Nov. 2, 2014), <http://www.brownpoliticalreview.org/2014/11/the-effect-of-beauty-standards-in-professional-america> (discussing a woman who was told she could have a successful career in broadcast news if she straightened her braided hair. The woman ended up changing majors and her career path).

⁷ See Areva Martin, *The Hatred of Black Hair Goes Beyond Ignorance*, TIME (Aug. 23, 2017, 4:01 PM), <https://time.com/4909898/black-hair-discrimination-ignorance/> (detailing The Good Hair Study, which found that Black women feel more anxiety about their hair compared to white women) (last visited Jan. 17, 2021).

⁸ See Aysa Gray, *The Bias of ‘Professionalism’ Standards*, STAN. SOC. INNOVATION REV. (Jun. 4, 2019), https://ssir.org/articles/entry/the_bias_of_professionalism_standards (discussing how the institutionalized centering of whiteness impacts white and Western standards of dress and hairstyle).

tics of race, national origin, religion, and sex (including sexual orientation and gender identity).⁹ Under Title VII, a plaintiff may bring a disparate treatment or disparate impact claim.¹⁰ To bring a disparate treatment claim, a plaintiff must prove intentional discrimination.¹¹ This can be achieved through the use of direct or circumstantial evidence.¹² If a plaintiff seeks to use circumstantial evidence, they must provide a prima facie case of discrimination under the *McDonnell Douglas Corp. v. Green*¹³ burden shifting framework.¹⁴ Under that framework and in the context of grooming discrimination claims, a plaintiff must prove that they are Black, that they were qualified for a position or were adequately performing that position, that they suffered an adverse employment action (e.g., termination), and that they were treated less favorably than others outside of their group or because of intentional discrimination.¹⁵ Once the plaintiff makes a prima facie case, the burden shifts to the employer to provide a legitimate nondiscriminatory reason for their hair policy.¹⁶ The burden then shifts to the plaintiff to provide direct or indirect evidence of pretext or falsity.¹⁷

Disparate impact claims may be more successful for plaintiffs seeking redress for hair discrimination. To bring a successful disparate impact claim, a plaintiff must show that a policy had an undue burden on them due to their race.¹⁸ Disparate impact claims reach policies that are fair or neutral in form, but are discriminatory in practice.¹⁹ To demonstrate a disparate impact claim, a plaintiff must prove a prima facie case of discrimination, tying discrimination to the reason for their termination.²⁰ To do so, a plaintiff may provide general population figures or statistical evidence showing that there was a substantial disparity

⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971) (“The objective of Congress in the enactment of Title VII . . . 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.”).

¹⁰ Dawn Bennett-Alexander & Linda Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 *CARDOZO J.L. & GENDER* 437, 441 (2016).

¹¹ Venessa Simpson, *What’s Going On Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads From Receiving Deserved Title VII Protection*, 47 *SW. L. REV.* 265, 278 (2017).

¹² *Id.*

¹³ 411 U.S. 792 (1973).

¹⁴ See Simpson, *supra* note 11, at 279.

¹⁵ See Simpson, *supra* note 11, at 279.

¹⁶ See Simpson, *supra* note 11, at 281.

¹⁷ See Simpson, *supra* note 11, at 279.

¹⁸ See Simpson, *supra* note 11, at 282.

¹⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²⁰ Simpson, *supra* note 11, at 283.

between them and other persons.²¹ Scholars have argued that claims advancing theories that Black hairstyles are immutable not because of culture, but because of the basic biology of Black hair, could be successful as a disparate impact suit.²² Once a plaintiff has made such a showing, the burden shifts to the employer to provide that the policy was job related and a business necessity.²³ The burden then shifts back to the plaintiff to provide that other employment options would serve the employer's interest without creating undesirable discriminatory effects.²⁴

Because racial discrimination in the workplace did not disappear after Congress passed Title VII, courts added an immutability standard to Title VII claims for employment discrimination.²⁵ Under this standard, Title VII *only* protects characteristics an employee cannot change.²⁶ Courts have used the immutability standard to find that Black hairstyles like twists, braids, and locs are mutable.²⁷ Curiously, these same courts have consistently found that afros, another traditionally Black hairstyle, are not.²⁸ The inherent difference between the two, according to the courts, is that twists, braids, and locs can be changed to comply with an employer's policy.²⁹ A Black person could opt to wear a wig, a hairpiece, relax their hair, or cut their hair off.³⁰ Conversely, a Black person could wear an afro as it is "the product of natural hair growth."³¹ The immutability standard is premised on the idea that race is a biological, fixed characteristic.³² However, research indicates that it is not.³³ Section II outlines the social, legal, and historical construction of race to shed light on what race is and is not.³⁴

²¹ Simpson, *supra* note 11, at 283–84.

²² Simpson, *supra* note 11, at 280–81.

²³ Simpson, *supra* note 11, at 283.

²⁴ Simpson, *supra* note 11, at 283.

²⁵ See EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1028–30 (11th Cir. 2016) (applying the mutable characteristic standard).

²⁶ See *id.* at 1032.

²⁷ *Id.* at 1030; see also *id.* at 1035 (holding that an employer did not discriminate against a job applicant when it refused to hire her because she would not cut off her locs); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (holding that a grooming policy that prohibited braided hairstyles was not racially discriminatory because braids are a mutable characteristic).

²⁸ See Rogers, 527 F. Supp. at 232 (finding that afros are closer to an immutable characteristic).

²⁹ *Id.*

³⁰ Simpson, *supra* note 11, at 287.

³¹ See Rogers, 527 F. Supp. at 232 (noting that banning a natural hairstyle would violate discrimination policies).

³² Sharona Hoffman, *Is there a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1096 (2004).

³³ *Id.* at 1122.

³⁴ See *infra* Section II.

II. WHAT'S RACE GOT TO DO WITH IT? THE SOCIAL AND LEGAL CONSTRUCTION OF RACE

What is race? In jumping through hoops to define mutable and immutable racial characteristics, courts have struggled to answer this question. Indeed, this question has stumped legal institutions for almost 500 + years.³⁵ Perhaps that is because *no one* has a clear definition for race. How could we when race was legally and socially created?³⁶ At its core, hair discrimination is rooted in white supremacist ideals about what bodies are beautiful.³⁷ Hair discrimination is reinforced by a system that prioritizes the skin, hair, and bodies of people who have been racialized as white over those who have been racialized as Black.³⁸ To understand hair discrimination and the immutability standard, one must first accurately define “race.”

Dr. Maulana Karenga defines race as “an arbitrary socio/biological classification created by Europeans during the time of worldwide colonial expansion, to assign human worth and social status using themselves as the model of humanity, for the purpose of legitimizing white power and white skin privilege.”³⁹ David Gillborn, a researcher known for his work in critical race theory defines white supremacy as a “political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”⁴⁰ Race and white supremacy have led us to a place where Black hair, in its loc’d, afro’d,

³⁵ See generally Hoffman, *supra* note 32, at 1113–36 (explaining the varying definitions of race across various institutions).

³⁶ Hoffman, *supra* note 32, at 1101.

³⁷ Crystal Powell, *Bias, Employment Discrimination, and Black Women’s Hair: Another Way Forward*, 2018 BYU L. REV. 933, 936 (2019) (“In most societies a woman’s hair is her beauty; and its absence becomes her ugliness. Slavery made the Black woman’s hair ugly[.]”).

³⁸ Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32(4) CRITICAL SOCIO. 649, 660 (2006).

³⁹ *Understanding & Dismantling Racism: MCARI Anti-Racism Workshop*, <https://www.ramseycounty.us/sites/default/files/Assistance%20and%20Support/Systemic%20Power%20Race.pdf> (last visited Oct. 29, 2020). The authors want to acknowledge that Dr. Karenga is a controversial figure; he was convicted and served time for the felonious assault and false imprisonment of a Black woman. Kirsten West Savali, *Kwanzaa: Revisiting Maulana Karenga’s Legacy*, THE ROOT (Dec. 28, 2017 9:00AM), <https://www.theroot.com/kwanzaa-revisiting-maulana-karenga-s-legacy-1821579446>. While we decry that act of violence against a Black woman’s body, this is the most accurate definition of race we have found.

⁴⁰ Vann R. Newkirk II, *The Language of White Supremacy*, THE ATLANTIC (Oct. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/10/the-language-of-white-supremacy/542148/>.

and braided glory, has been written off as unprofessional, ugly, and unnatural.⁴¹ This Section discusses this country's history of race, racism, and white supremacy, its roots in anti-Blackness, and its cultural and societal implications.

A. Whiteness

The “rules” of racial assignment and whiteness began percolating in this country long before enslaved Africans arrived.⁴² Before slave traders brought enslaved Africans to Turtle Island, this land was, and indeed still is, inhabited by indigenous peoples.⁴³ Among them was Pocahontas.⁴⁴ Though many of us first learned of Pocahontas through Disney's Pocahontas, her real life was much more disturbing. In 1614, Pocahontas married Tobacco tycoon John Rolfe.⁴⁵ This marriage was not one of love, but of politics and power.⁴⁶ The marriage was a political alliance between Rolfe and Pocahontas' father, Chief Powhatan.⁴⁷ While John Rolfe died a rich man,⁴⁸ Pocahontas, later baptized as Rebecca Rolfe, did not.⁴⁹ Unfortunately, Pocahontas died in England, separated from her family, in her early 20s.⁵⁰ However, before her death, she gave birth to a son, Thomas.⁵¹ The “rules” around race, racial as-

⁴¹ See *EEOC v. Catastrophe Mgmt. Sols.*, 837 F.3d 1156, 1159 (11th Cir. 2016) *opinion withdrawn and superseded*, 852 F.3d 1018 (11th Cir. 2016) (discussing that an employer would not employ an employee who had dreadlocks because they are “messy”).

⁴² See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING* 22 (Bold Type Books, 1st ed. 2020) (“Richard Mather and John Cotton inherited from the English thinkers of their generation the old racist ideas that African slavery was natural and normal and holy. These racist ideas were nearly two centuries old when Puritans used them in the 1630s to legalize and codify New England slavery[.]”).

⁴³ Howard Zinn, *A People's History of the United States 1492-Present* 13 (2001) (“When the Pilgrims came to New England they too were coming not to vacant land but to territory inhabited by tribes of [Native Americans]”).

⁴⁴ History.com Editors, *Pocahontas*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/native-american-history/pocahontas>.

⁴⁵ *This Day in History: Pocahontas marries John Rolfe*, HISTORY, (Apr. 2, 2020), <https://www.history.com/this-day-in-history/pocahontas-marries-john-rolfe>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Karen Ordahl Kupperman, *The Full Story of Pocahontas Is Rarely Told. Here's What We're Missing*, TIME (Mar. 12, 2019, 3:30 PM), <https://time.com/5548379/pocahontas-real-meaning/> (last visited Jan. 17, 2021).

⁴⁹ See History.com Editors, *supra* note 44 (describing that after Pocahontas died, her son, Thomas Wolfe, claimed his father's and grandfather's inheritances and became a successful tobacco farmer).

⁵⁰ See History.com Editors, *supra* note 44.

⁵¹ See History.com Editors, *supra* note 44.

signment, and white supremacy begin here because it is essential to understand the arbitrariness of race, racial assignment, and power allocation.

In 1640, years after the first enslaved Africans were brought to the United States, but before the American institution of slavery was born, three indentured servants, a Scotsman, a Dutchman, and an African named John Punch, ran away together.⁵² The three ended up getting caught.⁵³ When they did, the Scotsman and the Dutchman had four years added to their time.⁵⁴ John Punch, the Black man, received the sentence of perpetual servitude, thereby sentencing him to enslavement for life.⁵⁵ This represented the codification of slavery on the basis of racial phenotype.

John Punch's story would not be the first or last time that Blacks and poor whites engaged in organizing. In the 1670s, between 1676 to 1677, farmers of multiple classes, poor Black indentured servants, and slaves banded together with Nathaniel Bacon in a cross-racial, cross-class uprising against Virginia's Governor William Berkeley.⁵⁶ The uprising was swiftly crushed and the Virginia House of Burgesses cracked down on future uprisings via the Virginia Slave Codes.⁵⁷ Under the Virginia Slave Codes, a master had the right to correct a slave and would not be punished if the slave died.⁵⁸ The Codes encouraged free white people to hunt down Africans who had escaped slavery and to even capture free Blacks.⁵⁹ White men or women who married people of African or indigenous descent would be committed to jail and pay a fine.⁶⁰ The Slave Codes effectively ended any hopes at cross-racial organizing in the Virginia colony.

Virginia continued to create a color divide. In 1682, the Virginia House of Burgesses, the first legislative body in the new colonies, passed a law limiting citizenship to Europeans.⁶¹ All those who were not

⁵² Scene on Radio, *Seeing White: Made in America* (Mar. 16, 2017), http://www.sceneonradio.org/wp-content/uploads/2017/11/SeeingWhite_Part3Transcript.pdf.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* While this represented a cross-racial, cross-class uprising, the authors would be remiss to note that Nathaniel Bacon wanted the uprising to serve as an impetus for attacking indigenous people. *Id.*

⁵⁷ *Id.*

⁵⁸ Scene on Radio, *Seeing White: Made in America* (Mar. 16, 2017), http://www.sceneonradio.org/wp-content/uploads/2017/11/SeeingWhite_Part3Transcript.pdf.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

European at the time, including Black people, Moors, mixed-race individuals, and indigenous people were “slaves to all intents and purposes.”⁶² The House of Burgesses needed such a law because it was giving away land in 50-acre allotments to Europeans.⁶³ In 1691, the House of Burgesses passed another law that declared “[w]hatsoever English or other white man or woman, being free, shall intermarry with a negro, mullato, or Indian man or woman, bond or free, shall within three months after marriage be banished and removed from this dominion forever.”⁶⁴ This was the first documented use of the term “white” to describe full citizens.

About one hundred years later, in 1790, this country conducted its first census.⁶⁵ According to Nell Irvin Painter, this first U.S. census “counted people in these categories: white males 16 years and older, white males under 16, white females, all other free persons, and slaves. Remember, enslaved people were counted as 3/5 of a person for purposes of taxation and representation in Congress.”⁶⁶ In other words, being an American citizen meant being a white person.⁶⁷ That same year, our first Congress passed the Naturalization Act of 1790, which said that only free white persons could be naturalized as citizens.⁶⁸

These vignettes display a number of lessons. First, race, specifically whiteness, was socially and legally constructed. Second, the legal and social construction of race was meant to consolidate and maintain access to power, regardless of whether that power was land, money, or the ability to vote. On the flip side of the construction of whiteness was the entrenchment of pervasive anti-Blackness throughout the country.⁶⁹

B. The Roots of Racialization and anti-Blackness

For whiteness and race to truly “stick,” there had to be a group at the bottom. As demonstrated above, this country had already found a

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Scene on Radio, *Seeing White: Made in America* (Mar. 16, 2017), http://www.sceneonradio.org/wp-content/uploads/2017/11/SeeingWhite_Part3Transcript.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Nick J. Sciallo, Richard Sherman, *Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201, 212 (2014–2015) (“[W]hiteness sustains itself by anti-blackness in law, from employment discrimination to constitutional law to criminal law, then, legal actors are otherizing blackness not simply to demean a racial group, but instead of construct and sustain whiteness.”).

way to separate poor or indentured whites from poor, indentured, or enslaved Blacks.⁷⁰ The roots of anti-Black sentiment developed long before colonizers reached Turtle Island.⁷¹ According to Ibram Kendi, as Puritans studied the ideas of Aristotle, they began to internalize a racial hierarchy.⁷² Aristotle himself had labeled African people as having “burnt skin,” which was the original meaning of the term “Ethiopian” in Greek.⁷³ Kendi argues that although ethnic, religious, and color prejudice existed in the ancient world, the *construction* of race did not, therefore racist ideas and racism did not yet exist.⁷⁴ However, the foundations for what we now consider to be racial prejudice was laid.⁷⁵

Travelers to Africa depicted Africans as being “submissive to slavery,” because they were subhuman and “possess[ed] attributes that [were] quite similar to those of dumb animals.”⁷⁶ The scientific belief of the time was that if Negroes or Black people migrated to the cooler north, their skin would eventually turn white because they could physically assimilate to colder climates.⁷⁷ Thus, physically inferior Black people could adopt white skin and straight hair.⁷⁸

Religious justifications for slavery were also developing at this time. Specifically, there was a theory, derived from Genesis 9:18-29, that Black people were the descendants of Ham.⁷⁹ The theory, thus, argued that Ham’s color and slavery was the direct consequence of this curse.⁸⁰ The Portuguese ended up being the first Europeans to sail across the Atlantic to bring enslaved Africans back to Europe.⁸¹ At the time, many of the captives being sold in Western Europe were actually Eastern Europeans of Slavic origin.⁸² Hence, the term “Slavs,” or “slaves.”⁸³ However, as the market began to change and the captivity of Africans was increasing, “Western Europeans began to see the natural Slav(e) not

⁷⁰ Scene on Radio, *supra* note 52.

⁷¹ Turtle Island is the indigenous name for the lands we now know as North and Central America. Steven Newcomb, ‘Canada’ and the ‘United States’ Are in Turtle Island, Indian Country Today (Sept. 30, 2011), <https://indiancountrytoday.com/archive/canada-and-the-united-states-are-in-turtle-island-BuMvxVSitEG766jBQ2WplA>.

⁷² KENDI, *supra* note 42, at 16

⁷³ KENDI, *supra* note 42, at 16–17.

⁷⁴ KENDI, *supra* note 42, at 17.

⁷⁵ KENDI, *supra* note 42, at 17.

⁷⁶ KENDI, *supra* note 42, at 20.

⁷⁷ KENDI, *supra* note 42, at 20.

⁷⁸ KENDI, *supra* note 42, at 20 n.9.

⁷⁹ KENDI, *supra* note 42, at 21.

⁸⁰ KENDI, *supra* note 42, at 21.

⁸¹ KENDI, *supra* note 42, at 22.

⁸² KENDI, *supra* note 42, at 23.

⁸³ KENDI, *supra* note 42, at 23.

as White, but Black.”⁸⁴ In Portugal, these African captives were regarded as having “lived like beasts, without any custom of reasonable beings[.]”⁸⁵

When Spanish colonists arrived in the “New World,” they were armed with racist ideas about Blackness. Upon their arrival, Spanish colonists would call indigenous people *negros de terra* or “Blacks from the land.”⁸⁶ Newcomers to the United States believed that Black people were inherently cursed because they “were naturally and permanently inferior, and totally incapable of becoming White.”⁸⁷ This sentiment extended to when white colonizers arrived on Africa’s shores and would cut the hair off those they would later enslave.⁸⁸ Given that the seeds of racialization were slowly being planted, by the time John Cotton was drafting New England’s first constitution in 1636, he was legalizing the enslavement of people.⁸⁹ Kendi also notes that this sentiment of perpetual enslavement had reached British colonies including Barbados.⁹⁰ There, Bajan officials announced that “Negroes and Indians that come here to be sold, should serve for Life, unless a Contract was before made to the contrary.”⁹¹

Briefly, it is important to acknowledge the devastating toll this had on enslaved Africans and the havoc it continues to wreak on their descendants. Between the 1500s and the 1860s, some scholars estimate that slave traders captured between ten to fifteen million Africans.⁹² Between the time of capture and the Middle Passage, about ten to twenty percent of those captured died due to the process of being broken, tortured, and “seasoned.”⁹³ When enslaved African women had children, they were required to continue picking cotton, and often half of their

⁸⁴ KENDI, *supra* note 42, at 23 n.23.

⁸⁵ KENDI, *supra* note 42, at 23 n.5.

⁸⁶ KENDI, *supra* note 42, at 25.

⁸⁷ KENDI, *supra* note 42, at 31.

⁸⁸ Brenda A. Randle, *I Am Not My Hair: African American Women And Their Struggles With Embracing Natural Hair!*, 22 RACE, GENDER, AND CLASS J. 114, 117 (2015).

⁸⁹ KENDI, *supra* note 42, at 18.

⁹⁰ KENDI, *supra* note 42, at 18 (“In 1636, Barbados officials announced that ‘Negroes and Indians that come here to be sold should serve for Life, unless a Contract was before made to the contrary.’”).

⁹¹ KENDI, *supra* note 42, at 18 (emphasis in original) (quoting ALDEN T. VAUGHN, *ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE* 157 (N.Y. Oxford Univ. Press 1995)).

⁹² *Documenting Slave Voyages*, EMORY UNIV. (2018), <https://slavevoyages.org/voyage/database#tables> (last visited Jan. 17, 2021).

⁹³ *The Middle Passage*, PBS (1999), <https://www.pbs.org/wgbh/aia/part1/1p277.html>.

babies died in their first year of life.⁹⁴ By the time of the Civil War in 1863, there were four million enslaved Africans living in the United States.⁹⁵ During the mid-19th century, more than half of the babies of the four million enslaved Black people had died.⁹⁶ The American institution of slavery had been in effect for over two hundred years meaning that a majority of those enslaved had been born into slavery.⁹⁷ This is a hard history to write and accept, but it is a necessary foundation for discussing the roots of anti-Blackness and hair discrimination.

For many enslaved Africans, hair connected them to the cultures and lands they had been ripped from,⁹⁸ but living in a white supremacist society meant their hair was used against them.⁹⁹ The degradation and dehumanization of enslaved Africans continued once they reached this country's shores, extending down to their hair. In early racial trials, as this country sought to divide power and constantly shift what was considered white, hair was used as a proxy for race.¹⁰⁰ In 1806, a Virginia court declared that even if one's skin was light or white, a person's hair

⁹⁴ Steven Mintz, *Historical Context: Facts about the Slave Trade and Slavery*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-facts-about-slave-trade-and-slavery> (last visited Jan. 17, 2021).

⁹⁵ Stanley B. Burns, *Behind the Lens: A History in Pictures: Slavery and the Civil War*, PBS, <http://www.pbs.org/mercy-street/uncover-history/behind-lens/slavery-civil-war/> (last visited Jan. 17, 2021).

⁹⁶ Deidre Cooper Owens and Sharla M. Fett, *Black Maternal Health: Historical Legacies of Slavery*, 109 AM. PUB. HEALTH ASS'N. 1342, 1343 (Oct. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6727302/pdf/AJPH.2019.305243.pdf>.

⁹⁷ Steven Mintz, *Historical Context: Facts about the Slave Trade and Slavery*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-facts-about-slave-trade-and-slavery> (last visited Jan. 17, 2021) (“U.S. slaves where more generations removed from Africa than those in the Caribbean. In the nineteenth century, the majority of slaves in the British Caribbean and Brazil were born in Africa. In contrast, by 1850, most US slaves were third-, fourth-, or fifth generation Americans.”).

⁹⁸ Martin Childs IV, *Comment: Who Told You Your Hair Was Nappy?: A Proposal For Replacing An Ineffective Standard for Determining Racially Discriminatory Employment Practices*, 2019 MICH. ST. L. REV. 287, 302 (2019) (“[T]he significance of African-American hair can be traced back to Africa, where hairstyles were not worn solely for the purpose of beauty. Africans wore these hairstyles to identify each other's tribe, religion, or village. Africans also wore these hairstyles to signify when someone was going to war or to show that someone was in mourning.”).

⁹⁹ See *id.* at 303–04 (detailing how enslavement was used to strip enslaved Africans of their identity via their hair).

¹⁰⁰ See Anna-Lisa F. Macon, *Comment: Hair's The Thing: Trait Discrimination and Forced Performance of Race Through Racially Conscious Public School Hairstyle Prohibitions*, 17 U. PA. J. CONST. L. 1255, 1280 (2015) (“[H]air texture and hairstyle function as a fundamental proxy for race. ‘Hair texture [and hairstyle are] sought out as a proxy for the visual cues associated with race as a way to determine the terms, limits, and boundaries of social interactions.’”) (quoting Osagie K. Obasogie, *Can the Blind Lead the Blind? Rethinking Equal Protection Jurisprudence Through an Empirical Examination of Blind People's Understanding of Race*, 15 U. PA. J. CONST. L. 705, 751 (2013)).

texture was dispositive in determining their race.¹⁰¹ When enslaved Africans fled slavery, their hairstyles were used as descriptors.¹⁰² For example, a slave owner would cut an enslaved African's hair in an irregular manner as a punishment for fleeing her enslavement.¹⁰³ Hair was used as a vehicle to control Black bodies.

After Abraham Lincoln "freed the slaves," Black people were far from free.¹⁰⁴ Almost immediately after the Emancipation Proclamation abolished slavery for all people except those convicted of a crime, "black codes" emerged to criminalize and police Black bodies.¹⁰⁵ These "black codes" included laws that criminalized loitering, breaking curfew, being unemployed, walking near railroad tracks, and talking too loudly in the presence of white women.¹⁰⁶

In 1954, the Supreme Court held that separate but equal was inherently unequal in *Brown v. Board of Education I*.¹⁰⁷ There, the Court relied on the "doll test[s]" conducted by Black psychologists, Kenneth and Mamie Clark, during a 1940s tour of segregated Black American schools.¹⁰⁸ As many scholars noted, the Court's reliance on this social science research focused entirely on the ways in which Black children

¹⁰¹ D. Wendy Greene, *Title VII: What's Hair (And Other Race-Based Characteristics) Got To Do With It?*, 79 U. COLO. L. REV. 1355, 1366 (2008).

¹⁰² Barbara J. Heath, *Buttons, Beads, and Buckles: Contextualizing Adornment Within the Bounds of Slavery*, in *HISTORICAL ARCHAEOLOGY, IDENTITY FORMATION, AND THE INTERPRETATION OF ETHNICITY* 47 (Maria Franklin & Garrett Fesler eds., 1999).

¹⁰³ *Id.* at 55.

¹⁰⁴ See ZINN, *supra* note 43, at 197–99 (detailing how because property confiscated during the war reverted back to the heirs of Confederate owners, many Southern states enacted "Black codes," which "made the free slaves like serfs.").

¹⁰⁵ See Shayna Watson, *Black Codes and Dress Codes: Will Black Hair Always Be Against the Rules?*, THE ROOT (May 28, 2017, 9:03 AM), <https://www.theroot.com/black-codes-and-dress-codes-will-black-hair-always-be-1795599759>.

¹⁰⁶ See Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2257–63 (1998) (discussing the history of Black Codes and their continuing legacy through vagrancy and other laws).

¹⁰⁷ 347 U.S. 483, 692 (1954).

¹⁰⁸ Leila McNeill, *How a Psychologist's Work on Race Identity Helped Overturn School Segregation in 1950s America*, SMITHSONIAN MAG. (Oct. 26, 2017), <https://www.smithsonianmag.com/science-nature/psychologist-work-racial-identity-helped-overturn-school-segregation-180966934/>.

had internalized their inferiority, also known as internalized racial oppression.¹⁰⁹ The Court had an opportunity to center whiteness, white supremacy, and white violence, but instead chose silence.¹¹⁰ In doing so, the Court began to entrench the idea of race neutrality and immutability into civil rights law, which has played into white supremacy's hand and dug us into a hole so deep we cannot keep up.

In 1934, Congress passed the Federal Housing Act.¹¹¹ The federal government adopted these manuals and practices and channeled funds to white neighborhoods.¹¹² Specifically, the Home Owners Loan Corporation (HOLC) created color-coded maps that designated which areas were safe to insure mortgages.¹¹³ Anywhere that Black people lived or were close to were marked "red," making them too risky to insure.¹¹⁴ The Underwriting Manual of the Federal Housing Administration (FHA) recommended that highways were a good way to separate Black neighborhoods from white neighborhoods.¹¹⁵ Again, Black people, many of whom were the descendants of enslaved Africans, were marked as dangerous.

In the 1930s, President Roosevelt enacted the New Deal programs, including the Social Security Act.¹¹⁶ President Roosevelt's New Deal made \$120 billion (now approximately \$1 trillion) in loans available.¹¹⁷ About ninety-eight percent of those loans went to people who

¹⁰⁹ Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 801–02, n.33 (2002).

¹¹⁰ Angela Onwuachi-Willig, *Article: Reconceptualizing The Harms Of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019) (arguing that the Brown Court "completely failed to even name, much less recognize, the material benefits that had come to Whites, even poor Whites, as a result of Jim Crow racism," and that the Brown Court also failed to impart "important lessons about not just white privilege but also the dehumanizing effects of racial segregation on Whites.").

¹¹¹ National Housing Act, ch. 847, 48 Stat. 1246 (1934).

¹¹² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 64 (2017) ("Because the FHA's appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program. The FHA judged that properties would probably be too risky for insurance if they were in racially mixed neighborhoods or even in white neighborhoods near black ones that might possibly integrate in the future.").

¹¹³ See Fed. Hous. Admin., *Underwriting Manual: Underwriting and Valuation Procedure until Title II of the National Housing Act*, 937 (1938).

¹¹⁴ *Id.*

¹¹⁵ See ROTHSTEIN, *supra* note 112, at 122 (noting that the government went to great lengths to create racial division such as "routing interstate highways to create racial boundaries or to shift the residential placement of African American families.").

¹¹⁶ SYLVESTER J. SCHIEBER & JOHN B. SHOVEN, *THE REAL DEAL: THE HISTORY AND FUTURE OF SOCIAL SECURITY* 22 (1999).

¹¹⁷ *Where Race Lives: Uncle Sam Lends a Hand*, PBS (2003), https://www.pbs.org/race/000_About/002_06_a-godeeper.htm.

had been racialized as white.¹¹⁸ Because the language of the bill was race-neutral, anti-discrimination language was conveniently left out of it.¹¹⁹ Thus, race-neutral language was used to continue enforcing racist policies and practices. Similarly, the Social Security Act and the Fair Labor Standards Act of 1935, excluded agricultural and domestic workers, but did not explicitly name race.¹²⁰ At the more than 70 percent of agricultural and domestic workers were Black.¹²¹ The lack of naming race specifically led to their exclusion.

III. STAMPED: THE ENDURING LEGACY OF EUROCENTRIC BEAUTY NORMS ON TITLE VII JURISPRUDENCE

A. *White is Right*

This history of socially and legally constructed race, including whiteness, and deeply entrenched anti-Blackness, brought us to where we are today. Because Black people have constantly been dehumanized, animalized, and undervalued, we have not been considered the default when it comes to professionalism and beauty—people who have been racialized as white are.¹²² This section discusses how white supremacy permeates ideas around what it means to appear as “professional” or “businesslike.”

Under white supremacist systems, whiteness is “a yardstick for beauty[.]”¹²³ Even Thomas Jefferson, one of our founding fathers, valued and normalized long, straight, flowing hair.¹²⁴ He described white, flowing hair as an “elegant symmetry of form,” while describing Black people as orangutans.¹²⁵ Such a system only works when a group or

¹¹⁸ *Id.*

¹¹⁹ Adolph Reed Jr., *The New Deal Wasn't Intrinsicly Racist*, THE NEW REPUBLIC, (Nov. 26, 2019), <https://newrepublic.com/article/155704/new-deal-wasnt-intrinsicly-racist>.

¹²⁰ Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. (2010), <https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>.

¹²¹ See HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 97 (1977) (noting that the Fair Labor Standards Act did not apply to agricultural and domestic labor, where more than seventy percent of black workers were concentrated).

¹²² See Shelby Stewart, *Study shows Black women with natural hair less likely to get jobs, Twitter reacts*, CHRON. (Aug. 13, 2020, 3:16 PM), <https://www.chron.com/beauty/article/Study-shows-Black-women-with-natural-hair-less-15482010.php>.

¹²³ Kaili Moss, *Black Hair(tage): Career Liability or Civil Rights Issue?*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 191, 192 (2018).

¹²⁴ *Id.*

¹²⁵ *Id.* at 193.

groups of people are relegated to the lowest rungs of society.¹²⁶ Whiteness became beautiful and Blackness became ugly. In the 1700s, Black women in Louisiana were subject to Tignon Laws, which were ordinances that required them to cover their hair to signal their enslavement.¹²⁷

Given this historical context, Black people, for survival alone, have had to consistently move closer to a proximity to whiteness. That meant, if possible, having straight hair because, if you could never be white, at least you could have hair that reminded white people of whiteness. Less kinky or straight hair theoretically pushed one closer to whiteness.¹²⁸ The lighter one's skin, the more acceptable that person would be in a white supremacist society.¹²⁹ Black people have had to make these constrained choices due to surviving the horrors of slavery, the lynchings of the Jim Crow movement, or surviving enough to eventually build the same generational wealth this country has consistently robbed Black people of.¹³⁰

When Black people tried to build generational wealth, it often came on the back of the white is beautiful ideal.¹³¹ Madame C.J. Walker

¹²⁶ See JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND 98–99 (Thomas Bendyshe, 1969); THOMAS H. HUXLEY, *On The Methods And Results Of Ethnology*, in MAN'S PLACE IN NATURE AND OTHER ANTHROPOLOGICAL ESSAYS 209, 244–45 (1896) (“Of all the odd myths that have arisen in the scientific world, the ‘Caucasian mystery,’ invented quite innocently by Blumenbach, is the oddest. A Georgian woman’s skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as deviations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic ‘Adamic’ man.”).

¹²⁷ Jameelah Nasheed, *A Brief History of Black Hair, Politics, and Discrimination*, TEEN VOGUE (Aug. 9, 2019), <https://www.teenvogue.com/story/a-brief-history-of-black-hair-politics-and-discrimination#:~:text=In%20order%20to%20diminish%20%E2%80%9Cexcessive,slave%20class%20%E2%80%94%20despite%20the%20fact>.

¹²⁸ See Shayna Watson, *Black People Please Stop Saying Straightening Our Hair Is Appropriation*, THE ROOT (Oct. 22, 2016, 6:14 AM), <https://www.theroot.com/black-people-please-stop-saying-straightening-our-hair-1790857373> (“Even after slavery ended, black women who straightened their hair were seen as being more “well-adjusted” and had an easier time gaining employment from white employers than women who maintained their natural texture.”).

¹²⁹ Simpson, *supra* note 11, at 286.

¹³⁰ See Deborah A. Rosen, *Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric*, 58 Am. J. Legal Hist. 126, 136 (2018) (detailing the consequences enslaved Africans faced if they refused to conform to the demands of slavery-related laws); KENDI, *supra* note 42, at 273–74 (noting that lynchings spiked in the 1890s because Black people were resisting segregation); Anthony C. Thompson, *Symposia: Stepping Up To The Challenge of Leadership on Race*, 48 Hofstra L. Rev. 735, 736 (2020) (“Race cleaves the country into two competing visions of who is dangerous and who is not; who has power and who does not; who enjoys the benefits of generational wealth and who does not; who is entitled to voice and who is not.”).

¹³¹ See Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007) (describing how Black people have had to “accommodate” and downplay their Blackness as a means for survival and advancement in society.).

became this country's first Black millionaire by selling other Black women hair products that would make their hair straighter.¹³² Madame C.J. Walker and other Black women clearly viewed their hair "as an indicator of [their] gender, social class, sexual orientation, political views, religion, and even age."¹³³ Today, many of the country's leading Black hair companies, which are often owned white-owned, continue to profit off a society that degrades and devalues Black hair and Black bodies.¹³⁴

B. *Black Resistance to Eurocentric Ideals*

Because of the normalization of whiteness and white standards as the norm for humanity, any acceptance or pride around the natural form and aesthetics of Black hair is an act of resistance against white supremacy and act of self-empowerment for Black people. This conclusion is demonstrated by the fluid and transformative history of Black peoples' acceptance, rejection, detachment, and linked relationship between Black people and our hair.

In the 1960s and 1970s, Black people began to push back against white beauty standards via the "Black is Beautiful" movement.¹³⁵ For instance, the Black activist Angela Davis, wore an afro as a sign of Black power.¹³⁶ Given her relationship with the Black Panther Party, however, Angela Davis and afros were quickly written off as being "militant."¹³⁷ The Black is Beautiful movement of the 1960s reaffirmed for Black people and for the broader white society, that whiteness, including white skin, hair, and ideals, were not the gold standard, and that Black people loved themselves.¹³⁸

¹³² Mallory, Morgan Simone, *When the Sun of Cultural Beauty Rises, the Competent Mind Remains Resilient!': The Journey of Title VII and the Story of Natural Hair*, S. UNIV. L. REV. (forthcoming).

¹³³ Randle, *supra* note 88, at 119.

¹³⁴ Seren Morris, *From Shea Moisture to Carol's Daughter, This List of Non-Black-Owned Hair Brands May Surprise You*, NEWSWEEK (June 9, 2020, 11:42 AM), <https://www.newsweek.com/list-non-black-hair-brands-shea-moisture-carols-daughter-1509677>.

¹³⁵ PAUL C. TAYLOR, *BLACK IS BEAUTIFUL: A PHILOSOPHY OF BLACK AESTHETICS* 16 (Wiley 2016).

¹³⁶ Monica C. Bell, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 131 (2007).

¹³⁷ Kayla K. Jackson, *Passively Black, Actively Unprofessional: Beyond a Fault-Based Conception of Black Women's Identity and Hairstyling in Title VII Jurisprudence* (Mar. 20, 2019) (Honors Theses, Bates College) (on file with SCARAB: Digital Commons@Bates).

¹³⁸ See MAXINE LEEDS CRAIG, *AIN'T I A BEAUTY QUEEN?: BLACK WOMEN, BEAUTY, AND THE POLITICS OF RACE* 24 (2002) (explaining the emergence of the Black is Beautiful movement in the 1960s).

This was one of the first times that Black people, on a national scale, attempted to reconnect with their African heritage and culture.¹³⁹ This revolution led to a resurgence in representation for Black people in film. The 1960s produced films such as “Guess Who’s Coming to Dinner,” which occurred six months after the Supreme Court decided *Loving v. Virginia*.¹⁴⁰ Black people began to be portrayed on television not as “the help,” but as Black professionals.¹⁴¹ Black journalists talked about race on talk shows.¹⁴² Black people danced and evoked Black joy on shows like *Soul Train*.¹⁴³ As an excerpt from Alice Walker’s *Living by the World* articulates, Black people and our hair are both separate and one-in-the same:

I realized I had never been given the opportunity to appreciate hair for its true self. That it did, in fact, have one. I remembered years of enduring hairdressers—from my mother onward—doing missionary work on my hair. They dominated, suppressed, controlled. Now, more or less free, it stood this way and that. I would call up my friends around the country to report on its antics. It never thought of lying down. Flatness, the missionary position, did not interest it. Being short, cropped off near the root, another missionary “solution,” did not interest it either. It sought more and more space, more light, more of itself. It loved to be washed; but that was it.¹⁴⁴

This intimate connection makes it such that Black people relate to our hair as a part of ourselves, but we also are forced to continuously take into account what our hair means to other people. Throughout our history, Black people have continued to resist hair-related oppression at every turn:

¹³⁹ Griffin, *supra* note 1.

¹⁴⁰ Kimberly Marcela Duron, *Old v. New: Race and Relationships in ‘Guess Who’s Coming to Dinner’ and ‘The Big Sick’*, FILM INDEP. (Sep. 29, 2017), <https://www.filmindependent.org/blog/old-v-new-race-relationships-guess-whos-coming-dinner-big-sick/>.

¹⁴¹ See *Black is Beautiful: The Emergence of Black Culture and Identity in the 60s and 70s*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/blog-post/black-beautiful-emergence-black-culture-and-identity-60s-and-70s> (discussing Diahann Carroll’s portrayal of a nurse, widow, and single mother in the comedy “Julia.”).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Alice Walker, *Oppressed Hair Puts a Ceiling on the Brain*, in *LIVING BY THE WORLD* (1987).

1700 - Black women slaves who worked in produce fields covered their hair to protect it from harsh conditions they were forced to work in.¹⁴⁵ Black women slaves who worked in slave master houses sometimes copied the hairstyles of the slave masters.¹⁴⁶

1960 - My Black is Beautiful sentiment spreads throughout the Black community; Black Panther Party claims the afro as part of their uniform.¹⁴⁷

2019 - First legislation passed in two states in the United States making hair discrimination illegal as a part of race discrimination.¹⁴⁸

2020 - Certain appearances of Black natural hair are generally accepted, other types and forms are still looked down upon.¹⁴⁹

Considering this timeline, and also considering the four-hundred plus years of oppression Black people faced and continue to face due to white supremacy, racism, and anti-Blackness, it is not difficult to imagine that the remedies of the legal system have been inadequate to provide Black people protection or justice.

C. Critical Race Theory, Intersectionality, and the Need for These Legal Theories

Critical race theory developed from a group of legal scholars discussing the shortcomings of the American legal system in its attempts (or lack thereof) to address racial injustice¹⁵⁰ established and perpetuated by American institutions. “Critical race theory is a body of legal

¹⁴⁵ Griffin, *supra* note 1.

¹⁴⁶ Griffin, *supra* note 1.

¹⁴⁷ Griffin, *supra* note 1.

¹⁴⁸ Nasheed, *supra* note 127.

¹⁴⁹ See Tina Amo, *Problems in the Workplace for Persons Who Wear Dreadlocks*, CHRON (detailing the problems people face when wearing dreadlocks), <https://work.chron.com/problems-workplace-persons-wear-dreadlocks-19400.html> (last visited Jan. 17, 2021).

¹⁵⁰ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking back to Move Forward*, 43 CONN L. REV. 1253, 1263–65 (2011).

scholarship, a majority of whose authors are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law.”¹⁵¹ Kimberle Crenshaw coined both intersectional legal theory intersectionality.¹⁵² Intersectionality is the understanding of identity categories and their significant intersection when people experience inequities.¹⁵³

As racism goes, it permeates many aspects of the lives of which it oppresses. Hair discrimination is a tentacle of racism and functions as such. The various cases of hair discrimination that have happened recently and over history not only affect Black people psychologically, but also in a more immediate sense financially. Hair discrimination, and race discrimination generally of course, affects a person’s access to money, capital, and generational wealth.¹⁵⁴ Job offers rescinded,¹⁵⁵ salary increases denied,¹⁵⁶ and blocked educational opportunities¹⁵⁷ are only a few of the repercussions that Black people face because of hair discrimination.

The legal structure in the United States utterly fails to account for racial equity in analysis and provision of legal remedies to litigants and affected parties. Given the history of this country and the demonization of Black people in every conceivable way, recognition of this fact at least warrants a judicial analysis that considers the humanity and suffering of Black people.

Regardless of courts’ reasoning that a specific hairstyle is not an “immutable characteristic,” the fact is that a white person in the same

¹⁵¹ DERRICK BELL, *THE DERRICK BELL READER* 78 (Richard Delgado & Jean Stefanie eds., 2005).

¹⁵² Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019, 9:09 AM EDT), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>.

¹⁵³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

¹⁵⁴ See, e.g., Caitlin Mullen, *Black Women’s Hair Choices Can Affect Their Job Chances*, *Study Says*, BIZWOMEN (Aug. 24, 2020, 8:37 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/08/black-womens-hair-choices-can-affect-their-job.html?page=all>; see also Tanehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (describing the myriad of ways that racism has robbed Black people from generational wealth building).

¹⁵⁵ EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (11th Cir. 2016).

¹⁵⁶ Heidi Macomber, *Jackson National Life Insurance to Pay \$20.5 Million To Settle EEOC Lawsuit* (Jan. 9, 2020), <https://heidimacomber.com/2020/01/09/jackson-national-life-insurance-to-pay-20-5-million-to-settle-eEOC-lawsuit/>.

¹⁵⁷ Andre M. Perry, *School Dress and Grooming Codes are the New ‘Whites Only’ Signs*, BROOKINGS: BROWN CTR. CHALKBOARD (Feb. 14, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/02/14/school-dress-and-grooming-codes-are-the-new-whites-only-signs/>.

scenario would not be penalized for the way in which they wore their hair naturally or otherwise. The counterargument that a white person wearing their hair in a generally unacceptable way, such as a bright orange mohawk in a conservative workplace, does not mirror the ordinary Black person's experience with hair discrimination. When Black people push back against these prevailing norms, whiteness is weaponized against them.¹⁵⁸

D. Backlash: *Rogers v. Am. Airlines*

Critical race theorists, like Kimberlé Crenshaw, have argued that Title VII's categorical framework benefits white women and Black men, often at the exclusion of Black women.¹⁵⁹ Given the courts' confusion about intersectionality and claims that involve both race and gender-based discrimination, Black women often get the short end of the stick when it comes to grooming cases.¹⁶⁰

Renee Rodgers, an American Airlines employee, wore her hair to work in cornrows.¹⁶¹ In the same ways that Black codes were historically used to reign in Black behavior and expression, American Airlines implemented a grooming policy that banned braided hairstyles.¹⁶² Rodgers argued that American Airlines' race neutral policy constituted race and sex discrimination in violation of Title VII.¹⁶³ Rodgers attempted to bring an intersectionality claim, arguing that the policy uniquely discriminated against Black women.¹⁶⁴ Rodgers asserted that American Airlines' policy was just like bans on afros, because braids also had historical and cultural significance to Black women.¹⁶⁵

¹⁵⁸ Aysa Gray, *The Bias of 'Professionalism' Standards*, STAN. SOC. INNOVATION REV.: HUMAN RTS. (June 4, 2019), https://ssir.org/articles/entry/the_bias_of_professionalism_standards.

¹⁵⁹ Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 8 (2019).

¹⁶⁰ Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 134 (2001) ("Black men (unlike Black women) have been able to successfully litigate hair-grooming policies as racially discriminatory.").

¹⁶¹ The plaintiff's last name is actually Rodgers but is referred in the official case as Rogers. See Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. Am. Airlines*, in RACE LAW STORIES 571, 575 n.12 (Devon W. Carbado & Rachel F. Moran eds., 2008).

¹⁶² *Id.* at 576.

¹⁶³ *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

¹⁶⁴ Caldwell, *supra* note 161, at 573.

¹⁶⁵ *Rogers*, 527 F. Supp. at 231–32.

The *Rogers* court disagreed.¹⁶⁶ The court grounded its analysis in the immutability doctrine and held that to find braids immutable, it needed evidence that Black people predominantly or exclusively wore braids.¹⁶⁷ As evidence that Black people did not exclusively wear braids, the court looked to the fact that Bo Derrek, a white actress, wore cornrows in the movie “10.”¹⁶⁸ The court reasoned that Bo Derrek, not Black culture, popularized cornrows.¹⁶⁹ Because Rodgers’ braids were the result of synthetic hair extensions, the court found that her cornrows were an “easily changeable artifice.”¹⁷⁰

Had the court grounded its analysis in the socio-historical context detailed in Part II,¹⁷¹ it would have realized two things. Firstly, its analysis that Bo Derrek popularized cornrows served, yet again, to hold Black hair to a white, Eurocentric standard. Secondly, that race is *not* an immutable characteristic, but has shifted over time given social and legal norms. Such an understanding would have enabled the court to ascertain that it is prevailing racial stereotypes and biases about Black hair that are “immutable,” not Black hair or race itself. Courts’ reluctance to do the painstaking work of incorporating a socio-historical and intersectional lens into its legal analysis creates a double-edged sword for Black people in the workplace. On one hand, Black people can manipulate their hair to comply with an employer’s standards, or they can forego the risk of Title VII’s protections, depending on whether they have afros, braids, locs, or twists. Working through a socio-historical and legal analysis of the development of race would render the immutability doctrine a “legal fiction.”¹⁷²

The immutability doctrine is a “legal fiction” because is not based in fact, but has very real consequences for Black people challenging discrimination in the workplace.¹⁷³ Under the immutability standard,

¹⁶⁶ *Id.* at 232 (“An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.”).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See supra* Part II.

¹⁷² 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. MIA. L. REV. 987, 1029 (2017) (“Strict immutability, therefore, serves as a “legal fiction”: a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion.”).

¹⁷³ *Id.* at 1029–30.

as evidenced in *Rogers*, employers can and do consider applicant's appearances when making hiring decisions.¹⁷⁴ This puts Black people in a bind, especially when it comes to their hair. If a Black woman with locs walks into an interview and is told she must either take her locs down or get rid of them altogether, she is faced with a hard choice: risk unemployment or risk putting her hair into a style that will damage the fine structure of her hair.¹⁷⁵ Current Title VII law does not accommodate for the millions that Black women spend annually on making sure that they are read as "professional."¹⁷⁶ Nor does Title VII law take into account the socio-historical context that brought us to this place. Instead, the courts rely on the legal fiction of immutability and on race neutrality, to twist Black people in the workplace.

IV. SOLUTIONS: A WAY OUT

A. *A New Legal Standard*

As this Article has demonstrated, race is a social¹⁷⁷ and legal¹⁷⁸ construct. In addition, race neutral laws in this country, like the G.I. Bill or the Social Security Act, have often had a deleterious impact on Black people—often preventing them from accessing the benefits of these laws altogether.¹⁷⁹ The same impact occurs when courts require race neutral grooming codes which, in effect, disproportionately burden

¹⁷⁴ See *Rogers*, *supra* note 163, at 232.

¹⁷⁵ See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1112–20 (2010) (documenting the ways in which relaxers, hair extensions, and wigs can damage Black women's hair and scalps); see also Simpson, *supra* note 11, at 276–78.

¹⁷⁶ Moss, *supra* note 123, at 202–03 (proposing that one of the reasons the black hair care industry is worth nearly \$500 billion is because black women are often compelled to alter their natural hair or wear false hair in order to comply with workplace grooming policies that "track normative standards of appearance," or otherwise risk exclusion from the workplace for deciding to wear their hair in its natural, unaltered texture).

¹⁷⁷ Moss, *supra* note 123, at 208 ("[T]he scientific community would generally agree that 'race is a social construct without biological meaning.'") (quoting Megan Gannon, *Race is a Social Construct*, *Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue>).

¹⁷⁸ See, e.g., IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 7–14 (2006) (documenting the legal construction of race in the United States).

¹⁷⁹ Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583 (2014) ("In the design and implementation of the G.I. Bill, the federal government explicitly encouraged residential segregation and discrimination against [B]lacks.").

Black people.¹⁸⁰ The courts' reliance on immutability, which flies in the face of what we know to be true about race, compounds this burden.¹⁸¹

Courts should remove the immutability standard from Title VII jurisprudence. Numerous scholars have argued that the immutability doctrine is a legal fiction that is rooted in discredited views of race.¹⁸² The Equal Employment Opportunity Commission ("EEOC") advanced a similar argument in *EEOC v. Catastrophe Management Solutions*, another hair discrimination case.¹⁸³ In that case, the EEOC urged the court to embed an understanding of the socio-historical treatment of hair into its understanding of race.¹⁸⁴ The court refused to adopt a socio-historical analysis of race, because doing so would lead to "absurd results" because white and Black employees who wore locs would be able to challenge the employer's grooming policy.¹⁸⁵

Relying on the immutability doctrine, the court found that the employer's race-neutral grooming policy "could not be race-based if individuals who did not share the same racial identity can be subject to its enforcement."¹⁸⁶ The court also found that "Title VII does not protect against discrimination based on traits, even a trait that has sociocultural racial significance."¹⁸⁷ As Wendy Greene argued, the court treated afros as legally protected textures and anything else as legally unprotected hairstyles, leading it to "literally split hairs to preserve four decades of legal precedent protecting the former."¹⁸⁸

When the case reached the Eleventh Circuit, the panel engaged in an analysis of what race was.¹⁸⁹ Despite coming to the conclusion that scholarly arguments about the social construction of race were persuasive, the panel decided that the definition of race in 1964 would be their

¹⁸⁰ See, e.g., Onwuachi-Willig, *supra* note 175 (discussing how facially neutral grooming codes disproportionately burden Black women).

¹⁸¹ Greene, *supra* note 172, at 1029 ("Strict immutability, therefore, serves as a 'legal fiction': a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion.").

¹⁸² Greene, *supra* note 172, at 1009.

¹⁸³ Plaintiff's Brief in Opposition to Defendant Motion to Dismiss at 8, *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139 (S.D. Ala. 2014) (No. 13-cv-00476-CB-M).

¹⁸⁴ *Id.* at 10.

¹⁸⁵ *EEOC v. Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014).

¹⁸⁶ See Greene, *supra* note 172, at 1015 (citing *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1143–44).

¹⁸⁷ *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1144.

¹⁸⁸ Greene, *supra* note 172, at 1017.

¹⁸⁹ *EEOC v. Catastrophe Mgmt. Sols.*, 837 F.3d 1156, 1164–67 (11th Cir. 2016), *withdrawn and superseded by*, *EEOC v. Catastrophe Mgmt. Solutions*, 852 F.3d 1018 (11th Cir. 2016).

North Star.¹⁹⁰ The panel, like the district court, found that afros were a black hair texture, while locs were a black hairstyle.¹⁹¹

Title VII does not strictly address immutability. However, courts borrowed immutability concepts from cases such as *Willingham v. Macon Telephone Publishing Company*, to shape their reading of Title VII.¹⁹² This is disastrous for Black litigants, especially because our courts played a central role in the legal construction of race.¹⁹³ According to Wendy Greene, the leading expert on grooming codes cases, the immutability doctrine is at odds with Title VII's statutory language and evidentiary burdens.¹⁹⁴ Scholars have argued that courts should adopt an expansive reading of immutability akin to that in sexual orientation cases.¹⁹⁵ In those cases, courts have traditionally read immutability as including characteristics that are "central and fundamental" to one's identity.¹⁹⁶

We would take that analysis one step further. On June 15, 2020, the Supreme Court held that Title VII protects employees against discrimination based on sexual stereotypes about sexual orientation or gender identity in *Bostock v. Clayton County*.¹⁹⁷ The Court held that discrimination based on sexual stereotypes constitutes discrimination *because of sex* and thus violates Title VII.¹⁹⁸ Courts should retire the immutability requirement and replace it with a new standard—that Title VII protects Black people who were terminated because of racial stereotypes about their hair, including whether or not their hair is professional, or racial stereotypes rooted in what constitutes professional or business-like hair. Such a standard would side-step the legal fiction of the immutability requirement, and would bring locs, braids, twists, and

¹⁹⁰ EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026–28 (11th Cir. 2016).

¹⁹¹ *Id.* at 1030.

¹⁹² See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975); see also Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 29 (2015) (stating that "[e]ven though the term immutability does not appear in any employment discrimination statute, courts have borrowed immutability concepts [from the constitutional context] to answer definitional questions about the scope of statutory prohibitions on discrimination").

¹⁹³ See, e.g., *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (holding that white means Caucasian people); see also *United States v. Thind*, 261 U.S. 204, 211, 214–15 (1923) (using the racialized science of the day to hold that Caucasian and white are not synonymous).

¹⁹⁴ Greene, *supra* note 172, at 1031.

¹⁹⁵ See generally Brief for NAACP Legal Def. & Educ. Fund, Inc. et al. as Amici Curiae Supporting Appellants at 12–13, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482).

¹⁹⁶ *Id.* at 13.

¹⁹⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

¹⁹⁸ *Id.* at 1754.

other culturally and historically Black hairstyles within Title VII's protection.¹⁹⁹

CONCLUSION

Although our courts have attempted to define race so that Black people can be afforded Title VII's protections, they have woefully failed. Though racial discrimination in the workplace has reduced, courts' reluctance to retire the immutability standard and having a meaningful reckoning about race continues to harm Black people economically and legally. Because courts lack a clear definition for race, they continue to make arbitrary distinctions between hair that is mutable versus hair that is not. Courts should infuse a socio-historical and intersectional lens into their legal analysis because without it, Black litigants bringing hair discrimination claims will be trapped between a loc and a hard place.

¹⁹⁹ Nicola Dall'Asen, *The CROWN Act Passes in the House, Proceeds to Senate for Consideration*, TEEN VOGUE (Sept. 23, 2020), <https://www.teenvogue.com/story/the-crown-act-passes-in-the-house-proceeds-to-senate-for-consideration>.