

WHO TOLD YOU YOUR HAIR WAS NAPPY?: A PROPOSAL FOR REPLACING AN INEFFECTIVE STANDARD FOR DETERMINING RACIALLY DISCRIMINATORY EMPLOYMENT PRACTICES

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2019 MICH. ST. L. REV. 287

ABSTRACT

Courts often hold that race-neutral grooming policies do not constitute the type of race-based discrimination that is prohibited under Title VII of the Civil Rights Act of 1964. In reaching this decision, courts rely on a narrow interpretation of Title VII, in which the statute only prohibits discrimination that is directed at an individual's immutable characteristics. Thus, courts only grant Title VII protection when it is clear that employees cannot reasonably change their physical characteristic to comply with the employer's grooming policy. Unfortunately, this interpretation of Title VII allows employers to create grooming standards that have a disproportionate, discriminatory effect on employees of a specific race as long as the standard pertains to employees' mutable characteristics.

Recent cases demonstrate just how problematic it is for courts to determine racial discrimination using the immutable characteristics standard. Specifically, courts have consistently held that employers are free to create grooming policies that prohibit employees from wearing certain hairstyles, even if the hairstyle is historically, culturally, and traditionally associated with a particular race. Many of these policies prevent employees from wearing their hair in

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dreadlocks or braids, which are hairstyles conducive to naturally curly hair and instead favor hairstyles that are conducive to hair that naturally grows straight. These standards significantly disadvantage African Americans because it forces African Americans to either seek alternative job opportunities or comply with the policy by chemically straightening their hair. Ultimately, policies like these prevent African Americans from achieving an equal opportunity for employment, which Title VII guarantees.

To achieve the goal of ensuring equal employment opportunities for all, courts must abandon the current immutable characteristics standard and adopt a more inclusive standard that prevents all forms of racial discrimination in the workplace. Therefore, this Article proposes a new standard that does not automatically dismiss complaints that allege that an employer's grooming standard is racially discriminatory against employees' mutable characteristics. By adopting the proposed standard, courts will truly uphold the intent of Congress by ensuring that each individual, no matter his or her race, has an equal opportunity for employment.

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INTRODUCTION

“Nappy,” “kinky,” “unprofessional,” and “wild” are just a few unfavorable words used to describe the curly, coarse hair texture of some African Americans.¹ However, with the emergence of the “Black is Beautiful” movement, which coincided with the Civil Rights Movement of the 1960s, negative connotations associated with African-American hair began to shift in a more positive direction.² With the convergence of these two movements, political activists such

1. See Neal A. Lester, *Roots That Go Beyond Big Hair and a Bad Hair Day: Nappy Hair Pieces*, 30 CHILD. LITERATURE EDUC. 171, 171 (1999) (stating that words like nappy, kinky, and wild are often interchangeable with “nappy” to identify the natural state of African-American hair).

2. See Rumeana Jahangir, *How Does Black Hair Reflect Black History?*, BBC NEWS (May 31, 2015), <http://www.bbc.com/news/uk-england-merseyside-31438273> [https://perma.cc/YC7G-3X5M].

as Angela Davis and Huey P. Newton wore their hair in afros while proudly fighting against racial oppression.³ In so doing, civil rights activists encouraged the empowerment of black self-love and political awareness.⁴ Consequently, African Americans' natural hair—specifically the afro—quickly emerged as a symbol of political change, self-love, and pride as African Americans fought for equal rights and protections under the law.⁵

During this period of cultural awareness for African Americans, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.⁶ In addition to granting African Americans the right to vote, the Act prohibited racial discrimination in public education and public accommodations, and it established the Equal Employment Opportunity Commission (EEOC).⁷ Notably, Congress ratified Title VII of the Civil Rights Act of 1964 to achieve equal employment opportunities for all individuals by removing barriers that favored white employees over employees of different races.⁸ Removal of these barriers included the prohibition of discrimination against employees on the basis of race, color, religion, sex, or national origin, as the Civil Rights Act deemed these particular characteristics protected.⁹ As such,

3. See Princess Gabbara, *The History of the Afro*, EBONY (Mar. 2, 2017), <http://www.ebony.com/style/the-history-of-the-afro#axzz4tQvSCK8q> [<https://perma.cc/8FPC-KPTL>] (“[As] political activists such as Angela Davis, Huey P. Newton and Jesse Jackson proudly rock[ed] Afros while fighting oppression, the hairstyle quickly emerged as a symbol for Black beauty, liberation and pride.”); Jahangir, *supra* note 2.

4. See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 319 (1997). “We have to stop being ashamed of being black. A broad nose, a thick lip and nappy hair is us and we are going to call that beautiful whether they like it or not.” *Id.*

5. See Nina Ellis-Hervey et al., *African American Personal Presentation: Psychology of Hair and Self-Perception*, 57 J. BLACK STUD. 869, 873 (2016).

6. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

7. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (“To enforce the constitutional right to vote, . . . to provide injunctive relief against discrimination in public accommodations, . . . public facilities and public education, . . . [and] to establish a Commission on Equal Employment Opportunity . . .”).

8. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (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.”).

9. See § 2000 e-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

this landmark legislation was enacted, in part, to prevent discriminatory employment practices and procedures from excluding protected classes of individuals from equal opportunities of employment.¹⁰

Despite this landmark legislation, racial discrimination in the workplace did not disappear. To solve this problem, courts established the immutable characteristics standard when presiding over Title VII claims of employment discrimination.¹¹ This standard provides that Title VII only protects the characteristics that an employee cannot change.¹² However, in applying this immutability standard to employer grooming policies, courts have permitted the discrimination of employees based on hairstyles that are historically and culturally associated with African Americans because courts have deemed these hairstyles mutable.¹³ Because courts permit this form of discrimination, many employers impose a standard of beauty that disproportionately affects African Americans' ability to obtain an equal opportunity for employment, effectively erecting a barrier that indirectly favors one race over another.¹⁴ However, courts have not

individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applications 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.

Id.

10. See *Griggs*, 401 U.S. at 429-30.

11. See *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (applying the mutable characteristic standard).

12. See *id.* at 1032. An immutable characteristic is a characteristic that an individual cannot change. See *id.*

13. See *id.* at 1035 (holding that an employer did not discriminate against a job applicant when not hiring her because of her refusal to cut her dreadlocks); see also *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).

14. See Imani Gandy, *Black Hair Discrimination Is Real—But Is It Against the Law?*, REWIRE (Apr. 17, 2017, 4:58 PM), <http://www.rewire.news/abl/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/> [https://perma.cc/5LS5-FNWU]. Racially neutral policies disproportionately affect African Americans because they exclude hairstyles based on the stereotype that natural hair and hairstyles are unprofessional, messy, too eye-catching, or excessive. See *id.* These policies reinforce the notion that black hairstyles—specifically black women's hairstyles—do not belong in the workplace, and as a result, “[b]lack women who choose to wear natural hairstyles . . . are either excluded from the workplace entirely or are forced to conform to white hair standards either by wearing wigs, weaves, or straightening their hair.”

recognized that this form of discrimination is in direct opposition to the purpose of Title VII.¹⁵

Deeming African-American natural hairstyles as mutable and permitting this form of discrimination is significant when considering the momentous traction that the “Natural Hair Movement”—an evolution of the Black is Beautiful Movement—has gained.¹⁶ This movement encourages African Americans—particularly African-American women—to style and wear their hair in its most natural state for beauty and health reasons.¹⁷ Thus, there is a growing number of African Americans with natural hairstyles that these employment rules affect.¹⁸

Additionally, deeming African-American hairstyles to be mutable is significant because of the negative views and biases that many individuals still hold regarding African-American hairstyles today.¹⁹ To some, African-American hairstyles are seen as unprofessional,²⁰ dangerous,²¹ and less beautiful than Eurocentric

Id. “This sort of Herculean effort is . . . not generally expected of white women, whose hair is considered the norm.” *Id.*

15. See 42 U.S.C. § 2000e-2(a) (2012) (establishing the standard and making clear that it is illegal to discriminate against an employee or prospective employee on the basis of race).

16. See Leah Binkovitz, *A Natural Hair Movement Takes Root*, SMITHSONIAN (June 7, 2013), <http://www.smithsonianmag.com/smithsonian-institution/a-natural-hair-movement-takes-root-95923558/> [<https://perma.cc/6BJG-HRLJ>]; see also Dawn D. Bennett-Alexander & Linda F. 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, 438 (2016).

17. See Bennett-Alexander & Harrison, *supra* note 16, at 438. “African American women have increasingly moved to wearing their natural hair rather than using heat, chemicals, weave, or wigs to make it appear straight and thus more ‘mainstream’ or ‘acceptable’ in the workplace.” *Id.*

18. See Christopher Muther, *Chemical-Free Black Hair Is Not Simply a Trend*, BOS. GLOBE (May 28, 2014), <https://www.bostonglobe.com/lifestyle/2014/05/28/chemical-free-black-hair-not-simply-trend/kLVdugv5MChUejSkDXoO3/story.html> [<https://perma.cc/39HT-4F9N>]. Consumer research shows that hair straightener sales have dropped from \$206 million in 2008 to \$152 million in 2013, while sales for products to maintain natural hair are rising. *Id.*

19. See Tina R. Opie & Katherine W. Phillips, *Hair Penalties: The Negative Influence of Afrocentric Hair on Ratings of Black Women’s Dominance and Professionalism*, 6 FRONTIERS PSYCHOL. 1, 5 (2015) (explaining the negative views that some individuals harbor towards African-Americans who wear natural hair).

20. See *id.* One study indicated that “employment candidates with Afrocentric hairstyles were rated as less professional and less likely to succeed in Corporate America than employment candidates with Eurocentric hairstyles.” *Id.*

21. See *ACLU and TSA Reach Agreement Over Racial Profiling of Black Women’s Hair*, ACLU (Mar. 26, 2015), <http://www.aclunc.org/news/aclu-and-tsa->

hairstyles.²² For example, using popular Internet search engines, such as Google, Yahoo, and Bing, reinforces the notion that these biases exist: For example, when using the search terms “unprofessional hairstyles for interviews” during a Google Images search, the image results return pictures of African Americans wearing natural hairstyles; however, when using the search terms “professional hairstyles for interviews” during a Google Images search, the image results return pictures of white Americans wearing Eurocentric hairstyles.²³ Thus, employers—who either have these biases or do not want to offend customers who have these biases—might create rules that disproportionately exclude African Americans from employment opportunities.²⁴ Therefore, a new standard is needed for determining

reach-agreement-over-racial-profiling-black-womens-hair [https://perma.cc/JX6Q-RQ5Y]. The American Civil Liberties Union reached an agreement with the Transportation Safety Agency with regards to “unnecessary, unreasonable and racially discriminatory hair searches that single out black women at airports,” following outcries from African-American women who were subject to hair pat downs after successfully going through body scanners. *Id.* In one instance, a woman wearing dreadlocks was subject to hair pat downs, in which her braids were “squeeze[d] . . . from top to bottom.” *Id.*

22. See Alexis McGill Johnson et al., *The “Good Hair” Study: Explicit and Implicit Attitudes Toward Black Women’s Hair*, PERCEPTION INST. (Feb. 2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf> [https://perma.cc/4J27-SUTZ]. The study found that the afro and other natural African-American hairstyles were rated significantly more negatively on a beauty and sexy/attractiveness scale than African-American women who wore Eurocentric hairstyles. *See id.*

23. See Image Search for Unprofessional Hairstyles, GOOGLE IMAGES, <https://image.google.com> [https://perma.cc/T9XU-KJRD] (follow hyperlink; then search “unprofessional hairstyles for interviews”). For photographs of what Google Images considers “professional hairstyles” image search for Professional Hairstyles, GOOGLE IMAGES, <https://image.google.com> [https://perma.cc/T9XU-KJRD] (follow hyperlink; then search “professional hairstyles for interviews”). Additionally, performing a Yahoo image search of “professional hairstyles for business” yields images of white men and women wearing hairstyles that are considered Eurocentric. Image Search for Professional Hairstyles for Business, YAHOOIMAGES, <https://images.search.yahoo.com/images> [https://perma.cc/JV6Y-8PJ9] (follow hyperlink; then search “professional hairstyles for business”). Conversely, a search for “unprofessional hairstyles for business” yields photos of African-American men and women with natural hairstyles. Image Search for Unprofessional Hairstyles for Business, YAHOOIMAGES, <https://images.search.yahoo.com/images> [https://perma.cc/JV6Y-8PJ9] (follow hyperlink; then search “unprofessional hairstyles for business”).

24. See Kamika S. Shaw, *Hair and Employer Regulations: Redefining Race-Based Discrimination*, ONLABOR (Mar. 9, 2017), <https://onlabor.org/hair-and-employer-regulations-redefining-race-based-discrimination/> [https://perma.cc/W6YK-S9PH]. “Implicit biases may lead a supervisor to view

what constitutes discriminatory actions under Title VII because the immutable characteristics standard does not adequately provide protection.²⁵

This Note proposes a new standard that will replace the immutable characteristics standard for determining whether an employer's grooming policy racially discriminates against a person because of his or her hairstyle.²⁶ Part I discusses the history of Title VII with respect to the Civil Rights Act of 1964 and how the immutable characteristics standard does not properly prohibit all forms of employment discrimination.²⁷ Part II discusses two cases from different circuit courts, analyzing how courts have applied the immutable characteristics standard with regard to an employee's hair.²⁸ Part II also presents the EEOC's position on racial discrimination in the workplace, highlights a recent New York law banning discriminatory grooming standards, discusses how the United States Army reacted to racially discriminatory grooming policies, and analyzes two employment discrimination laws in the United Kingdom.²⁹ Part III presents a new standard for determining whether

hairstyles traditionally associated with a specific racial or ethnic group as unprofessional for reasons that have very little legitimate biases in workplace policy." *Id.*

25. See Bennett-Alexander & Harrison, *supra* note 16, at 456-60 (suggesting policy proposals under Title VII that can help eliminate racial discriminatory grooming policies); see also Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 861 (1994) (proposing that Congress add "ethnic traits" to Title VII to provide specific protections to those traits).

26. See *infra* Parts I-III (proposing and explaining the New Standard and its benefits).

27. See *infra* Part I. This Part will provide a historical overview of Title VII and will explain the development of the immutable characteristics standard.

28. See *infra* Sections II.A-B. These sections will present two appellate cases in which courts have used the immutable characteristics standard to determine if an employee grooming standard is constitutional. The sections will also discuss the problems with the immutable characteristics standard and will explain why a new standard for determining racial discriminatory policies is needed.

29. See *infra* Sections II.C-F. First, these sections will provide an overview of how the EEOC interprets Title VII and explains the guidance that the Commission published to prevent discriminatory workplace grooming standards. Second, these sections include an overview of a recently adopted New York law prohibiting discriminatory grooming standards. Third, these sections will evaluate the United States Army's recent rule regarding African-American hair. Lastly, these sections will present the United Kingdom's law regarding racial discrimination and will explain, through a recent case, how its courts have interpreted the country's racial discriminatory laws.

an employer's grooming policy is racially discriminatory.³⁰ Finally, Part IV discusses why this standard is the clearest means for rejecting discriminatory practices prohibited by Title VII.³¹

I. A JOURNEY THROUGH TIME: EXPLAINING THE HISTORY OF TITLE VII AND THE HISTORICAL SIGNIFICANCE OF AFRICAN-AMERICAN HAIRSTYLES

Known as the “bill of the century,” the Civil Rights Act of 1964 has a rich and long history.³² The Act was instrumental in helping to remove barriers that prevented African Americans from enjoying the same rights and liberties that white Americans enjoyed under the law.³³ Unfortunately, *actual* equality remains elusive today as employers, for example, can legally discriminate against African Americans for wearing their hair in natural hairstyles because hair is considered a mutable characteristic.³⁴ This form of legal discrimination is alarming, considering that Congress enacted the Civil Rights Act—and more specifically, Title VII of the Act—to prevent employment discrimination against African Americans.³⁵ Moreover, this form of legal discrimination is disheartening and demoralizing, considering the historical significance that many

30. See *infra* Part III. This Part will present a detailed explanation of the new standard that should replace the immutable characteristics standard. To determine the viability of the standard, a recent workplace discrimination lawsuit will be used to model how a court would likely apply the standard to similar cases.

31. See *infra* Part IV. This Part will present an explanation of why the new standard is better than the immutable characteristics standard. It will also answer likely questions that might arise when the standard is implemented.

32. Alicia W. Stewart & Tricia Escobedo, *What You Might Not Know About the 1964 Civil Rights Act*, CNN (Apr. 10, 2014, 1:53 PM), <https://www.cnn.com/2014/04/10/politics/civil-rights-act-interesting-facts/index.html> [<https://perma.cc/5WZ6-RWK5>].

33. *Id.* (“Its goal was to help finish the work of the Civil War, 100 years after the war had ended, and to make the promise of legal equality for blacks and whites . . .”).

34. *Id.* (“[A]ctual equality is elusive to this day.”); Ria Tabacco Mar, *Why Are Black People Still Punished for Their Hair?*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/opinion/black-hair-girls-shaming.html> [<https://perma.cc/PH6R-TFDB>] (explaining that courts have decided that employers can legally discriminate against workers who wear their hair in natural African-American hairstyles such as dreadlocks).

35. See Damon Ritenhouse, *Where Title VII Stops: Exploring Subtle Race Discrimination in the Workplace*, 7 DEPAUL J. SOC. JUST. 87, 90 (2013) (explaining that promoting equal employment opportunities for African Americans was the primary reason for the passage of the Title VII).

African Americans associate with natural hairstyles.³⁶ Consequently, Congress has broken its promise of legal equality for all Americans.³⁷

A. The History and Purpose of Title VII

Before the passage of Title VII and the Civil Rights Act, the United States was embroiled in a battle over the civil rights of African Americans.³⁸ The nation watched as civil rights activists marched, protested, and demonstrated in cities all over the country for the prohibition of segregationist practices and for equal opportunity and protection under the law.³⁹ Many political leaders insisted that their cities or states would never cave to the pressure of treating African Americans equally and vowed to resist any effort to end segregation in their cities or states.⁴⁰ On June 11, 1963, President John F. Kennedy addressed the nation in a live television appearance and discussed the issue of racism in the country.⁴¹ In his address, the President told the nation that he was going to send legislation to Congress that would address issues of racism, end segregation, and prevent the common practices of discrimination in the country.⁴² Unfortunately, President

36. See Gabbara, *supra* note 3 (explaining that African-American natural hairstyles can be dated back to Africa); Gandy, *supra* note 14 (explaining that historical significance of African-American natural hairstyles).

37. See Stewart & Escobedo, *supra* note 32 (explaining how the Civil Rights Act was a promise of legal equality for blacks and whites).

38. See Michael J. Fellows, *Civil Rights—Shades of Race: An Historically Informed Reading of Title VII*, 26 W. NEW ENG. L. REV. 387, 397 (2004). When the Civil Rights Act of 1964 bill was submitted to Congress, the nation was “embroiled in a long, violent . . . struggle” over inequities of race in America. *Id.*

39. See *id.* Americans witnessed Civil Rights activists such as Dr. Martin Luther King Jr. get jailed for defying court orders to cease demonstrations. See *id.* Americans also witnessed civil rights activists get attacked by dogs, police batons, and sprayed with high powered water hoses during demonstrations. See *id.*

40. See *id.* Political leaders like Alabama Governor George Wallace vowed to fight any attempt by the Federal Government to desegregate the University of Alabama. See *id.* Additionally, political leaders like Governor Faubus of Arkansas closed the Arkansas state schools rather than integrating the schools and allow African-American students to attend the schools. See *id.* at 404 n.138.

41. See *id.* at 399.

42. See President John F. Kennedy, Report to the American People on Civil Rights, Televised Address (June 11, 1963) (transcript available at <http://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights> [<https://perma.cc/4579-5JN9>]). In his speech, President Kennedy decried the racial discrimination that African Americans faced and called on Congress to pass a law allowing Americans of all races to enjoy all of the same rights granted to them under the Constitution. See *id.*

Kennedy was assassinated shortly after sending the bill to Congress; however, his speech helped spearhead the passage of the Civil Rights Act.⁴³ Congress ultimately passed the Civil Rights Act in 1964 with the support of members in both the House and Senate.⁴⁴

The Civil Rights Act is comprised of eleven titles, with each title addressing and prohibiting a certain type of discrimination in America.⁴⁵ Title VII addresses the prohibition of discriminatory employment practices.⁴⁶ Within the text of Title VII, Congress identified and banned discrimination based on individual characteristics that employers traditionally used to implement discriminatory practices, including race, national origin, sex, and religion.⁴⁷ Congress chose these “protected categories” to remove any barrier that would have favored white employees over another identifiable group of employees.⁴⁸ In doing so, Congress sought to forbid the burdensome employment practices that produced atmospheres of racial and ethnic oppression.⁴⁹

The main objective of Title VII, however, was to accomplish President Kennedy’s goal of ending the practice of racially discriminatory employment practices against African Americans.⁵⁰

43. See Fellows, *supra* note 38, at 400.

44. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

45. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

46. See § 2000(e)-2(a).

47. See *id.*

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 applications 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.

Id.

48. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The *Griggs* court held that the plain language of Title VII made it clear that the law’s purpose was to remove barriers that favored white employees over other identifiable groups of people. *Id.*

49. See *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

50. See *Ritenhouse*, *supra* note 35, at 87. Title VII prevents employers from using race as a bona fide occupational qualification, which reinforces the notion that racial discrimination was a clear focus of Congress when creating Title VII. See *id.* at 90. Congress required that employers remove any artificial, arbitrary, and unnecessary barrier that operated to discriminate against individuals because of their race. See *Griggs*, 401 U.S. at 431.

Congressmen who supported the Act and those who opposed it recognized that Title VII was specifically designed to curtail workplace discrimination against African Americans, which prevented them from obtaining the same employment opportunities as white Americans.⁵¹ For example, a supporter of the Civil Rights Act, Congressman Madden, noted that the Act was designed to improve the high unemployment rate of African Americans, which was caused by racial discrimination.⁵² Thus, Congress's intent behind the creation of Title VII was to improve the lives of African Americans by preventing employers from discriminating against them because of their race.⁵³

In addition to prohibiting discrimination and mandating equal employment opportunities regardless of race, Title VII also created the EEOC.⁵⁴ Congress tasked the EEOC with ensuring that employers did not discriminate against employees or job applicants on the basis of the protected categories established in Title VII; further, the EEOC was empowered to investigate any claims of discrimination against employers accused of ignoring this law.⁵⁵ In doing so, Congress granted the EEOC investigatory authority to investigate claims of discrimination,⁵⁶ bring civil suits against employers who may implement discriminatory practices,⁵⁷ and create rules that employers

51. See Fellows, *supra* note 38, at 400.

52. See *id.*

53. See *id.* Employment practices and procedures “even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of . . . discriminatory employment practices.” *Griggs*, 401 U.S. at 430. “Promoting equal opportunities for people of all races, especially blacks, was clearly the driving force behind the passage of the Civil Rights Act.” Ritenhouse, *supra* note 35, at 90. “The legislative history of Title VII supports the notion that Congress intended to eliminate all forms of workplace discrimination caused by a person’s race, . . . [and t]his history and the resulting legislation provided a broad framework to address all forms of discrimination facing racial minorities, whether obvious or subtle.” *Id.* at 90-91.

54. See 42 U.S.C. § 2000e-4 (2012).

55. See § 2000e-4(g).

56. See 42 U.S.C. § 2000e-6(e) (2012). “[T]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.” *Id.*

57. See 42 U.S.C. § 2000e-5(f) (2012). Individuals may file a charge with the EEOC against an employer who may implement discriminatory practices. See 42 U.S.C. § 2000e-5(b) (2012). After investigation, if the employer does not voluntarily comply with Title VII, the EEOC can commence with a civil action against any person whom the charge alleges was aggrieved by the unlawful employment practices. See § 2000e-5(f).

must follow to remain in compliance with Title VII.⁵⁸ Thus, Congress wrote Title VII to prevent workplace discrimination and tasked the EEOC with ensuring that employers complied with the law.⁵⁹

B. The Immutable Characteristics Standard

The immutable characteristics standard provides that Title VII only protects the characteristics that an employee cannot change.⁶⁰ Because an employee cannot change his or her immutable characteristics, courts have held that forcing the employee to do so would be unjust, as it would be nearly impossible for the employee to comply with such a policy.⁶¹ Hence, immutable characteristics that pertained to a person's race, national origin, and sex were worthy of protection under Title VII.⁶² Conversely, characteristics such as hairstyles, language, and clothing more closely embody employee choice.⁶³ Employees can more easily change their mutable characteristics to comply with their employer's policy; therefore, courts do not protect these characteristics under Title VII.⁶⁴

58. See 42 U.S.C. § 2000e-12 (2012). "The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provision of [Title VII]." *Id.*

59. See 42 U.S.C. § 2000e-2 (2012).

60. See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1508 (2011) (explaining the immutable characteristics standard "designate[d] particular characteristics as off-limits and immaterial to employers' decision-making processes"). Immutable characteristics are deemed unchangeable characteristics. See *id.* "[R]ace discrimination only extend[ed] to a covered employer's regulation of or adverse treatment based upon immutable traits: traits with which one is born, are fixed, difficult to change, and/or displayed by individuals who share the same racial identity." See 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, 998 (2017).

61. See Hoffman, *supra* note 60, at 1508. "[I]t is unjust for workers to suffer ill consequences solely because of traits with which they were born or that they cannot modify." *Id.* at 1519. Absent antidiscrimination laws, employers would be free to create policies that require employees to change traits that cannot be reasonably changed. See *id.* at 1520. Doing so will cause employees to make hard choices about whether they should comply with the policy or risk losing the job. See *id.*

62. See *id.* at 1487 (explaining that immutable characteristics include race, color, national origin, and sex); see Hoffman *supra*, note 60 (explaining that an immutable characteristic is characteristic that a person cannot change).

63. See Hoffman, *supra* note 60, at 1524, 1527 (explaining courts hold that languages and hairstyles are mutable characteristics).

64. See Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 774 (1987) (presenting

Courts saw the immutable characteristics standard as the best way to apply Title VII protections while safeguarding an employer's right to make business decisions.⁶⁵ Courts also saw this standard as the best way for courts and employers to recognize when a workplace policy violated Title VII.⁶⁶ Many immutable characteristics such as height and skin color have a biological connection to an individual's race.⁶⁷ Thus, courts use the immutable characteristics standard when determining racial discrimination because it is easier for courts and employers to recognize biological characteristics that cannot be changed.⁶⁸ Cultural characteristics associated with one's race, however, are more difficult for an employer or court to recognize.⁶⁹ Cultural practices and characteristics can frequently change,⁷⁰ and courts have stated that it would place a burden on employers and courts to determine which cultural practices are associated with a particular race.⁷¹

examples of mutable characteristics). Mutable characteristics include grooming styles and attire. *See id.* A characteristic that is deemed mutable is based upon the fact that the individual can change the characteristic. *See* Kenn Nakasu Davison, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 *ASIAN L.J.* 161, 168 (2005). Characteristics that employees can reasonably change and conform to employers' regulations are mutable. *See* Shaw, *supra* note 24. "Courts have determined that expanding Title VII protections to cover these instances of discrimination is unwarranted." *Id.*

65. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (stating that employers retain the right to determine how best to run their business).

66. *See* Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (recognizing that there is a fine line between immutable and mutable characteristics, but it is a line that courts must draw to determine when an employment policy is unconstitutional).

67. *See id.* at 1033 (explaining how race is akin to biological characteristics).

68. *See id.*

69. *See* Richard T. Ford, *Race as Culture? Why Not?*, 47 *UCLA L. REV.* 1803, 1811 (2000). If courts were to include cultural practices in their interpretation of race, it would require "courts to determine which expressions [were] authentic and therefore deserving of protection." *Id.* The *Catastrophe Management* court specifically cited this law review article for support in finding that cultural practices do not require protection under Title VII prohibition against racial discrimination. *See* 852 F.3d at 1034.

70. *See* *Catastrophe Mgmt. Sols.*, 852 F.3d at 1033. "[C]ulture itself is (or can be) a very broad and ever-changing concept." *Id.*

71. *See id.* at 1034. The court questioned how employers and courts are to determine what cultural practices are associated with a particular race and which cultural characteristics, should be excluded from Title VII protection. *Id.*

C. Narrowing the Scope of Title VII: Hair Is an Unprotected Characteristic

The Fifth Circuit in *Willingham v. Macon Telegraph Publishing Co.* established the standard that hair is a *mutable* characteristic, meaning individuals can change this physical characteristic to comply with their employer's workplace policy; thus, the court deemed this characteristic unprotected under Title VII.⁷² The court reasoned that, when enacting Title VII, Congress did not seek to limit an employer's ability to make decisions on how best to run his or her business.⁷³ Rather, Congress sought to give all employees an equal opportunity for gainful employment.⁷⁴ Thus, in establishing that hair is a mutable characteristic, the *Willingham* court sought to prevent discrimination against employees for characteristics that the employee could not change, while still empowering employers to make decisions on how to best run their business.⁷⁵

Given the complexity of race and culture in society and the benefits of the immutable characteristics standard, American courts continue to apply this standard to Title VII racial discrimination lawsuits.⁷⁶ However, an understanding of the historical importance and cultural significance of African-American hairstyles demonstrates why some African-American hairstyles are not characteristics that can be easily modified.⁷⁷

72. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

73. See *id.* at 1092. Congress did "not [seek] to limit an employer's right to exercise his informed judgment as to how best to run his [business]." *Id.*

74. See *id.* "Congress sought only to give all persons equal access to the job market . . ." *Id.*

75. See *id.*

76. See generally *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (holding that language is not an immutable characteristic and that an employer banning employees from speaking Spanish in the workplace was not workplace discrimination under Title VII); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980) (explaining that "employment practices between men and women on the basis of immutable or protected characteristics" is in violation of Title VII); *Barrett v. Am. Med. Response, N.W., Inc.*, 230 F. Supp. 2d 1160 (D. Or. 2001) (holding that hair length was not an immutable characteristic and cannot obtain Title VII protection); *In re Nat'l Airlines, Inc.*, 434 F. Supp. 269 (S.D. Fla. 1977) (holding that weight, unlike height, is an immutable characteristic and not entitled to Title VII protection).

77. See *Gabbara*, *supra* note 3 (explaining the importance that African-American hairstyles have within the African-American community).

D. Roots: The Saga of African-American Hair

The importance of African-American hair did not begin with the “Black is Beautiful” Movement⁷⁸ or the “Natural Hair Movement.”⁷⁹ Rather, the significance of African-American hair can be traced back to Africa,⁸⁰ where hairstyles were not worn solely for the purpose of beauty.⁸¹ Africans wore these hairstyles to identify each other’s tribe,⁸² religion, or village.⁸³ Africans also wore these hairstyles to signify when someone was going to war or to show that someone was in mourning.⁸⁴ However, during the expansion of the American slave

78. See MAXINE LEEDS CRAIG, *AIN’T I A BEAUTY QUEEN?: BLACK WOMEN, BEAUTY, AND THE POLITICS OF RACE* 24 (2002) (explaining that the Black is Beautiful Movement emerged in the early 1960s).

79. See Gabbara, *supra* note 3 (explaining that the Natural Hair Movement began in the late 1990s).

80. See Princess Gabbara, *Cornrows and Sisterlocks and Their Long History*, EBONY (Jan. 20, 2017), <https://www.ebony.com/style/everything-you-need-know-about-cornrows/> [<https://perma.cc/S6R8-CYYF>] (dating the cornrow hairstyle back to ancient Africa). “Cornrows on women date back to at least 3000 B.C. and as far back as the nineteenth century for men, particularly in Ethiopia.” *Id.* Hair sometimes identified where a person was from and his or her tribe. See Bennett-Alexander & Harrison, *supra* note 16, at 444. “Africans historically took pride in wearing their hair in clean, neat, and well-groomed styles.” Gandy, *supra* note 14. Evidence suggests that ancient Egyptian pharaohs wore dreadlocks as mummified bodies that have been recovered after thousands of years contain dreadlocks still intact. See Princess Gabbara, *The History of Dreadlocks*, EBONY (Oct. 18, 2016), <http://www.ebony.com/style/history-dreadlocks> [<https://perma.cc/R6D2-T2MF>].

81. See Jahangir, *supra* note 2. In addition to beauty, many Africans believed that “hair, given its close location to the skies, was the conduit for spiritual interaction with God.” *Id.*

82. See Gandy, *supra* note 14. “African tribes adopted elaborate hair braiding patterns that were unique to their own tribes and known by other tribes as being unique to that particular tribe.” *Id.*

83. See *id.* Historically, in Africa “[j]ust about everything about a person’s identity could be learned by looking at [a person’s hair.]” *Id.* Each tribe had a unique braiding style and design that might also indicate the tribe’s religion, village, or familial kinship. See G. v. Head Teacher & Governors of St. Gregory’s Catholic Sch. Coll. [2011] EWHC (Admin) 1452 [1-2] (Eng.); see also Gandy, *supra* note 14. “In the early fifteenth century, hair functioned as a carrier of messages in most West African societies.” *Id.* Moreover, some African hairstyles signified a person’s “marital status, age, religion, ethnic identity, wealth, and rank within the community.” See *id.*

84. See Jahangir, *supra* note 2. “When men from the Wolof tribe (in modern Senegal and . . . Gambia) went to war[,] they wore a braided [hairstyle].” *Id.* When a woman was mourning she would adopt a more conservative, subdued hairstyle. See *id.*

trade beginning in the seventeenth century,⁸⁵ Africans were stripped of their identity and were required to leave behind any memories or traditions of their former lives as free Africans.⁸⁶ Part of the stripping of enslaved African's identity included physically cutting off enslaved Africans' hair and establishing the perception that kinky hair was bad while straight hair was good.⁸⁷ Slave masters also drew distinctions between the various hair textures of African slaves—treating Africans with kinky hair texture as inferior to Africans with naturally straighter hair.⁸⁸

After centuries of subjugation in which African slaves were influenced by, and many times required to conform to, a standard of beauty created by white slave masters, some African slaves believed in the concept of good hair and bad hair.⁸⁹ After the emancipation of

85. See Lisa Rein, *Mystery of Virginia's First Slaves is Unlocked 400 Years Later*, WASH. POST (Sept. 3, 2006), https://www.washingtonpost.com/archive/politics/2006/09/03/mystery-of-vas-first-slaves-is-unlocked-400-years-later/7015c871-aabd-4ba2-b5ce-7c0955aa0d75/?utm_term=.fe422ae19051 [<https://perma.cc/P7JQ-26FE>] (explaining that the first known slaves to set foot in North America occurred in 1607 in Jamestown, Virginia).

86. See Bennett-Alexander & Harrison, *supra* note 16, at 444-45. Slave holders cut off the hair of those they captured to exude their power and subjugation over the captured Africans. *Id.* “[I]t was important to remind [African slaves] constantly of their subservient position;” therefore, some states created laws requiring African women to wear head scarves covering their hair. *Id.*

87. See *id.* at 444. “Because Africans’ identity was inexorably intertwined with their hair, when slave traders began to traffic in African people, one of the first things they did was to shave enslaved people’s heads in order to strip them of their individuality and ties to their community.” Gandy, *supra* note 14. Nappy hair is a term, used to describe “tightly coiled, kinky black hair.” Noel Cymone Walker, *Is It Time to Reclaim the Word “Nappy”?*, ALLURE (Sept. 25, 2018), <https://www.allure.com/story/is-nappy-hair-a-negative-term> [<https://perma.cc/JTV4-QSKY>]. This is a term that is usually used in a derogatory way to describe African-American hair. See *id.*

88. See *The Roots of “Good Hair” Are About Survival, Not Beauty*, THEGRIO (Oct. 9, 2009), <https://thegrio.com/2009/10/09/i-know-a-lot-about/> [<https://perma.cc/2VTQ-LYPR>]. Slaves knew that the less “African” that they appeared, the better treatment that they would likely receive from their masters. See *id.* They used straightening methods to straighten their hair in an attempt to be offered better food, living conditions and jobs. See *id.* Slaves knew that the less African and more European they seemed, the better they were treated by their slave master. See *id.*

89. See *id.* Good hair is often seen as having straighter hair while bad hair is seen as having naturally, tightly coiled hair. See Catherine Saint Louis, *Black Hair, Still Tangled in Politics*, N.Y. TIMES (Aug. 26, 2009), <https://www.nytimes.com/2009/08/27/fashion/27SKIN.html> [<https://perma.cc/HZV8-NCPU>]. “Straightening hair has been perceived as a way to be more acceptable to certain relatives, as well as to the white establishment.” *Id.*

African slaves, caricatures depicting African Americans who wore natural hairstyles as ignorant, subservient, and dangerous reinforced the notion that African-American natural hairstyles were bad.⁹⁰ To combat these images, African Americans began straightening their hair with hair products and tools in an effort to achieve a Eurocentric standard of beauty.⁹¹

Nevertheless, beginning in the 1960s with the emergence of the “Black is Beautiful” Movement,⁹² many African Americans began to reject the Eurocentric standard of beauty and embraced characteristics that made African Americans unique.⁹³ To fully embody this new movement, many African Americans abandoned the harsh chemicals used to straighten their hair, rejecting the notion that certain hairstyles and textures constitute good hair while other hairstyles and textures constitute bad hair.⁹⁴ This movement resulted in many African Americans wearing natural hairstyles like braids and dreadlocks, the same hairstyles that their slave ancestors, centuries earlier, were

90. See Bennett-Alexander & Harrison, *supra* note 16, at 446. Stereotypical images of African Americans as “nappy-haired caricatures were firmly planted in the national conscious by marketing products across the country.” *Id.* “[S]cholars have documented the grotesque portrayal of black men and women in artifacts, literature, advertisements, and films.” CRAIG, *supra* note 78, at 24. The “physical attributes of blacks were associated with negative character traits and low social positions. Racist ideologies created social hierarchies based on visible physical differences. Blacks were stigmatized on the basis of their skin color[] [and] the texture of their hair.” *Id.* Through the use of these images in media, dark skin, kinky hair, and African features became associated with ugliness, sin, and danger. *See id.*

91. See Kristin Booker, *A History of Black Hair in America*, REFINERY29 (Feb. 21, 2014, 4:00 PM), <https://www.refinery29.com/black-hair-history> [<https://perma.cc/PA99-WLC3>]. African Americans like Madame C.J. Walker developed a line of hair-care products that straightened African-American hair textures. *See id.* Because of the popularity of her haircare products, Madame C.J. Walker became the first black millionaire in United States history. *See id.* Other African Americans like Garrett Morgan created the first permanent hair straightener for men. *See id.*

92. CRAIG, *supra* note 78, at 23. This title was created to refer to the “new practices of self-presentation and the newly expressed appreciation of dark skin and tightly curled hair that became widespread in African-American communities in the late 1960s.” *Id.*

93. See Stephanie M. H. Camp, *Black is Beautiful: An American History*, 81 J. SOUTHERN HIST. 675, 686 (2015). African Americans “rejected straightened hair . . . in favor of more ‘natural,’ more authentic styles of self-presentation.” *Id.*

94. See MELBA MILLER, *THE BLACK IS BEAUTIFUL BEAUTY BOOK* 48 (1974). African Americans abandoned the “never-ending battle of straightening combs, permanents, relaxers, and anything that would promise straight hair.” Camp, *supra* note 93, at 687. African Americans had broken out of the good hair/bad hair mentality and accepted their natural beauty. *See id.*

forbidden from wearing.⁹⁵ In sum, African Americans were encouraged to reject the notion that kinky hair was something to be ashamed of and instead embrace it as something to be celebrated.⁹⁶

Currently, the acceptance and reaffirmation of black natural beauty is reemerging in the African-American community through the evolution of the Natural Hair Movement.⁹⁷ Similar to the Black is Beautiful Movement, the Natural Hair Movement encourages African Americans—particularly, African-American women—to embrace their naturally curly and coarse hair and wear hairstyles that accentuate the way African-American hair naturally grows.⁹⁸ In addition to promoting the health benefits of natural hair,⁹⁹ the Natural Hair Movement has created a sense of pride and ownership in African heritage and history.¹⁰⁰ It has established an avenue where African

95. See Gabbara, *supra* note 3. During the Black is Beautiful Movement, individuals began wearing natural hairstyles like the afro, braids, and cornrows. See *id.*

96. See Kang, *supra* note 4, at 319. Civil rights activists encouraged African Americans to be proud of their “nappy hair” and to not be ashamed of the African characteristics that made African Americans unique. *Id.*; see also Camp, *supra* note 93, at 686. Black Americans used the concept of black racial beauty to combat the shame of just being black by celebrating the very features that they were supposed to be ashamed of like “curly hair, brown skin, and lush features.” Camp, *supra* note 93, at 686.

97. See Gandy, *supra* note 14. “Since the recent explosion of the natural hair movement, many Black women are learning to embrace and love the hair that grows out of our heads as it grows out of our heads.” *Id.* (emphasis added).

98. See Bennett-Alexander & Harrison, *supra* note 16, at 438.

99. See *id.* Natural hairstyles are healthier than hairstyles which use chemical straighteners. See *id.*; see also Ronnie Cohen, *Dark Hair Dye and Chemical Relaxers Linked to Breast Cancer*, REUTERS (July 12, 2017, 11:07 AM), <https://www.reuters.com/article/us-health-breastcancer-hair-dyes/dark-hair-dye-and-chemical-relaxers-linked-to-breast-cancer-idUSKBN19X229> [<https://perma.cc/75DE-2MR9>] (citing a study showing an increase in breast cancer risk among African-American women who used chemical relaxers to straighten their hair); Alexandra Sifferlin, *Beauty Products Marketed to Black Women May Contain More Hazardous Chemicals: Report*, TIME (Dec. 6, 2016), <http://time.com/4591079/beauty-products-marketed-to-black-women-may-contain-more-hazardous-chemicals-report/> [<https://perma.cc/AG5S-GPMV>] (explaining that hair products marketed to African-American women are “more likely to contain potentially harmful chemicals and ingredients”). “Many of the hair relaxers . . . contained lye which is used to break down chemical bonds in hair. Some chemical hair straighteners have been linked to baldness or a higher risk for growths in a woman’s uterus.” *Id.*

100. See G. Paris Johnson, *Black Hair: The Natural Look Shows Off Cultural Unity and Pride*, HOUS. PRESS (July 17, 2017, 5:00 AM), <http://www.houstonpress.com/arts/natural-hair-a-movement-towards-cultural-unity-and-pride-9601632> [<https://perma.cc/SWB2-2L5S>]. For African-American women,

Americans can reclaim a piece of the identity that was stripped from enslaved Africans centuries ago.¹⁰¹ The movement is so widespread and celebrated that African Americans who wear natural hairstyles have created websites, blogs, and even festivals to establish a natural hair community, share tips regarding natural haircare, and provide support for those in or interested in joining the movement.¹⁰² Moreover, the Natural Hair Movement is so widespread that it forced hair companies to rethink their haircare product lines, as hair relaxer sales continue to decline and the sales for natural hair products increase.¹⁰³ With each year, the number of African Americans who

removing the need for hair straightening products and wearing natural hairstyles has created a sense of liberation. *See id.*

101. *See* Gandy, *supra* note 14. Because of the importance of African-American hair and the significance that African-American hair had on the identities of many Africans, “one of the first things [slave traders] did [to enslaved Africans] was to shave enslaved [Africans]’ head in order to strip them of their individuality and ties to their community.” *Id.*; *see also* Shayna Watson, *Black Codes and Dress Codes: Will Black Hair Always Be Against the Rules?*, *THE ROOT* (May 27, 2017, 9:03 AM), <https://www.theroot.com/black-codes-and-dress-codes-will-black-hair-always-be-1795599759> [<https://perma.cc/9FZD-UJ2Z>]. During this era, southern states passed laws as a means of “help[ing] newly freed blacks ‘fit in’ with their new environment.” Watson, *supra*. The codes limited the freedom of identity and cultural expression of Africans. *See id.*

102. *See* NATURALLY CURLY, <https://www.naturallycurly.com/> [<https://perma.cc/VHP2-5RVY>] (last visited Mar. 27, 2019); NAPPTURALITY, www.nappturality.com (last visited Mar. 27, 2019); CURLY NIKKI, <https://www.curlynikkiforums.com/forum/naturally-curly-hair> [<https://perma.cc/48AS-M93V>] (last visited Mar. 27, 2019); *see also* Alexis Webb, *11 Experts We’ll Always Follow for Our 4C Hair Needs*, *ESSENCE* (Jan. 17, 2017), <https://www.essence.com/hair/4c/top-4c-hair-bloggers> [<https://perma.cc/9T5B-2YC2>] (presenting websites for African Americans interested in natural hair care). Festivals such as “Curlfest” were established to highlight the beauty of natural hair. Tamara Best, *At Curlfest, a Celebration of Natural Hair and Black Beauty*, *N.Y. TIMES* (July 19, 2017), <https://www.nytimes.com/2017/07/19/fashion/beauty/curlfest-a-celebration-of-curl-confidence.html> [<https://perma.cc/PTR8-AAU2>].

103. *See* Nana Sidibe, *This Hair Trend Is Shaking Up the Beauty Biz*, *CNBC* (July 1, 2015, 2:45 PM), <https://www.cnbc.com/2015/07/01/african-americans-changing-hair-care-needs.html> [<https://perma.cc/V2XE-4DJ5>]. The sales of relaxers began declining as far back as the 1990s, and there are estimates that the sale of hair relaxing products will decline to 45% in 2019. *Id.* To account for this decline, companies have been forced to create natural haircare product lines. *See id.* Companies like L’Oréal established an Au Naturele product line which includes products that are specifically tailored to address natural hair. *See id.* Revlon, a company known for making hair straightening products, launched a series of haircare products specifically for curly hair textures. *See id.* Likewise, L’Oréal also acquired a well-known natural hair brand that was created more than twenty years ago, demonstrating the demand for natural hair care. *See id.* This company was known as Carol’s Daughters and specialized in hair care products for black women. *See* Kara

wear natural hairstyles increases; unfortunately, courts have done very little to protect employment opportunities for African Americans who wear these natural hairstyles.¹⁰⁴

II. WHAT THE HAIR?: THE GROWING TREND OF PROHIBITING GROOMING STANDARDS THAT ARE DISCRIMINATORY TOWARDS NATURAL AFRICAN-AMERICAN HAIRSTYLES

Although many African Americans view natural hairstyles as important because of the historical and cultural significance that the hairstyles have, courts have allowed employers to create discriminatory grooming standards that prohibit African Americans from wearing these hairstyles.¹⁰⁵ By following the immutable characteristics standard, courts have allowed this form of discrimination and have held that African-American hairstyles are unprotected characteristics because hair itself is mutable.¹⁰⁶ Courts believe that determining whether an employee's characteristic is immutable or mutable can sometimes be difficult, but it nonetheless is necessary.¹⁰⁷ Courts continue to use this standard because it is the easiest way to determine workplace discrimination, and it gives employers the freedom to implement policies that employers think are

Brown, *L'Oreal Buys Carol's Daughter Following Bankruptcy*, JEZEBEL (Oct. 24, 2015), <https://jezebel.com/loreal-buys-carols-daughter-following-bankruptcy-1650455109> [<https://perma.cc/YG3B-68RV>].

104. See A.B. Wilkinson, *No Dreadlocks Allowed*, ATLANTIC (Nov. 3, 2016), <https://www.theatlantic.com/business/archive/2016/11/no-dreadlocks-allowed/506270/> [<https://perma.cc/YHS5-LA74>]. Courts have relied on “some well-established legal precedents as well as some outdated notions of race” to reach the decision that employers are free to prohibit African Americans from wearing hairstyles that are culturally and historically associated with their race. *Id.*

105. See Shaw, *supra* note 24 (explaining that courts have refused to expand Title VII protections to cover racial characteristics such as hair).

106. See Campbell v. Alabama Dep't of Corr., No. 2:13-CV-00106-RDP, 2013 WL 22480086, at *2 (N.D. Ala. May 20, 2013) (holding that a dreadlock hairstyle is a mutable characteristic and not protected under Title VII); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) (holding that an employer's grooming standard, prohibiting unconventional hairstyles like braids, was not prohibited under Title VII because the grooming standard concerned mutable characteristics); McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779, at *2 (N.D. Ga. Sept. 19, 1996) (holding that a policy prohibiting braided hairstyles was not prohibited under the Title VII mutable characteristic standard).

107. See Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016). “We recognize that the distinction between immutable and mutable characteristics of race can sometimes be a fine (and difficult) one, but it is a line that courts have drawn.” *Id.*

best for the workplace.¹⁰⁸ However, by adopting this standard, courts have opened the door for employers to implement discriminatory workplace policies with respect to their employees' mutable characteristics—specifically hair.¹⁰⁹

A. You're Fired!: American Airlines Terminates an Employee for Wearing Cornrows

In 1981, the United States District Court for the Southern District of New York determined that American Airlines' (American) grooming policy, which prohibited cornrows, was not racially discriminatory.¹¹⁰ American claimed that it had a bona fide business purpose for implementing its policy, which was to project a more business-like atmosphere.¹¹¹ However, Renee Rogers,¹¹² an African-American woman who wore her hair in a cornrow hairstyle, claimed that the standard discriminated against her as an African-American woman.¹¹³

The district court concluded that American's grooming standard did not violate Title VII's prohibition against racial discrimination in the workplace.¹¹⁴ First, the court concluded that the cornrow hairstyle was a mutable characteristic because it could be easily changed to comply with American's grooming standard.¹¹⁵ The court held that the

108. See *id.* "[T]he concept of immutability' though not perfect, 'provides a rationale for the protected categories encompassed within the antidiscrimination statutes.'" *Id.*

109. See Greene, *supra* note 60, at 1022. The Eleventh Circuit's decision in *Equal Employment Opportunity Commission v. Catastrophe Management Solutions* has made it certain that "workplace discrimination against racialized, mutable characteristics would never implicate Title VII protection." *Id.* at 1023.

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

111. See *id.* at 233. American claimed that the policy was adopted to help American project a conservative, business-like image. See *id.*

112. See *id.* at 231. American employed Renee for approximately eleven years, and she specifically worked as an operations agent for over one year. See *id.* In the role of operations agent, Renee's duties "involve[d] extensive passenger contact, including greeting passengers, issuing boarding passes, and checking luggage." *Id.*

113. See *id.* Specifically, Renee argued that her cornrow hairstyle had a special significance for black women and was a historical style adopted by Black women. See *id.* at 231-32. Moreover, this hairstyle was "reflective of cultural, historical essence of the Black women in American society." *Id.* at 232.

114. See *id.*

115. See *id.* The court explained that the all-braided/cornrow hairstyle is not the product of natural hair growth; rather, it is a style that is an easily changed characteristic, making the characteristic mutable. See *id.* The court stated that a grooming policy banning the afro "might offend Title VII" but this would occur

cornrow hairstyle was not a natural hairstyle, but rather a grooming choice.¹¹⁶ The district court also concluded that characteristics, although culturally associated with a particular race, are not entitled to Title VII protection if the characteristics are mutable.¹¹⁷ Therefore, the court held that the cornrow hairstyle—although culturally associated with African Americans—was not subject to Title VII protection because the hairstyle was mutable.¹¹⁸ Furthermore, American’s grooming standard applied to members of all races equally, as it forbade *all* employees from wearing an all-braided hairstyle and was not limited to African-American employees.¹¹⁹ Thus, the district court concluded that American’s grooming policy was not discriminatory because it did not specifically single out and prohibit African Americans from wearing a certain hairstyle, while permitting another group of individuals to wear the same hairstyle.¹²⁰

With this decision, American was free to implement its grooming policy because the standard pertained to a characteristic not covered by Title VII’s definition of race—even though the policy negatively and disproportionately affected African Americans.¹²¹ This ruling was not the only case to allow employers to create discriminatory rules against African-American hairstyles.¹²²

“because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.” *Id.*

116. *See id.* The court was not persuaded by the argument that the cornrow hairstyle had a special significance for black women. *See id.* at 231-32.

117. *See id.* at 232. The court explained that even if a characteristic is “socioculturally associated with a particular race or nationality, [it] is not an impermissible basis for distinctions in the application of employment practices by an employer.” *Id.* The court also observed that Renee had only adopted the hairstyle shortly after it became popularized by the white actress Bo Derek. *See id.* This observation, however, ignores centuries of historical and verifiable proof that persons of African descent wore cornrows long before Bo Derek. Gabbara, *supra* note 80 (“History tells us cornrows originated in Africa.”).

118. *See Rogers*, 527 F. Supp. at 232. Prohibiting an all-braided hairstyle is unlike a grooming standard prohibiting afros because prohibiting afros more closely resembles prohibiting an immutable characteristic. *See id.*

119. *Id.* (“[T]he grooming policy applies equally to members of all races.”). The court also pointed to the fact that Renee did not claim that the all-braided hairstyle is worn predominantly or exclusively by African Americans. *See id.*

120. *See id.* The court concluded that “even if ill-advised, [the policy] does not offend the law.” *Id.* at 233.

121. *See id.* at 232.

122. *See Equal Emp’t Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1035 (11th Cir. 2016) (holding that it was constitutionally permissible for an employer to prohibit employees from wearing dreadlocks).

B. Bad Hair Day: Court Upholds an Employer's Right to Prohibit Dreadlocks in the Workplace

In 2016, the Eleventh Circuit Court of Appeals reviewed whether an employer's grooming standard was unconstitutionally discriminatory when the employer refused to hire a prospective employee because she wore her hair in dreadlocks.¹²³ Chastity Jones, an African-American woman, was selected for an in-person interview for a call center job with Catastrophe Management Solutions (CMS).¹²⁴ She arrived to the interview dressed in a business suit and wore her hair in a short, dreadlocks style.¹²⁵ After completing an interview with a CMS representative, a CMS employee extended Jones an offer of employment.¹²⁶

Shortly after receiving the offer, Jones and the other candidates who were offered jobs were brought into a large room to listen to Jeannie Wilson, the CMS human resources manager, who discussed the next steps that needed to be completed before beginning employment with the company.¹²⁷ When the meeting ended, Wilson, who is white, asked Jones whether she usually wore her hair in the dreadlocks style.¹²⁸ After Jones replied "yes," Wilson, asked Jones if she would be willing to cut her hair.¹²⁹ Jones refused,¹³⁰ and Wilson

123. *See id.* at 1020. The EEOC filed suit against Catastrophe Management Solutions on the behalf of Chastity Jones, claiming the employer's grooming standard was racially discriminatory. *See id.* The District Court dismissed the complaint, holding that the complaint did not allege intentional racial discrimination against Ms. Jones. *See id.*

124. *See id.* at 1021. CMS is a claims processing company that provides customer support to insurance companies. *See id.* CMS announced that it was seeking job applicants with "basic computer knowledge and professional phone skills to work as customer service representatives." *Id.* Importantly, CMS customer service representatives do not have contact with the general public, they only speak to members of the public on the phone in a large call center. *See id.*

125. *See id.* Before being selected for the interview, Jones completed an online application. *See id.* The application did not tell prospective employees that the company adhered to a grooming standard that prohibited dreadlocks. *See id.* During Jones's interview, no one representing the CMS company commented on Jones's hair. *See id.*

126. *See id.*

127. *See id.* Wilson informed the new hires that they needed to complete lab tests and other paperwork before beginning their employment. *See id.*

128. *See id.*

129. *See id.* at 1021-22.

130. *See id.* at 1022. After Jones refused, Wilson informed Jones about an African-American male who was recently hired and cut off his dreadlocks in order to retain his job with CMS. *See id.* at 1021-22.

replied that the company could not hire her if she insisted on wearing dreadlocks.¹³¹ When Jones asked Wilson why she could not wear dreadlocks, Wilson replied that dreadlocks “get messy.”¹³² Jones again refused to cut her dreadlocks, and Wilson revoked CMS’s offer of employment.¹³³

The Eleventh Circuit concluded that CMS’s grooming policy was racially neutral and held that because the dreadlock hairstyle is a mutable characteristic, the grooming policy was not unconstitutional.¹³⁴ Title VII only protects mutable characteristics,¹³⁵ and unlike hair texture, job applicants can change their hairstyles to comply with a racially neutral hiring standard.¹³⁶ Additionally, the Eleventh Circuit relied on the precedent set forth in *Willingham*¹³⁷ in its determination that a hiring policy prohibiting the dreadlock hairstyle was not a form of racial discrimination prohibited by Title VII.¹³⁸ Like the *Willingham* court, the Eleventh Circuit determined that a hiring policy prohibiting hairstyles related more closely to an employer’s choice of how to run his or her business rather than to an action that circumvented the equal opportunity for employment.¹³⁹ Therefore, the court decided that a hairstyle, even if culturally,

131. *See id.* at 1022.

132. *See id.* at 1021. Jones asked Wilson what the problem was with wearing dreadlocks, and Wilson replied that “[dreadlocks] tend to get messy, although I’m not saying yours are, but you know what I’m talking about.” *See id.*

133. *See id.* at 1022. CMS employed a grooming policy which stated that “[a]ll personnel are expected to be dressed and groomed in a manner that projects a professional and business-like image while adhering to company and industry standards and/or guidelines.” *Id.* With respect to hairstyles, the policy stated that “[h]airstyle[s] should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable.” *Id.*

134. *Id.* at 1032 (“[C]ourts generally have upheld facially neutral policies regarding *mutable* characteristics . . . despite claims that the policy has an adverse impact on members of a particular race or infringes on the expression of cultural pride and identification.”).

135. *See id.*

136. *Id.* at 1028 (quoting *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975)) (“[E]qual . . . opportunity [of the law] . . . may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics.”).

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

138. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1028-29. The *Willingham* court held that a hiring policy that distinguishes grooming or length of hair is related to an employer’s choice of how to run his business rather than the equal opportunity for employment. *See Willingham*, 507 F.2d at 1091.

139. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1028-29.

historically, and ethnically associated with a particular race, was not a protected category under Title VII.¹⁴⁰

All too often, courts permit this sort of employment discrimination because courts deem hair a mutable characteristic.¹⁴¹ However, rulemaking bodies like the EEOC, in addition to the State of New York, the United States Army, and the United Kingdom, prohibit this type of discrimination.¹⁴² In doing so, these entities provide greater protection for African Americans than American courts.¹⁴³

C. The Equal Employment Opportunity Commission's Workplace Discrimination Rules

The Civil Rights Act of 1964 established the EEOC.¹⁴⁴ The EEOC is responsible for enforcing Title VII and ensuring that racial discrimination does not occur against employees or job applicants.¹⁴⁵ To perform this duty, the EEOC routinely issues regulations and guidance that employers should follow to ensure that they are adequately complying with the provisions in Title VII.¹⁴⁶ While these

140. *See id.* at 1032. The court recognized that the choice of hairstyle was an intensely personal decision but because Jones could cut her dreadlocks, the policy prohibiting her hairstyle was not discriminatory. *See id.* at 1035.

141. *See, e.g.,* Barrett v. Am. Med. Response, N.W., Inc., 230 F. Supp. 2d 1160, 1164 (D. Or. 2001) (holding that hair length was mutable characteristic); *see also* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) (holding that dreadlocks are a mutable characteristic).

142. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 15-VII(B)(5) (Apr. 19, 2006) [hereinafter EEOC COMPLIANCE MANUAL] (prohibiting employers from creating grooming standards that disproportionately affect African Americans); Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014) (permitting African-American women to wear dreadlocks and cornrow braids); Equal Opportunity Act 2010, c. 15, §§ 9, 13 (Eng.) (prohibiting racial discrimination in the workplace).

143. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1035. Unlike the other rulemaking bodies, American courts apply racial discrimination protections more narrowly. *See id.*

144. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (“To enforce the constitutional right to vote, . . . to provide injunctive relief against discrimination in public accommodations . . . public facilities and public education, . . . [and] to establish a Commission on Equal Employment Opportunity . . .”).

145. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> [<https://perma.cc/RKL3-9V8V>] (last visited Mar. 27, 2019).

146. *See id.*

rules do not carry the force of law, courts suggest that employers look to this guidance for instruction on how to comply with Title VII.¹⁴⁷

In 2006, the EEOC published an updated version of its compliance manual, which provided guidance and rules on race and color discrimination in the workplace.¹⁴⁸ The manual specifically provided guidance to employers on issues of employer-created grooming standards and policies.¹⁴⁹ With regard to hair standards, the manual set neutral hairstyle rules, whereby employers could impose hair grooming standards so long as the standard respected the racial differences in hairstyles and applied to employees of all races equally.¹⁵⁰ The guidance specifically prohibited employers from preventing their female African-American employees from wearing their hair in a natural, afro style.¹⁵¹ The guidance also prohibited employers from applying neutral hairstyle standards toward hairstyles that are predominantly worn by African Americans.¹⁵²

Although the EEOC, through the guidance published in the compliance manual, recognized that Title VII protects employee hairstyles that are predominately worn by African Americans,¹⁵³ courts have not deferred to this interpretation.¹⁵⁴ Instead, courts reject this guidance because it conveys a standard that differs from the court-created immutable characteristics standard.¹⁵⁵ As such, courts have not

147. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[Administrative agency decisions] while not controlling upon the courts . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

148. See EEOC COMPLIANCE MANUAL, *supra* note 142.

149. See *id.*

150. See *id.* “Employers can impose neutral hairstyle rules . . . as long as the rules respect racial differences in hair textures and are applied evenhandedly.” *Id.*

151. See *id.* “Title VII prohibits employers from preventing African-American women from wearing their hair in a natural, unpermed ‘afro’ style that complies with the neutral hairstyle rule.” *Id.*

152. See Gandy, *supra* note 14. “Title VII [also] ‘prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.’” *Id.*

153. See *id.* In its manual, the EEOC stated that Title VII protects employee hairstyles that are “more restrictive to hairstyles worn by African Americans.” EEOC COMPLIANCE MANUAL, *supra* note 142.

154. See *Equal Emp’t Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1032 (11th Cir. 2016). “In our view . . . we choose not to give [the EEOC’s compliance manual’s] guidance much deference or weight in determining the scope of Title VII’s prohibition of racial discrimination.” *Id.*

155. See *id.* “The Compliance Manual . . . runs headlong into a wall of contrary case law . . . [as] ‘courts generally have upheld facially neutral policies

relied on EEOC-issued guidance on how best to implement workplace practices to ensure equal employment opportunities for all,¹⁵⁶ instead, courts continue the use of the immutable characteristics standard.¹⁵⁷

D. New York Becomes the First State to Ban Racially Discriminatory Grooming Standards on the Basis of Hair

In February of 2019, the New York Commission on Human Rights (the Commission) published new guidance on race discrimination on the basis of hair.¹⁵⁸ This guidance forbids employers from prohibiting natural hair or natural hairstyles in the workplace when those hairstyles are associated with African Americans.¹⁵⁹ The Commission explained that that prohibitions against natural hairstyles perpetuate racist stereotypes that African-American hairstyles are unprofessional.¹⁶⁰ The guidance gives legal recourse to anyone who has been “harassed, threatened, punished, demoted, or fired” because those individuals wear natural hairstyles.¹⁶¹ Specifically, the guidance provides that the Commission can levy penalties up to \$200,000 and

regarding *mutable* characteristics, . . . despite claims that the policy has an adverse impact on members of a particular race” *Id.*

156. See *id.* Congress granted the EEOC authority, under Title VII, to create rules and regulations to ensure equal employment opportunities for all individuals. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

157. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (explaining that Title VII only protects immutable characteristics).

158. See *NYC Commission on Human Rights Ban Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, NYC COMMISSION ON HUM. RTS. (Feb. 2019) (presenting the new guidance on hair discrimination in New York).

159. *Id.* (“Prohibitions on natural hair or hairstyles most closely associated with Black people.1 Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional.”). Commissioner and Chairwoman of the New York City Commission on Human Rights, Carmelyn P. Malalis, explained that “[t]here’s nothing keeping us from calling out these policies prohibiting natural hair or hairstyles most closely associated with black people.” *Id.*

160. See Stacey Stowe, *New York City to Ban Discrimination Based on Hair*, NY TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/style/hair-discrimination-new-york-city.html> [<https://perma.cc/R3HT-87GT>]; *New York City to Ban Discrimination on Basis of Hairstyle*, DAILY BEAST, <https://www.thedailybeast.com/new-york-city-to-ban-discrimination-on-basis-of-hairstyle> [<https://perma.cc/4P57-3AHH>] (last visited Apr. 19, 2019).

161. *New York City to Ban Discrimination on Basis of Hairstyle*, *supra* note 160.

force internal policy changes.¹⁶² Likewise, there is no cap on damages.¹⁶³

To help employers comply with the new guidance, the Commission outlined best practices that companies should consider—one such practice includes evaluating existing grooming policies and ensuring that the policies are inclusive on racial, ethnic, and cultural identities and practices.¹⁶⁴ Although it is too early to tell what type of affect the new guidance will have on the hiring practices and grooming standards of employers, it is the hope of the Commission that the guidance will help to prevent racism against African-Americans because it prohibits policies that exacerbate anti-black bias in employment practices.¹⁶⁵

E. The United States Army's Ban and Reversal on African-American Hairstyles

In 2004, the United States Army implemented a new rule banning hairstyles like twists, dreadlocks, and large cornrows.¹⁶⁶ Female soldiers, however, were permitted to wear their hair down or in a bun.¹⁶⁷ Many female African-American soldiers saw this rule as discriminatory because they believed that the new rule used white women as the baseline for the permitted hairstyles.¹⁶⁸ African-

162. Jessica Chasmar, *New York City bans natural Discrimination to Prevent "anti-Black racism"*, WASH. TIMES (Feb. 19, 2019) ("The city commission can levy penalties up to \$250,000 and force internal policy changes at offending institutions).

163. *See id.*

164. *See id.* (explaining that "as a best practice, . . . employers . . . [should] evaluate any existing grooming or appearance policies, standards, or norms relating to professionalism to ensure that they are inclusive of the racial, ethnic, and cultural identities and practices associated with Black and historically marginalized communities").

165. *See id.* "The change in law is specifically designed to prevent 'anti-black racism.'" *Id.* "Such policies exacerbate anti-Black bias in employment . . . and in other areas of daily living." *Id.*

166. *See* Army Reg. 670-1, *Wear and Appearance of Army Uniforms and Insignia*, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014) The Army's regulation explained that twists, defined as twisting two distinct strands of hair around one another to create a twisted rope-like appearance, are unauthorized; dreadlocks or braids that are unkempt or matted are unauthorized; and cornrows larger than 1/4 inch are unauthorized. *See id.*

167. *See id.* at ch. 3-2(a)(3)(c).

168. *See* Helene Cooper, *Army's Ban on Some Popular Hairstyles Raises Ire of Black Female Soldiers*, N.Y. TIMES (Apr. 20, 2014), <https://www.nytimes.com/2014/04/21/us/politics/armys-ban-on-some-popular-hairstyles-raises-ire-of-black-female-soldiers.html> [<https://perma.cc/EA5A-S3S8>].

American hair grows out, rather than down and is naturally very curly; thus, some African-American soldiers argued that it was more difficult to wear their hair down or style their hair in a bun to comply with the rule.¹⁶⁹ For this reason, the banned hairstyles were very popular with African-American women in the Army.¹⁷⁰ By using white female soldiers as the baseline for creating hair guidelines, the Army did not take into account the harsh effects that this rule would have on soldiers of African descent.¹⁷¹ For example, some African-American women would be forced to spend extra money to style their hair to comply with the rule,¹⁷² and others would find it hard to maintain chemically straightened hair when stationed overseas in war zones.¹⁷³

Moreover, some African-American soldiers saw the new guidelines as offensive and uninformed due to the terms used to describe natural hairstyles that were predominantly worn by African-American women.¹⁷⁴ The guidelines used terms such as “matted” and “unkempt” to describe the cornrow hairstyles.¹⁷⁵ The use of this terminology to describe African-American hairstyles showed a lack of understanding and empathy for the way African-American hair grows and was considered racially insensitive.¹⁷⁶ This rule directly affected the morale of the soldiers because they believed that that the Army devalued African Americans’ natural hair and considered it unprofessional.¹⁷⁷

In response to the uproar and unpopularity the new rule created, Defense Secretary Chuck Hagel ordered all branches of the military to review their hairstyle rules.¹⁷⁸ After the review, the Army—for the first time in its history—allowed African-American women to wear their

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.* With the implementation of the rule, African-American soldiers were worried that the only way for them to comply with the law was to chemically straighten their hair or get a wig. *See id.*

173. *See id.* “Even deployed black women in the Army who decide to straighten their hair run into problems, because the expensive hair products necessary to maintain it are often difficult to get.” *Id.*

174. *See id.*

175. *See id.* The use of these words was offensive because it was seen as the Army saying that “[hair] had to be neat and couldn’t be unkempt.” *Id.*

176. *See id.* To the Army, “neat and kempt meant straightened.” *Id.*

177. *See id.*

178. *See id.*; *see also* Ayana Byrd & Lori L. Tharps, *When Black Hair is Against the Rules*, N.Y. TIMES (Apr. 30, 2014) <https://www.nytimes.com/2014/05/01/opinion/when-black-hair-is-against-the-rules.html> [https://perma.cc/AM9B-V2QN].

hair in natural hairstyles, including dreadlocks, twists, and cornrows.¹⁷⁹ Additionally, the Army revised its hairstyle rule removed the terms “matted” and “unkempt” from its guidelines.¹⁸⁰ The new rule was met with wide spread praise, especially from African-American women, as the rule no longer forced women to spend money on harsh chemicals to straighten their hair.¹⁸¹ The new rule also indicated that the Army recognized that African-American natural hairstyles were no less professional than hairstyles worn by other races.¹⁸² Thus, the United States Army recognized that its policy was discriminatory against African Americans and updated its policy to ensure that the discriminatory practices did not continue.¹⁸³

F. G v. The Head Teacher & Governors of St. Gregory’s Catholic Science College: A Landmark Race Discrimination Case in the United Kingdom

In 1976, the United Kingdom passed a law prohibiting racial discrimination within the country.¹⁸⁴ At the time, the law only banned

179. See Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014) (stating that medium and long hair may be styled with braids, cornrows, twists, or locks); see also Meghann Myers, *Soldiers Cheer Army’s Decision to Authorize Dreadlocks in Uniform*, ARMY TIMES (Jan. 30, 2017), <http://www.armytimes.com/news/your-army/2017/01/30/soldiers-cheer-army-s-decision-to-authorize-dreadlocks-in-uniform/> [<https://perma.cc/8AJ5-7YSZ>].

180. See Myers, *supra* note 179 (noting the absence of these terms); see also Maya Rhodan, *U.S. Military Rolls Back Restrictions on Black Hairstyles*, TIME (Aug. 13, 2014), <http://time.com/3107647/military-black-hairstyles> [<https://perma.cc/XH4Q-7TYD>]. “[T]he Army . . . will remove the terms ‘matted and unkempt’ from [its] grooming guidelines.” *Id.*

181. See Myers, *supra* note 179. For years, African-American women in the Army had been forced to spend money and time straightening their hair with harsh chemicals or wearing wigs to keep their hair within regulation. *Id.* This is particularly true for women with “thick, coarse, curly hair . . . whose natural hair [cannot] be coiled in a regulation bun” or straightened without chemicals. *See id.*

182. See Rhodan, *supra* note 180. The new rule recognized that natural hairstyles “do not result in or reflect less professionalism or commitment to the high standards required to serve within [the] Armed Forces.” *Id.* Some recognized that the new rule would also have a positive benefit on the soldiers’ morale. *See Myers, supra* note 179.

183. See Myers, *supra* note 179.

184. See Race Relations Act 1976, c.74 (Eng.). The Race Relations Act outlawed racism and discrimination in the United Kingdom. *See* Kehinde Andrews, *Racism Is Still Alive and Well, 50 Years After the UK’s Race Relations Act*, GUARDIAN (Dec. 8, 2015, 6:03 AM), <https://www.theguardian.com/commentisfree/2015/dec/08/50-anniversary-race-relations-act-uk-prejudice-racism> [<https://perma.cc/2H9N-7R3Y>]. The Act made it “illegal to refuse service or job opportunities on the basis of

direct racial discrimination, which occurs when an employer treats another individual differently *because* of his or her race.¹⁸⁵ In 2010, the United Kingdom passed the Equality Act of 2010 (the Act), which prohibited all types of discrimination,¹⁸⁶ including racial discrimination.¹⁸⁷ The Act continued its ban on direct discrimination,¹⁸⁸ while also introducing a ban on indirect discrimination, which occurs when a policy is ostensibly neutral but disadvantages individuals of a particular category.¹⁸⁹ Importantly, the Act does not differentiate between immutable and mutable characteristics when determining whether an employer's grooming policy violates the Act.¹⁹⁰ Instead, the Act prohibits all forms of discriminatory employment practices.¹⁹¹

skin colour . . . [and] was an important step in reducing the prejudice that ethnic minorities faced." *Id.*

185. See Race Relations Act 1976, c.74, § 1(1)(A) (Eng.).

A person discriminates against another [if] . . . he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but – (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons, [or] (b) which puts or would put that other at that disadvantage.

Id.

186. See generally Equality Act of 2010, c.15 (Eng.).

187. See Equality Act 2010, c.15, § 9 (Eng.) (presenting the definitions of race).

188. See Equality Act 2010, c.15, § 13(1) (Eng.). "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." *Id.*

189. See Equality Act 2010, c.15, § 19(1)-(2) (Eng.).

Indirect discrimination (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if . . . (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Id.; see also Alan Kennedy, *Supreme Court Decision on Key Indirect Discrimination Cases*, LEXOLOGY (Apr. 21, 2017), <https://www.lexology.com/library/detail.aspx?g=2be79839-2e93-4f6e-a734-c2374aa29090> [https://perma.cc/VVU5-YCV8].

Indirect discrimination occurs when "an employer's provision, criterion or practice . . . puts people with a protected characteristic at a particular disadvantage when compared to others who do not have that characteristic." *Id.*

190. See Equality Act 2010, c.15, § 9 (Eng.). Under the definition of "race" the act makes no reference to immutable or mutable characteristics. See *id.*

191. See Equality Act 2010, c.15, §§ 4, 9 (Eng.). The Act does this by prohibiting both direct and indirect discrimination. See Equality Act 2010, c.15, §§ 9,

By covering all types of discrimination, the Act protects the rights of all individuals to have equal employment opportunities in the United Kingdom.¹⁹²

In 2011, the United Kingdom's High Court of Justice ruled on a landmark decision when it determined that discrimination occurs when a policy has a disproportionate effect on a group of individuals because of their cultural practice.¹⁹³ G, a student of African-Caribbean descent, had not cut his hair since birth and styled it in cornrows.¹⁹⁴ Unbeknownst to G or his parents, G's school employed a uniform policy that prohibited cornrows.¹⁹⁵ To justify its ban on cornrows, the school claimed that it had an interest in keeping gang culture out of the school.¹⁹⁶ It claimed that ethnic tension and violence could result from individuals choosing to identify with this culture through their hair.¹⁹⁷ As a result of the school's priority for ensuring school safety, the school chose not to make an exception for G's hairstyle, and G transferred to a different school that did not prohibit cornrows.¹⁹⁸

19 (Eng.) (presenting the definitions of direct discrimination and indirect discrimination).

192. See *What Does Equal Opportunities Mean?*, EOC, <https://www.eoc.org.uk/> [<https://perma.cc/LL5M-WMQZ>] (last visited Mar. 27, 2019). Under the Act, "[t]he term 'equal opportunities' upholds the idea that all workers within an organisation should be entitled to and have access to all of the organization['s] facilities at every stage of employment, including the pre-employment phase." *Id.*

193. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [1-2, 37-38] (Eng.).

194. See *id.* at [2]. G kept his hair in the cornrow style in accordance with his family tradition of wearing braids. See *id.*

195. See *id.* The uniform policy at the time was unwritten but after complaints from G's mother, the school's prohibition against the wearing of cornrows was made explicit. See *id.*

196. *Id.* at [22] ("A major concern has been to keep any gang culture out of the school and to avoid the ethnic tensions and violence which so often accompany it.").

197. See *id.* The school stated that gangs wore distinctive haircuts as badges of ethnic or gang identity which "help[s] foster disunity rather than unity." *Id.* at [23(25)]. Moreover, the school believed that students might view distinctive haircuts as badges of ethnic or gang identity. See *id.* Comparing the prohibition against wearing braids to its prohibition against wearing "skin head" hairstyles, the school thought that prohibiting students from wearing distinctive hairstyles was the best way to keep students safe while at school. *Id.* Therefore, the school believed that the uniform policy played a critical role in keeping the school safe. See *id.* at [23(24-25)].

198. See *id.* at [3]. The school felt that it could not make an exception for one particular hairstyle because doing so would no longer justify the zero-tolerance policy on various "popular culture hairstyles" that other students might request to have. *Id.* at [23(26)].

The High Court of Justice concluded that the school's policy was indirectly discriminatory toward students of African-Caribbean decent and that the school did not provide adequate justification for implementing the ban.¹⁹⁹ The court reasoned that in the African, African-Caribbean, and African-American cultures, braids and cornrow hairstyles had a historical significance that dated back to practices from West Africa, Ethiopia, and Egypt.²⁰⁰ Moreover, this hairstyle had a familial connection because many braiding styles are passed down from generation to generation, creating sacred traditions within families of African heritage.²⁰¹

The court found that although the school's policy applied neutrally to all students, the policy created a particular disadvantage for students of African-Caribbean decent because of the rich history and cultural significance that those individuals shared with the cornrow hairstyle.²⁰² The court's ruling in this case is important because it made clear that cultural practices that are associated with a particular race are protected under the Act.²⁰³ Therefore, schools *and*

199. *See id.* at [41, 49]. To determine whether indirect discrimination occurred, the court applied a two-step indirect discrimination test. *See id.* at [25].

For [an indirect discrimination] claim to succeed, the claimant must show that the policy can result in discrimination within the meaning of the [Equal Opportunity Act] and that, in the circumstances there is a particular disadvantage to the claimant in the prohibition of cornrows. If he establishes this, it is for the defendant to justify the discrimination.

Id.

200. *See id.* at [29]. Each tribe in Africa had its own braiding style and unique design, indicating status, religion, village, or kinship. *See id.*

201. *See id.* Hair braiding has a historical and cultural significance to U.S. and British individuals with African decent because it is passed down from older generations to younger generations. *Id.*

202. *See id.* at [32]. The court recognized that individuals who view the cornrow hairstyle with such importance may not make up the majority of African-Caribbean people; however, these people still make up a group of people who could be disadvantaged from the policy. *See id.*; *see also School's Refusal to Let Boy Wear Cornrow Braids is Ruled Racial Discrimination*, GUARDIAN (June 17, 2011, 7:57 AM), <https://www.theguardian.com/uk/2011/jun/17/school-ban-cornrow-braids-discrimination> [<https://perma.cc/3ZQD-RJTU>] (explaining that "[t]he judge emphasised that the school's 'short back and sides' hair policy was perfectly permissible and lawful, but exceptions had to be made on ethnic and cultural grounds").

203. *See* Jerome Taylor, *School Braids Ban "Not Justified"*, INDEPENDENT (June 17, 2011, 4:23 PM), <http://www.independent.co.uk/news/uk/home-news/school-braids-ban-not-justified-2298925.html> [<https://perma.cc/U6NC-V2XK>]. "This is an important decision [that] . . . makes clear that . . . cultural and family practices associated with a particular race fall within the protection of equalities legislation." *Id.* "G was a landmark decision as it determined that

employers who implement grooming policies must take into account an individual's cultural and ethnic background before implementing a grooming policy.²⁰⁴

G. The Problem with the Immutable Characteristics Standard and Why a New Standard Is Needed

Racial discrimination in the workplace is a significant issue because those who face discrimination are less likely to enjoy the same employment opportunities as others who do not face the same discrimination.²⁰⁵ Racially discriminatory policies force individuals to subdue their racial characteristic in order to comply with the policy and remain employed.²⁰⁶ Congress enacted Title VII to prevent this form of discrimination and remove any barrier that could hinder the equal employment opportunity for all individuals.²⁰⁷ The immutable characteristics standard, however, established a new barrier that allows employers to discriminate against employees based on their racial characteristics.²⁰⁸

discrimination can occur when a practice or policy has [a] disproportionate impact upon a group of individuals who adhere to a non-religious cultural practice specific to their race." See Angela Jackman, *What Is the Issue With Natural African-Caribbean Hair?*, CITY UNIV. LONDON (June 2, 2016), <https://www.city.ac.uk/news/2016/june/what-is-the-issue-with-natural-african-caribbean-hair> [<https://perma.cc/X22T-R6SN>].

204. See Taylor, *supra* note 203. "[S]chools will now have to take into account someone's cultural and ethnic background when deciding uniform and hair style policies." *Id.* "Discriminatory demands in the workplace [such as requiring employees of African descent to wear weaves or chemically straighten their hair] . . . are amenable to Equality Act challenges in the Employment Tribunal based on race." Jackman, *supra* note 203.

205. See Eric Bachman, *Pew Survey Sheds New Light on Glass Ceiling Discrimination in STEM Jobs*, NAT'L L. REV. (2018). Discrimination affects how individuals view the workplace and opportunities for advancement. See *id.*

206. See Cortney Bryson, *Hair Today, Gone Tomorrow: How Immutable Traits May Become the New Face of Discrimination as Interpreted in Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, 39 N.C. CENT. L. REV. 166, 172 (2017). Some individuals are forced to tone down a disfavored identity to fit into the mainstream view of what is acceptable. See *id.*

207. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

208. See Davison, *supra* note 64, at 161.

[C]ourts have adopted a mutability requirement under which employers may permissibly discriminate based upon "socially-driven" characteristics, even if they are a part of a person's racial, sexual, or ethnic identity. Social characteristics such as one's language, manner of speech, style of hair, attire and choice of friends are all factors that are commonly viewed as indicators

Permitting employers to discriminate against protected categories, so long as the employee can change the characteristic,²⁰⁹ undermines the purpose of Title VII and the spirit of the Civil Rights Act.²¹⁰ Regardless of an employee's hairstyle or any other characteristic a court may deem mutable, all employees should have the same opportunities for employment.²¹¹ Therefore, it is incumbent upon courts to implement a new standard that will prevent employers from legally discriminating against employees based on racial characteristics that are deemed mutable.²¹²

In addition to undermining the purpose and spirit of Title VII, preventing African Americans from wearing natural hairstyles is an important issue because for centuries African Americans have been told that their natural hair is inferior to the Eurocentric standards of beauty.²¹³ Unfortunately, this standard of beauty has negative

of a person's racial ancestry, but remain unprotected under a mutability analysis.

Id. Courts have determined that no matter how entrenched a specific characteristic may be to an individual, if it can be "easily altered" then it is a mutable characteristic and thus, unprotected by Title VII. *Id.* at 168.

209. *See id.* "The mutability requirement rests upon the belief that an employer may permissibly discriminate against an employee based upon traits that are changeable." *Id.*

210. *See* Fellows, *supra* note 38, at 400.

211. *See* Griggs, 401 U.S. at 429-30; *see also* Michael D. Smith, *Tackling a Player by the Hair is Legal, Not a Horse-Collar Tackle*, PRO FOOTBALL TALK (Oct. 21, 2016, 6:24 PM), <http://profootballtalk.nbcsports.com/2016/10/21/tackling-a-player-by-the-hair-is-legal-not-a-horse-collar-tackle/> [<https://perma.cc/S89P-GRP9>]. In American professional football, many players wear long dreads or cornrows that fall out of the players' helmets past their shoulder pads. *See id.* Instead of prohibiting players from wearing these hairstyles for safety concerns or image concerns, the National Football League (NFL) allows the players to wear these hairstyles. *See id.* There are dangers associated with wearing these hairstyles, as the NFL permits defenders to tackle players by the hair. *See id.* However, regardless of the players hairstyle, players of all races have the same opportunities to play for an NFL team. *See id.*

212. *See* Davison, *supra* note 64, at 168. "[T]he Supreme Court hasn't yet agreed" with the EEOC that hair discrimination, because of its racial implications, is unconstitutional, "thus leaving lower courts to muddle through without guidance from the high court." Gandy, *supra* note 14.

213. *See* AYANA D. BYRD & LORI L. THARPS, *HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA* 52 (2001). Because African Americans spent "more than three-hundred years in a land that had collectively stripped them of pride in their Blackness[,] including pride in the color of their skin and all distinctly African physical attributes . . . many [African Americans] came to dismiss these characteristics as inferior." *Id.*

ramifications that affect African Americans today.²¹⁴ For example, there are schools that force African-American students to straighten their hair or risk being expelled.²¹⁵ Likewise, companies are implementing grooming standards that force African-American employees to chemically straighten their hair or risk being fired from their jobs.²¹⁶ Not only do these requirements have negative

214. See Watson, *supra* note 101 (demonstrating how companies are punishing their employees for wearing natural hairstyles). “Each time a person is questioned about their hairstyle, they are casually reminded that it is different and not the norm.” Stacey Gordon, *Is Your “Natural” Hairstyle Preventing You from Getting a Job?*, FORBES WOMAN (Mar. 11, 2013, 10:34 AM), <https://www.forbes.com/sites/shenegotiates/2013/03/11/is-your-natural-hairstyle-preventing-you-from-getting-a-job-2/#1c43cf425646> [https://perma.cc/G3LW-SWZM]. (“During an interview, an African-American woman with straightened hair is confident in the knowledge that her hair is not a factor in the interviewer’s thoughts because [everyone has] bought into the idea that straightened hair is acceptable. Curly, kinky and braided hair is not.”).

215. See Marquaysa Battle, *Times Black Girls Were Suspended for Their Hairstyles*, ELITE DAILY (May 16, 2017), <https://www.elitedaily.com/life/culture/black-girls-natural-hair-racism-schools/1953497> [https://perma.cc/HN49-J7MY]. African-American students across the country have been suspended or expelled from school for wearing natural hairstyles. See, e.g., Kay Lazar, *Black Malden Charter Students Punished for Braided Hair Extensions*, BOS. GLOBE (May 12, 2017), <https://www.bostonglobe.com/metro/2017/05/11/black-students-malden-school-who-wear-braids-face-punishment-parents-say/stWDIBSChw1zocUWR1QMP/story.html> [https://perma.cc/HA4D-PAB3] (explaining that a charter school in Boston punishes African-American students who wear their hair in braids by giving the students detention or suspending them); see also Teryn Payne, *School Claims Dress Code Violation After Student Wears His Hair in Braids*, TEEN VOGUE (Feb. 8, 2018), <https://www.teenvogue.com/story/school-claims-dress-code-violation-student-hair-braids> [https://perma.cc/M6J5-G3LW] (explaining that a school told the mother of an African-American male student that he could not come back to school unless he cut his cornrow braids); Deborah Roberts, Ignacio Torres & Jasmine Brown, *As Natural Hair Goes Mainstream, One High School’s Natural Hair Ban Sparks Firestorm*, ABC NEWS (Sept. 15, 2016, 1:24 PM), <http://abcnews.go.com/US/natural-hair-mainstream-high-schools-policy-sparks-firestorm/story?id=42100267> [https://perma.cc/3KZR-P9FT] (explaining that a school instituted a new dress policy, prohibiting dreadlocks, “cornrolls,” twists or braids).

216. See Watson, *supra* note 101. Companies state that they implement these policies because the policies decrease obvious disparities or differences that are distracting. See *id.* However, these standards are always used to make African Americans fit into a Eurocentric norm and never used to help white individuals fit into an African-American norm. See *id.*; see also Trudy Susan, *The Sad Truth About Natural Hair Discrimination*, EBONY (May 21, 2014), <http://www.ebony.com/style/the-sad-truth-about-natural-hair-discrimination-987> [https://perma.cc/82UL-RZGV]. “[C]ompanies perpetuat[e] the stereotype that healthy hair is shiny, springy,

ramifications because they force African Americans to comply or risk being unemployed,²¹⁷ but they also negatively affect the psyche of African Americans because they are constantly told that their natural state is not good enough.²¹⁸

The current immutable characteristics standard succeeds at identifying forms of overt racial discrimination; however, it is less effective at identifying covert forms of racial discrimination.²¹⁹ There are instances where an employer either purposefully or inadvertently implements a grooming policy that is discriminatory, but because the policy can be applied neutrally to all races or concerns an individual's mutable characteristic, the immutable characteristic standard may not render the policy unconstitutional.²²⁰ These policies are obviously problematic because they allow employers to skirt their constitutional obligation to provide equal employment opportunities to all individuals; however, they are also problematic because there are instances when employers discriminate against employees

thick and long." *Id.* "[F]or women with kinky hair textures, healthy hair doesn't have the same visual attributes that are found in looser textures." *Id.*

217. See Minda Honey, *Black Women Speak About Natural Hair Bias in the Workplace*, TEEN VOGUE (Feb. 24, 2017), <https://www.teenvogue.com/story/black-women-natural-hair-bias-discrimination> [<https://perma.cc/6D3F-S6GC>]. For example, an African-American woman, who wore a natural hairstyle, spoke at a leadership conference. *See id.* During the conference she was approached by numerous individuals, including her boss, who commented on her natural hair. *See id.* She was asked to pull her hair back into a pony tail instead of wearing her natural hairstyle. Consequently, this was the last time she was asked to speak at a conference. *See id.* Likewise, an African American licensed dermatologist who wears a natural hairstyle stated that "[some] patients . . . who wear a different hair style than [she] do[es], suggest that [she is] not able to help [clients] with their problems because of [her] natural hairstyle." *Id.*

218. See Watson, *supra* note 101. There are long term effects with these types of policies, which are akin to bullying. *See id.* Effects included anxiety, physical aggression and low-self-esteem. *See id.*; see also Honey, *supra* note 217. During a meeting, an African-American woman who worked in finance was told she "looked like Krusty the Clown from the Simpsons—in front of a meeting room full of people." Honey, *supra* note 217. Another white colleague told her that she looked like an NFL player who was known for his dreadlocks hairstyle. *See id.* This created an uncomfortable work atmosphere. *See id.*

219. See Shaw, *supra* note 24. The current understanding of race-based discrimination fails to recognize the forms of biases people of color—specifically African Americans—encounter while at work. *See id.*

220. *See id.* "[T]his can mean that seemingly neutral policies that afford supervisors substantial discretion can lead to results that have disproportionately negative impacts on traditionally marginalized groups." *Id.*

inadvertently.²²¹ Employers can harbor unintentional implicit biases towards African Americans that can have a major effect on the types of workplace policies that the employer implements.²²²

The EEOC, through its compliance manual, tried to prevent situations like these from occurring.²²³ Likewise, New York has banned discriminatory grooming standards, the United States Army repealed grooming standards that applied more restrictively to African Americans, and the United Kingdom provides protections against all forms of racial discrimination.²²⁴ Unlike most American courts, these entities recognize that racial discrimination occurs in many forms and can be easily identified by determining if the discriminatory policy

221. *See id.* “Implicit bias studies have shown that most people show a strong preference for white people as opposed to black people.” *Id.*

222. *See id.* Likewise, “[i]mplicit biases may lead a supervisor to view hairstyles traditionally associated with a specific racial or ethnic group as unprofessional for reasons that have very little legitimate basis in workplace policy.” *Id.* “Googling ‘unprofessional hairstyles for work’ yield[s] image results mainly of black women with natural hair, while searching for the ‘professional’ ones offered pictures of coiffed, white women.” Leigh Alexander, *Do Google’s “Unprofessional Hair” Results Show It Is Racist?*, *GUARDIAN* (Apr. 8, 2016, 3:50 AM), <https://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist-> [<https://perma.cc/TL69-HD38>]. Google uses an algorithm that mirrors conversations that occur across the Internet about “unprofessional hair.” *Id.* “Considering that the majority of the global population is non-white, we do immediately see how white, western-centric biases . . . dominate the very way the web works.” *Id.* Some individuals also see natural hairstyles as dangerous because of their implicit biases. *See* ACLU, *supra* note 21 (explaining how TSA agents specifically targeted African-American women who wore natural hairstyles and patted down their hair during security searches). Biases towards African-American natural hair is evidenced in Google and Yahoo image searches. *See* Google Image Search, *supra* note 23 (demonstrating that searches for unprofessional hairstyles for interviews populates photos of African-American Natural Hair, while searching for professional hair for interviews populates photos of Eurocentric hairstyles).

223. *See* EEOC COMPLIANCE MANUAL, *supra* note 142. The EEOC recognized that employers might create policies that apply more restrictively to hairstyles worn by African Americans. *See id.* Therefore, it prohibited employers from implementing these policies, as it restricts employment opportunities for African Americans. *See id.*

224. *See* Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014). The Army now allows African-American women to wear hairstyles that are naturally associated with the African-American culture. *See id.* The United Kingdom will not allow employers to create policies that are discriminatory, whether or not an employer intentionally or unintentionally created the discriminatory policy. *See* Equal Opportunity Act 2010, c.15, §§ 9, 13, 19 (Eng.).

pertains to an immutable or mutable characteristic.²²⁵ Racially discriminatory characteristics include characteristics that are historically, culturally, and traditionally associated with one's race, and employers should not be able to use these characteristics to discriminate against any group of employees.²²⁶ As long as employers are able to use these *mutable* characteristics to implement discriminatory policies, the purpose of Title VII will not be fully achieved.²²⁷

III. A PROPOSAL FOR A NEW STANDARD THAT PROTECTS ALL FORMS OF EMPLOYMENT DISCRIMINATION

Adopting a new standard in the United States that prevents employment discrimination, whether based on an individual's mutable or immutable characteristics, is the most effective way to prevent racial discrimination in the workplace.²²⁸ The current standard permits employers to implement policies and procedures that can apply neutrally to all employees but limits the employment opportunities of a certain segment of employees.²²⁹ It is incumbent upon courts to adopt a standard that ensures that this sort of injustice does not occur.²³⁰ A proposed new standard—the New Standard—will prevent this sort of injustice from occurring and will ensure that workplace practices do

225. See EEOC Compliance Manual, *supra* note 142. The EEOC manual expressly prohibits employers from using African-American hairstyles as a means of discriminating against African Americans. See *id.* For example, the manual specifically states that “Title VII prohibits employers from preventing African-American women from wearing their hair in a natural, unpermed ‘afro’ style.” *Id.*

226. See *G. v. Head Teacher & Governors of St. Gregory’s Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [29] (Eng.) (establishing the importance of cultural practice and historical significance when determining if a policy is racially discriminatory).

227. See *Ritenhouse*, *supra* note 35, at 90-91. The purpose of Title VII was to remove unnecessary racial barriers to employment. See *id.*

228. See *Perea*, *supra* note 25, at 866-67 (stating that a new standard should replace the immutable characteristics standard, which possibly includes protecting ethnic traits).

229. See *Davison*, *supra* note 64, at 161. Employers can discriminate against “socially-driven characteristics,” even if they are a part of a person’s race.” *Id.*

230. *Gordon*, *supra* note 214 (“Even though a dress code should not discriminate under Title VII of the Civil Rights Act of 1964, it is unfortunate that many enforceable dress codes include provisions that mainly adversely affect minorities.”).

not unjustly discriminate against those whom Title VII is supposed to protect.²³¹

A. The New Standard: Expanding Title VII's Protections to Prevent All Forms of Employment Discrimination

The New Standard is built upon the notion that many entities do not use an immutable characteristics standard when determining whether a workplace policy is racially discriminatory.²³² This New Standard is comprised of a three-step analysis, created by using the United Kingdom's Equality Act of 2010 as a baseline.²³³ Each step undergirds the intent of Congress in promoting equal employment opportunities²³⁴ while upholding an employer's right to make decisions on how best to run his or her business.²³⁵

When presiding over a Title VII racial discrimination suit, a court's first step is to determine whether the employer's policy has a disproportionate and adverse impact on the employment opportunities of a protected class of individuals.²³⁶ A policy that does not have an adverse impact on a protected class of individuals must be upheld because the policy would not provide any other group with a decidedly

231. *See id.*

232. *See, e.g.*, EEOC COMPLIANCE MANUAL, *supra* note 142 (prohibiting employers from creating grooming standards that have a disproportionate impact on African Americans); *see also* Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014) (permitting African-American women to wear cornrows and dreadlocks); *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWCH (Admin) 1452 [1-2, 41, 49] (Eng.) (explaining that cultural practices associated with an individual's race are protected under the Equality Act).

233. *See generally* Equality Act 2010, c.15 (Eng.).

234. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (underscoring the point that Congress intended for Title VII to remove barriers that favored an identifiable group of employees over other employees and promote equal employment opportunities). Congress intended for Title VII to promote equal employment opportunities for all individuals. *See Ritenhouse, supra* note 35, at 90-91.

235. *See Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (emphasizing an employer's right to make decisions on how to best run the company).

236. *See Mark R. Bandsuch, Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 990 (2009). Courts have agreed that there are certain grooming standards that disproportionately affect African Americans. *Id.* at 991. Likewise, the New Standard will prevent this sort of disproportional discrimination from occurring.

large advantage for employment over another group.²³⁷ Furthermore, a workplace policy that only affects a few workers must be upheld because it does not prohibit an entire class of individuals from obtaining an equal opportunity of employment with that particular employer.²³⁸

A court's second step is to determine whether the policy discriminates against a characteristic that is historically or culturally associated with the race of the class of individuals identified in step one.²³⁹ This step strays from the immutable characteristics standard that American courts currently implement.²⁴⁰ Rather than automatically upholding a policy that discriminates against these particular cultural characteristics, the New Standard recognizes that these characteristics are often ingrained in a particular race or ethnic group.²⁴¹ Because of the historical or cultural significance that the group of individuals have in common with the characteristic, the employment policy could negatively affect the group's ability to have the same opportunity of employment as other groups.²⁴² Thus, if a court finds that the employment policy discriminates against a

237. See, e.g., Equality Act 2010, c. 15, § 19(1)-(2) (Eng.). The United Kingdom's Equality Act of 2010 does not allow employers to create a policy that puts persons with shared racial characteristic at a particular disadvantage when compared with other person with whom the individual does not share the same advantage. *Id.*

238. See *id.*; see also Kennedy, *supra* note 189. The New Standard will emulate the Equality Act of 2010 by preventing individuals belonging to one race from having a decidedly large advantage for employment opportunities over individuals of another race. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [25] (Eng.).

239. See *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (holding that a grooming policy that is historically or culturally associated with a particular race is still a mutable characteristic and is not entitled to protection under Title VII).

240. See *id.* In general, courts agree with the *Catastrophe Management* court that these types of characteristics are mutable. See *id.*; see generally Ford, *supra* note 69 (explaining that courts do not currently review cultural practices when determining race).

241. See *G.*, EWHC (Admin) 1452 [1-2] (Eng.).

242. See *id.* at [29]. Some ethnic groups have cultural practices with roots that date back hundreds if not thousands of years, making the cultural practice significantly important to the ethnic group. See *id.*; see also *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); Gandy, *supra* note 14 (explaining the cultural significance of wearing natural hair styles). Braids and dreadlocks hold a strong cultural significance within communities of African descent. See *G.*, EWHC (Admin) 1452 [29] (Eng.); Camp, *supra* note 93, at 686 (noting the cultural significance of natural hairstyles during the Black is Beautiful Movement).

characteristic that is historically or culturally associated with the race of an identifiable group, the courts will then proceed to step three.

The third and final step in the New Standard is to determine whether the employer is objectively justified in creating its policy.²⁴³ If an employer is able to prove that there is a legitimate reason for implementing the policy, the law will be upheld; however, if the employer cannot prove that the policy is objectively justified, it will be held unconstitutional.²⁴⁴ Race, however, can never justify an employer's decision for creating a discriminatory policy under Title VII.²⁴⁵ Therefore, an employer must prove that there is a legitimate purpose for the policy without implicating race or any of the racial characteristics that were identified in step two.²⁴⁶

B. The Benefits of the New Standard

Step one of the New Standard is aligned with Congress's intent in creating Title VII because the step is concerned only with determining whether a group of people are adversely impacted by an employment policy such that they do not have the same access to employment as others.²⁴⁷ Congress did not create Title VII to rid the

243. See Equality Act 2010, c.15, § 19(1)-(2) (Eng.). If a policy is found to be discriminatory against a particular race and the employer "cannot show it to be a proportionate means of achieving a legitimate aim," the policy will be struck down. Equality Act 2010, c.15, § 19(2)(d) (Eng.). For an employer to be able to implement a discriminatory policy, the employer must justify the discrimination. See *G.*, EWHC (Admin) 1452 [25] (Eng.).

244. See *id.* Using the United Kingdom's standard, after a plaintiff successfully establishes that a policy is discriminatory under the Equal Opportunity Act, the burden shifts to the defendant to justify the discriminatory practice. See *id.* "[T]he claimant must show that the policy can result in discrimination within the meaning of the [Equal Opportunity Act] and that . . . there is a particular disadvantage to the claimant If he establishes this, it is for the defendant to justify the discrimination." *Id.*

245. See *Knight v. Nassau Cty. Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981). "Congress specifically excluded race from the list of permissible bona fide occupational qualifications." *Id.* Title VII prevents race from being used as a bona fide occupational qualification. Ritenhouse, *supra* note 35, at 90.

246. See *id.* Employers have an opportunity to establish non-discriminatory reasons for implementing their policies. See *id.* at 94. It was not Congress's intention to completely remove an employer's ability to make business decisions. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975).

247. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). Congress's intent in the enactment of Title VII was to remove barriers that favored one identifiable group over another. See *id.* Promoting the equal employment opportunities for all individuals was the driving force behind the creation of Title VII.

employment landscape of *all* forms of discrimination, even if it affected a small number of individuals; rather, Congress only intended to provide all individuals with the same opportunity to obtain employment.²⁴⁸ Thus, step one accomplishes Title VII's goal of protecting only identifiable groups that are adversely affected by an employment policy because employment policies that do not disproportionately *and* adversely impact an identifiable group of employees cannot be struck down.²⁴⁹

Like step one, step two is aligned with Congress's intent to ensure that employers retain their rights to make decisions that are in the best interest of the company.²⁵⁰ Congress did not intend to come into every place of employment and dictate every policy or decision that an employer makes.²⁵¹ Congress was only concerned with prohibiting employment policies that are associated with a particular group's racial characteristics, which could keep the group from obtaining equal employment opportunities.²⁵² Likewise, step two is not concerned with an employer's policy if it regulates any employee's characteristic that does not pertain to the particular racial group's history or culture.²⁵³ Furthermore, step three permits employers to have a say in the policies and affairs of the business.²⁵⁴ Thus, if an employer has a legitimate reason for adopting a policy that might be

See Ritenhouse, *supra* note 35, at 90. Congress created Title VII to prevent employment discrimination, whether the discrimination is subtle or obvious. *See id.*

248. *See Willingham*, 507 F.2d at 1092. Here the New Standard differs from the analysis used by the court in *G. See G.*, EWHC (Admin) 1452 [25] (Eng.). The court required plaintiffs to establish that the discriminatory policy caused the plaintiff a particular disadvantage. *See id.* The New Standard requires that the plaintiff establish that the employer's policy adversely impacts an entire class of individuals, which is more aligned with Congress's intent. *See Willingham*, 507 F.2d at 1092 ("Congress sought only to give all persons equal access to the job market.").

249. *See Ritenhouse*, *supra* note 35, at 88. "Congress enacted Title VII primarily to confront racial discrimination in the workplace . . ." *Id.* Courts generally uphold employment policies that do not apply disproportionately to or adversely impact identifiable groups of employees. *See id.*

250. *See id.*; *see also* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (arguing that prohibiting employees from wearing certain hairstyles helped the company project an image that customers liked).

251. *See Willingham*, 507 F.2d at 1092 (explaining that employers still have a right to make decisions that are in the best interest of the business).

252. *See Ritenhouse*, *supra* note 35, at 90 ("The passage of Title VII reflected an ambitious agenda of transforming society by eradicating discrimination based on protected characteristics . . .").

253. *See id.*

254. *See Willingham*, 507 F.2d at 1092 (discussing employer's rights in exercising their judgment in operation of their businesses).

viewed as racially discriminatory, the courts will not intercede and prohibit the employer's decision.²⁵⁵

C. Title VII's New Standard in Practice

The facts from *Catastrophe Management Solutions* are illustrative in demonstrating how the New Standard is best equipped to prevent racial discrimination in the workplace.²⁵⁶ In applying the New Standard, the *Catastrophe Management Solutions* court would first determine whether CMS's policy had a disproportionate and adverse impact on African Americans.²⁵⁷ CMS's grooming standard banned the dreadlock hairstyle,²⁵⁸ which is a hairstyle that is predominately worn by African Americans and persons of African descent.²⁵⁹ Although persons of other races may wear dreadlocks, by and large, dreadlocks are worn by African Americans.²⁶⁰ Thus, because African Americans would make up the racial group that is

255. See *Rogers*, 527 F. Supp. at 233. Although employers cannot use race as a bona fide occupational qualification, employers might have other justifiable reasons for instituting the policy. See *Knight v. Nassau Cty. Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981). However, employers with grooming standards banning dreadlocks and cornrows will have a difficult time proving that the policy has a bona fide occupational qualification, considering there is almost no occupational benefit from preventing anyone from wearing these hairstyles. See, e.g., *Smith*, *supra* note 211.

256. See *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1020 (11th Cir. 2016). Particularly important facts for this Section are that Jones was an African American, Jones wore a dreadlock hairstyle, and Jones received an offer to work in a call center. See *id.* at 1020-21.

257. *Supra* Section III.A (“[A] court’s first step is to determine whether the employer’s policy has a disproportionate and adverse impact on the employment opportunities of a protected class of individuals.”).

258. See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021. Wilson informed Jones that CMS prohibited its employees from wearing dreadlocks. See *id.* at 1021-22. Although the grooming policy does not explicitly state that dreadlocks are not a permissible hairstyle, Wilson made clear that Jones could not wear her hair in that manner as a CMS employee. See *id.* at 1022.

259. See *id.* “[D]readlocks remain the most distinctive black hairstyle among other ethnic groups.” Jahangir, *supra* note 2. Dreadlocks can be dated back to Ancient Egyptian civilization. See Gabbara, *supra* note 80.

260. See Emanuella Grinberg, *Dear White People with Dreadlocks: Some Things to Consider*, CNN (Apr. 1, 2016, 2:16 PM), <http://www.cnn.com/2016/03/31/living/white-dreadlocks-cultural-appropriation-feat/index.html> [<https://perma.cc/QAV2-WKLY>] (explaining that the dreadlocks hairstyle is a traditional black hairstyle); see also *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030 (explaining that dreadlocks are historically and culturally associated with African Americans).

most impacted by this policy, the policy would have a disproportionate and adverse impact on the employment opportunities of African Americans.²⁶¹

The second step that the court would perform is determining whether CMS's policy discriminates against a characteristic that is historically or culturally associated with African Americans.²⁶² The dreadlock hairstyle has a significant historical and cultural connection with African Americans and individuals of African descent.²⁶³ The hairstyle dates back to the practices created by ancient tribes in Africa and has been passed down throughout generations.²⁶⁴ Today, with the emergence of the Natural Hair Movement, many African Americans view the dreadlock hairstyle as a statement of pride, beauty, and identity.²⁶⁵ Moreover, some find that the hairstyle is the easiest, safest, and most efficient way to care for their hair.²⁶⁶

Dreadlocks are not only culturally and historically associated with African Americans, but they are also associated with African Americans because the style is created by using an individual's natural hair texture to obtain its distinctive look.²⁶⁷ The dreadlock hairstyle is a natural derivation of the natural growth of African-American hair.²⁶⁸ Many African Americans find that natural hairstyles are the best hairstyles to wear because they do not necessitate the use of harsh

261. See Grinberg, *supra* note 260 (explaining that dreadlocks are a traditional African-American hairstyle). This holding would align with the EEOC's guidance which prohibits employees from creating policies that negatively and disproportionately impact African Americans. See EEOC COMPLIANCE MANUAL, *supra* note 142.

262. See *supra* Section III.A ("A court's second step is to determine whether the policy discriminates against a characteristic that is historically, physiologically, or culturally associated with the race of the class of individuals identified in Step One.").

263. See Jahangir, *supra* note 2.

264. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* (2011) EWHC (Admin) 1452 [29] (Eng.).

265. See Grinberg, *supra* note 260. "Black hair [is intertwined with] beauty, identity and politics." *Id.*

266. See Emma Kasprzak, *Black Natural Hair: Why Women Are Returning to Their Roots*, BBC NEWS (May 6, 2017), <http://www.bbc.com/news/uk-england-39195836> [<https://perma.cc/Y27Q-5XGV>]. Natural hairstyles are safer than hairstyles that require harsh chemicals and easier to maintain than hairstyles that require a visit to the hairdresser every few weeks. See *id.*

267. See Bryson, *supra* note 206, at 170-71. "Dreadlocks are formed through the process of leaving the hair uncombed and uncut, which is then allowed to knot . . . into [its] distinctive locks." *Id.*

268. See *id.* at 171.

chemicals to maintain the hairstyle.²⁶⁹ Therefore, a judge would most likely find that CMS's grooming policy discriminates against a characteristic that is historically and culturally associated with African Americans.²⁷⁰

The third and final step that the court would perform is to determine whether CMS was objectively justified in creating this policy.²⁷¹ CMS presented little evidence that would prove the existence of an objectively justifiable reason for creating a policy that banned dreadlocks.²⁷² Jones applied for a position as a call service representative,²⁷³ which required no face-to-face contact with the public, as the representative would only handle telephone calls in a large room of CMS employees.²⁷⁴ There was no occupational value in requiring Jones to literally cut off her hair to answer phones in a call center.²⁷⁵ Thus, CMS would not be objectively justified in implementing this policy, and the court would likely hold that CMS's

269. See Cooper, *supra* note 168 (explaining that one way to comply with these policies is to use harsh hair straightening products); see also Cohen, *supra* note 99. Scientists have linked using hair straightening products to an increase in risk for breast cancer. See Cohen, *supra* note 99. Likewise, these products contain chemicals that are known to cause baldness. See Sifferlin, *supra* note 99.

270. But see Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (holding that a characteristic that is historically and culturally associated with African Americans is not entitled to protection under Title VII).

271. See *id.* (finding that CMS's grooming policy prohibited a hairstyle that was historically and culturally associated with African Americans). Unlike the *Catastrophe Management Solutions* court, which discounted a characteristic's historical and cultural association with a race, the New Standard weighs these factors in favor of the plaintiff. See *id.*

272. See *id.* at 1021. The only reason provided by CMS was that dreadlocks seem to get "messy." *Id.*

273. See *id.* CMS hired Jones to work in a call center. See *id.* She would work in a large room and have no face-to-face contact with any customers. See *id.* Even if CMS implemented the policy to project a business-like image, prohibiting call center employees from wearing dreadlocks provides the company with no occupational value. See *id.* at 1021-22.

274. See *id.* at 1021. There is more of an occupational value in prohibiting NFL players from wearing dreadlocks and cornrows, considering the dangers the hairstyles present during games. See Smith, *supra* note 211. There is much more of an occupational value prohibiting these types of hairstyles in the NFL than in a call center. See *id.* (explaining that players can be tackled by the hair); see also *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021 (explaining that Jones would work in a call center).

275. See Bryson, *supra* note 206, at 167. Generally, dreadlocks cannot be unlocked or changed without cutting off the hair. See *id.*

grooming policy violated Title VII's prohibition against racial discrimination.²⁷⁶

IV. AN APPEAL FOR JUSTICE: REPLACING THE IMMUTABLE CHARACTERISTICS STANDARD

The current immutable characteristics standard is best equipped to prohibit overt forms of racial discrimination.²⁷⁷ However, the standard is not well equipped to handle newer forms of racially discriminatory employment practices.²⁷⁸ Thus, employers have moved away from implementing overt forms of racially discriminatory policies and moved toward implementing policies that disfavor certain characteristics and traits.²⁷⁹ Because courts only protect traits that cannot be changed, employers are free to target racial characteristics that courts deem mutable.²⁸⁰ Unlike the current standard, the New Standard prohibits all forms of racially discriminatory employment

276. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (stating that it is an unlawful employment practice for employers to refuse to hire any individual because of their race). This holding is consistent with Title VII, as it will prevent an employer from discriminating against employees because of their race. *Id.* Although CMS did not expressly state that the company would refuse to hire African Americans, the policy created a decidedly large disadvantage for African Americans who applied for jobs with the company. See *id.*; *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022; see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (stating that Congress created Title VII to remove barriers that favored white employees over other groups of employees).

277. See Shaw, *supra* note 24. The immutable characteristics standard is best equipped to deal with overt forms of racial discrimination. See *id.*

278. See *id.* The current standard only prohibits racially discriminatory practices when the practices discriminate against an employee's immutable characteristic. See *id.*; see also Bandsuch, *supra* note 236, at 969-70. "Title VII's current analytical framework struggles to evaluate properly, and deter sufficiently, [newer forms of racially discriminatory employment practices] . . . present in today's diverse workplace . . ." Bandsuch, *supra* note 236, at 969-70. "Deliberate racism has . . . been replaced by cognitive bias, which influences the decision-making and interactions involving black workers." Ritenhouse, *supra* note 35, at 88. The judicial techniques used to combat over racism are "simply ineffective against this evolved type of discriminatory treatment." *Id.*

279. See Bandsuch, *supra* note 236, at 969. Instead of implementing overt forms of racially discriminatory policies, employers now participate in "trait discrimination" in which employees' dress code and grooming policies apply neutrally to all employees but have a disproportionately negative effect on protected classes. *Id.* These policies are "rooted in stereotypical notions of 'traits and attributes that are culturally or statistically associated with race.'" *Id.*

280. See *id.* Courts have generally upheld these employment policies when they do not apply to an employee's mutable trait. See *id.* at 970.

practices because it prohibits both the older, express forms of discrimination and the newer, covert forms of employment discrimination.²⁸¹ Therefore, courts should adopt the New Standard to fully achieve Congress's goal of ensuring that all Americans have an equal opportunity for employment.²⁸²

A. Does the New Standard Prohibit Every Form of Racial Discrimination, Unlike the Immutable Characteristics Standard?

The New Standard is better equipped to identify instances of racial discrimination—especially when a grooming policy applies neutrally to all employees regardless of their race.²⁸³ As such, the New Standard achieves the purpose of Title VII, which is to ensure that all individuals—regardless of their race—have equal employment opportunities.²⁸⁴ The current immutable characteristics standard does not achieve this equality because it permits some forms of employment discrimination based on racial and ethnic characteristics.²⁸⁵ Employees with naturally curly or coarse hair should be valued just as much as employees with naturally straight hair.²⁸⁶

281. See Hoffman, *supra* note 60, at 1508. The current immutable characteristics standard designates certain racial characteristics as “off-limits” while not affording the same protection to other racial characteristics. *Id.*; see also *supra* Part III. The New Standard does not evaluate whether an employer’s policy pertains to an employee’s mutable characteristic; rather, the New Standard evaluates: (1) whether the policy has a disproportionate impact on a protected class of individuals; (2) whether the policy discriminates against a characteristic that is historically or culturally associated with a class of individuals; and (3) whether the employer is objectively justified in crafting the policy. See *supra* Part III.

282. See Fellows, *supra* note 38, at 400. Congress designed Title VII to promote equal employment opportunities, regardless of race. See *id.*

283. See Shaw, *supra* note 24. The immutable characteristics standard is not well equipped to identify a racially discriminatory workplace policy that applies neutrally to all employees. See *id.*

284. See EEOC COMPLIANCE MANUAL, *supra* note 142. Title VII’s purpose is to prevent race and color discrimination in the workplace. See *id.*

285. See Davison, *supra* note 64, at 168. Because of the immutable characteristics standard, employers can legally discriminate against employees or job applicants based on racial characteristics that the employee can change. See *id.* Courts have determined that a characteristic that an employee can change is not a characteristic protected by Title VII. See *id.*; see also Shaw, *supra* note 24. The current immutable characteristics standard does not prevent all forms of racial discrimination, especially when the workplace requirement is not overt. See Shaw, *supra* note 24.

286. See Rhodan, *supra* note 180. Whether or not an employee’s hair grows straight, curly, coarse, or wavy, individuals deserve the same amount of respect. See *id.*

The New Standard recognizes that some mutable characteristics are of such importance to a particular race that rules prohibiting the characteristic are unconstitutional because the rules place individuals with those characteristics at an unnecessary disadvantage for employment.²⁸⁷

Likewise, the New Standard recognizes that there are certain physical features that are associated with a particular race because of the feature's cultural and historical association with that race. Currently, courts ignore the historical significance of a characteristic's association with race when determining whether a standard prohibiting that characteristic is racially discriminatory unless the employee *literally* cannot change the characteristic.²⁸⁸ A hairstyle like dreadlocks, which cannot be changed unless the individual cuts the hair where the twists begins, is deemed a mutable characteristic; thus, employers can currently prohibit individuals from wearing this natural hairstyle.²⁸⁹ However, the New Standard recognizes that hairstyles like these are important to African Americans because of these hairstyles' rich history.²⁹⁰ As important, although any individual can wear these hairstyles, is that these hairstyles are worn predominately by African Americans.²⁹¹ Taking all these facts into consideration, the New Standard recognizes that while an individual might be able to change his or her hairstyle, doing so would require employees to subvert their true selves.²⁹²

Moreover, moving away from the immutable characteristics standard would not be improper just because the standard is judicially

287. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [1-2] (Eng.) (recognizing the importance that natural African hairstyles have to individuals of African descent). Some of these hairstyles have been passed down throughout generations. See *id.*

288. See *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021-22 (11th Cir. 2016). For example, courts have agreed that dreadlocks are culturally and historically associated with African Americans; yet, the courts do not strike down employment rules used to discriminate against African Americans who wear these hairstyles. See *id.*

289. See *Bryson*, *supra* note 206, at 167. Dreadlocks cannot be unlocked or untangled without cutting off the braided hair. See *id.*

290. See *G.*, EWHC (Admin) 1452 [29] (Eng.).

291. See *Grinberg*, *supra* note 260. Hairstyles like dreadlocks are traditionally associated and worn by African Americans. See *id.*

292. See *Honey*, *supra* note 217. Some African Americans who straighten their hair because of their jobs wish that they could wear their natural hair and "present [their] truest self to employers." *Id.*

created.²⁹³ Courts created the standard because it was the easiest way to determine what Congress meant by the term “race” in the absence of an express definition in the statute.²⁹⁴ This, however, should not be the reason to uphold a standard that has a major impact on employment opportunities in the country.²⁹⁵

Importantly, the New Standard protects employers from accidentally implementing racially discriminatory grooming standards when the grooming standard applies neutrally to all races.²⁹⁶ When implementing grooming standards, many employers do not think about the effect that the grooming standard could have on current or prospective African-American employees.²⁹⁷ Some employers might have implicit biases that cloud their ability to see how their policy might negatively impact African Americans.²⁹⁸ Likewise, employers might have different reasons for implementing a policy.²⁹⁹ If the

293. See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030. “[T]he concept of immutability,’ though not perfect, ‘provides a rationale for the protected categories encompassed within the antidiscrimination statutes.’” *Id.*

294. See *id.* at 1026 (using statutory interpretation to determine the meaning of the word “race” because the term was not defined in the text of Title VII).

295. See Shaw, *supra* note 24. The EEOC has dismissed 73% of racial discrimination claims because the claims pertain to an employee’s mutable characteristic. *Id.* As such, the EEOC cannot investigate the claim because courts permit this form of discrimination. See *id.*

296. See *id.* Implicit biases might lead employers to view hairstyles that are typically associated with African Americans as unprofessional. See *id.* Indeed, these biases exists everywhere, including web searches, where searching for professional hairstyles yields images of white people with straight hair, while searching for unprofessional hairstyles yield images of African Americans wearing natural hairstyles. See Alexander, *supra* note 222.

297. See, e.g., *G. v. Head Teacher & Governors of St. Gregory’s Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [20] (Eng.). In this case, the school’s principal did not think that he was implementing a discriminatory grooming policy by prohibiting braided hairstyles; instead, the principal believed that his policy was the best way to prevent gang violence. See *id.* Likewise, when the Army instituted its original cornrow and dreadlock ban, it did not weigh the repercussions that this would have on enlisted African Americans. See Byrd & Tharps, *supra* note 178.

298. See *G.*, EWHC (Admin) 1452 [24] (Eng.). The principal compared the school’s prohibition against students wearing dreadlocks to the school’s prohibition against students wearing “skin head” hairstyles because both prohibitions prevent gang violence. See *id.* at [25]. The principal’s lack of understanding of the history and cultural importance of dreadlocks demonstrated his bias toward this type of hairstyle. See *id.* at [41].

299. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (explaining that American Airlines prohibited cornrows to portray a more conservative, business-like image); ACLU, *supra* note 21 (explaining the former process where TSA agents would pat down and search the hair of African-American women in airports).

employer does not understand the historical and cultural importance that African-American hairstyles have or does not understand the health benefits of wearing these hairstyles, an employer might not see the harm in implementing policies that prohibit natural hairstyles.³⁰⁰

The New Standard, unlike the current immutable characteristics standard, considers the effect that an employer's policy has on a protected class of individuals.³⁰¹ When an employer prohibits an all-braided hairstyle, the New Standard considers whether African Americans—or any other race bringing the claim to court—are disproportionately affected by the policy.³⁰² The standard recognizes the employer's policy might be applied neutrally to all races, yet have a discriminatory effect on a certain protected class of individuals.³⁰³ If this happens under the New Standard, a court is more likely to strike down the employer's policy.³⁰⁴

B. What About an Employer's Right to Determine How to Best Run His or Her Business?

Many businesses argue that employers should have the right to create policies that are in the best interest of their business.³⁰⁵ Employers, like American Airlines,³⁰⁶ claim that they should be able to create policies that project a conservative, business-like image as

300. See Shaw, *supra* note 24. Employers who do not view the importance of wearing natural hairstyles will not create policies that protect an employee's right to wear the hairstyles. See *id.*

301. See EEOC COMPLIANCE MANUAL, *supra* note 142. Policies that have a disproportionate and negative effect on a racial group will be prohibited. See *id.*

302. See *id.*

303. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Employment practices and procedures "even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of . . . discriminatory employment practices." *Id.* at 430. Similar to the Equality Act of 2010, the New Standard will identify and prohibit policies that are applied neutrally to all employees but disadvantage a particular group of employees. See Equality Act 2010, c.15, § 19(1)-(2) (Eng.). This is in contrast with the immutable characteristics standard which is not well equipped to identify racial discrimination in workplace policies that apply neutrally to all employees. See Shaw, *supra* note 24.

304. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [34] (Eng.) (striking down a policy that applied neutrally to all students but had a discriminatory effect on students of African descent). The New Standard would strike down employer policies that have similar effects. See *id.*

305. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

306. See *id.* American claimed that it instituted its grooming policy so that it could project a more conservative, business-like image. See *id.*

long as the policy can be applied neutrally and concerns only its employees' mutable characteristics.³⁰⁷ While these policies are created so that a company's image does not offend any biases or prejudices that an employer's clientele might have, courts cannot permit such policies if they work to exclude a group of people from the same opportunities that are afforded to other groups.³⁰⁸

The Supreme Court recognized that individual biases exist and that the law cannot govern whatever privately-held biases an individual might harbor; however, the law cannot give these biases any effect, nor can it deny the rights of individuals because of the privately-held biases of others.³⁰⁹ Therefore, whether or not an employer's intention for creating a policy is grounded in the belief that the policy is best for business, courts cannot uphold the policy if it works to discriminate against a group of people because of a shared racial characteristic.³¹⁰ Employers should not be able to discriminate against cultural and ethnic practices of significance.³¹¹

307. See Hoffman, *supra* note 60, at 1508. The employees should change their characteristics to conform with the business-like image the company wants to project. *See id.*

308. See *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); see also *Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

309. See *Palmore*, 466 U.S. at 433. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* In *Palmore*, a father filed for custody of his three-year-old daughter after he learned that the child's mother married an African-American man. *See id.* at 430. After obtaining advice from counselors, the trial court held that living with a mother involved in an interracial marriage would "subject [the child] to environmental pressures not of [her] choice" because the mother's interracial marriage was "unacceptable to the father and to society." *Id.* at 430-31 (emphasis omitted). The Supreme Court held that racial prejudices do exist; however, these biases cannot be the basis for denying anyone their constitutional right. *See id.* at 433; see also *Buchanan*, 245 U.S. at 81.

310. See *Buchanan*, 245 U.S. at 81-82 (holding that a law prohibiting African Americans from living in predominately white neighborhoods was unconstitutional even if its purpose was to promote public peace). In this case, a city created a law prohibiting African Americans from residing in neighborhoods where the number of white occupants outnumbered African-American occupants. *See id.* at 73. The city's purpose for implementing this law was to avoid racial conflicts and preserve public peace. *See id.* The Court held that "[the law's] aim cannot be accomplished by . . . deny[ing] rights created or protected by the federal Constitution." *Id.* at 81.

311. *See id.* "Whatever problems [racial biases] . . . may pose . . . [the court cannot] support a denial of [an individual's] constitutional rights." *Palmore*, 466 U.S. at 434.

C. Will the New Standard Prevent Employers from Prohibiting Inappropriate Hairstyles in the Workplace?

Another concern is that replacing the immutable characteristics standard will restrict an employer's ability to prohibit outrageous hairstyles that an employee could claim are culturally or historically associated with their race.³¹² However, non-credible claims of characteristics associated with a particular race will not survive the New Standard's scrutiny because of the various safeguards in place.³¹³ A plaintiff will have to show that the employer's grooming standard disproportionately impacts the employment opportunities of a racial group.³¹⁴ A policy that disproportionately impacts only a few individuals will not obtain Title VII protection.³¹⁵

Moreover, employers will still retain their right to make decisions that are in the best interest of the company.³¹⁶ The right to make these fundamental decisions is protected as long as the decisions do not place a particular race at a disadvantage because the policy affects that race's shared racial characteristic.³¹⁷ For example, a court would most likely find an employer's grooming policy that prohibits dreadlocks to be unconstitutional; however, a court would not likely strike down a workplace policy that limited the length of the employees' hair or prohibited employees from dyeing their hair in

312. See, e.g., Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1022 (11th Cir. 2016). Although Jones did not wear an outrageous hairstyle, would CMS be justified under the New Standard for refusing to hire her if she did wear an outrageous hairstyle? See *id.* at 1021-22.

313. See *Buchanan*, 245 U.S. at 80- 81. Congress and the courts cannot prevent an employer from creating policies that are best for the business when the policy is not racially discriminatory. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

314. See *id.* The court must determine whether a policy has a disproportionate and adverse impact on the employment opportunities of a protected class of individuals. See *id.*

315. See *id.* at 1092. The New Standard will require that the employer's policy negatively affects a large group of employees, rather than a few. See *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [27] (Eng.).

316. See *Willingham*, 507 F.2d at 1092 (explaining the importance of allowing employers to make decisions in the company's best interest).

317. See *G.*, EWHC (Admin) 1452 [27] (Eng.) (explaining that the law prohibits policies that create decidedly large disadvantages for individuals because of their race). The New Standard protects every individual's right to obtain a job free from discrimination. See EEOC COMPLIANCE MANUAL, *supra* note 142 (explaining that Title VII's purpose is to prevent racial discrimination in the workplace).

outlandish colors.³¹⁸ Policies like these would likely be permitted because the policies do not concern any racial characteristic,³¹⁹ and the policy allows the employer to create an image that best reflects the views and standards of the company.³²⁰

CONCLUSION

Viewing African Americans who wear natural hairstyles as unprofessional, less attractive, and less acceptable is not a new phenomenon in American culture.³²¹ Whether it be the physical act of cutting enslaved Africans' hair, the verbal act of telling African Americans that their hair is nappy and undesirable, or the implicit act of implementing grooming standards prohibiting natural African-American hairstyles, society has consistently viewed natural African-American hair and hairstyles as a liability.³²² In deeming natural hairstyles a liability, African Americans have been forced to forgo their own cultural identity and acquiesce to the accepted Eurocentric standard of beauty for the sole purpose of obtaining or keeping a job.³²³ Doing so has had a detrimental effect on not only the employment opportunities for African Americans³²⁴ but also their physical and mental health.³²⁵

318. See Bennett-Alexander & Harrison, *supra* note 16, at 438, 443.

319. See *id.* at 438.

320. See *Willingham*, 507 F.2d at 1092.

321. See Louis, *supra* note 89 (explaining that naturally kinky and coarse hair textures are viewed as less acceptable than straight hair).

322. See Bennett-Alexander & Harrison, *supra* note 16, at 445 (explaining that caricatures of “nappy-haired” African Americans were created to demean African Americans); see also Gandy, *supra* note 14 (explaining that enslaved people’s heads were shaved in order to strip the enslaved Africans of their individuality). Employers all over the country have created grooming standards prohibiting African-American hairstyles. See, e.g., *Equal Emp’t Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1022 (11th Cir. 2016) (presenting a case in which a company established a grooming policy prohibiting dreadlock hairstyles).

323. See, e.g., Honey, *supra* note 217. Some African Americans have been conditioned to avoid natural hairstyles in the workplace. See *id.* Instead, it is inferred that hair should be straight. See *id.*

324. See, e.g., Gordon, *supra* note 214 (explaining that natural hairstyles prevent some African Americans from obtaining jobs).

325. See Kasprzak, *supra* note 266 (explaining the harsh side effects of using chemical relaxers to obtain straighter hair); see also Gordon, *supra* note 214. “Not once has anyone asked [the author] about how [the author] ‘get[s] her hair that way’ when it is straightened” but when African-American hair is worn in natural, unstraightened hairstyles, each time someone questions the hairstyle it is a reminder that the hairstyle is not the norm. Gordon, *supra* note 214.

Fortunately, many entities, including non-American legislative bodies, have established guidelines to help prevent racial discrimination in the workplace.³²⁶ These guidelines do not use the immutable characteristics standard, which only prohibits racial discrimination against physical characteristics that an individual cannot change; rather, the guidelines prohibit *all* forms of racial discrimination by focusing on the effect that discriminatory practices have on a protected class of individuals.³²⁷ In doing so, these entities allow for greater fairness for those searching for employment and for those currently employed.³²⁸ Considering Congress intended to prevent employment discrimination—particularly racial discrimination against African Americans—one questions why American courts have not done more to prevent workplace discrimination.³²⁹ For this reason, a New Standard is necessary.³³⁰

The New Standard prevents the injustice that occurs when a court uses the immutable characteristics standard.³³¹ By adopting the New Standard, courts will prevent all forms of employment discrimination and uphold the purpose of Title VII.³³² Furthermore, the

326. See EEOC COMPLIANCE MANUAL, *supra* note 142; Army Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia, ch. 3-2(a)(3)(f)-(i) (Mar. 31, 2014); *G. v. Head Teacher & Governors of St. Gregory's Catholic Sci. Coll.* [2011] EWHC (Admin) 1452 [1-2] (Eng.).

327. See EEOC COMPLIANCE MANUAL, *supra* note 142. The EEOC guidelines prohibit employers from preventing African-American women from wearing their hair in a natural, afro style. See *id.* The guidelines also interpret Title VII to prohibit employers from “applying neutral hairstyle rules more restrictively to hairstyles worn by African-Americans.” *Id.* The Army instituted new regulations allowing African-American women to wear their hair in natural hairstyles, including dreadlocks and cornrows. See Army Reg. 670-1 at ch. 3-2(a)(3)(f)-(i). The United Kingdom prevents all forms of workplace discrimination, including direct and indirect forms of discrimination. See Equality Act 2010, c.15, §§ 13, 19 (Eng.).

328. See Army Reg. 670-1 at ch. 3-2(a)(3)(f)-(i). The new Army regulations allow for more African Americans to enlist in the Army because they do not require African Americans to cut off their hair to comply with Army standards. See *id.*

329. See Gandy, *supra* note 14. Because of the Supreme Court’s silence on this issue, lower courts have been forced to determine whether these grooming standards are racially discriminatory with no guidance from the high court. See *id.*

330. See *supra* Part III (explaining that the New Standard will prevent help prevent *all* forms of racial discrimination in the workplace and help ensure the equal opportunity of employment for all individuals regardless of race).

331. See Davison, *supra* note 64, at 164. When courts use the immutable characteristics standard to analyze Title VII claims of racial discrimination, employers can legally discriminate against employees or job applicants based on racial characteristics that the employee or job applicant can change. See *id.*

332. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The New Standard does not depend on the employer’s policy pertaining to an employee’s

proposed New Standard promotes the values of today's society by removing the need to surrender one's racial and cultural identity for the sake of employment.³³³ Thus, the proposed New Standard is the best way for courts to ensure that Title VII prohibits all forms of racial discrimination in the workplace.

immutable characteristic, the policy being facially discriminatory, or the employer intentionally creating the policy to discriminate against a group of individual's protected characteristic. *See supra* Section III.A (demonstrating that the New Standard takes into account other aspects of the employer's policy like whether the policy pertains to a characteristic that is historically or culturally associated with the employee's race).

333. *See Bryson, supra* note 206, at 172.