TITLE VII: WHAT'S HAIR (AND OTHER RACE-BASED CHARACTERISTICS) GOT TO DO WITH IT?

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Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. Many Title VII cases have arisen when an applicant's or employee's non-conformity with an employer's policy barring certain hairstyles or clothing has resulted in an adverse employment action, such as a denial or termination of employment. Generally, courts have not deemed an adverse employment action resulting from an applicant's or employee's non-conformity with an employment policy banning the display of mutable characteristics commonly associated with a particular racial or ethnic group a violation of Title VII's proscription against racial, color, or national origin discrimination. These cases have largely been unsuccessful because of courts' narrow interpretations of Title VII's prohibitions against race, color, and national origin discrimination. Courts have viewed these protected categories as encompassing only "immutable characteristics" such as skin color and, in some instances, hair texture. Courts have also been less inclined to expressly hold that employment decisions based on racial, color, or ethnic stereotypes violate Title VII. Therefore, courts have hindered the

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efficacy of Title VII to achieve its mandate to ensure that individuals are not denied equal employment opportunities on the basis of race, national origin, and color.

This Article specifically addresses Title VII individual disparate treatment cases involving employment policies that prohibit certain mutable, racialized characteristics and resulting adverse employment actions because of an employee's non-conformity with the employment policy. In this Article, Professor Greene proposes a revised individual disparate treatment analysis for courts to adopt in such cases. Professor Greene argues that courts must employ a broader definition of race consistent with historical and contemporary understandings of race. Courts must assess the facts of these cases within a historical and contemporary social context. Additionally, courts must shift the focus from an employer's intent to discriminate to the effects of the employment decision on the employee or applicant. In doing so, courts must ascertain whether the employer's decisions perpetuate racial stigmatization. According to Professor Greene, if courts employ this pluralistic approach to individual disparate treatment cases involving mutable, racialized charachteristics, Title VII's protections for employees and applicants to be free from race, color, and national origin discrimination in employment will be strengthened. Therefore, Title VII's objectives will be more fully realized.

INTRODUCTION

Since the implementation of a league-wide dress code by the National Basketball Association ("NBA"), workplace dress and grooming codes have become a hot topic. The NBA's dress code garnered a lot of media attention because it arguably bespeaks what many believe is unthinkable in today's "color-blind" America: racism. The NBA requires players to wear "business-casual" attire when conducting team or league business. For the NBA, business-casual attire entails collared or turtleneck shirts with or without a sweater; dress slacks, khaki pants or dress jeans; and "presentable" shoes and socks—no "sandals, flip-flops, or work boots."[1] Players cannot wear sleeveless shirts, shorts, T-shirts, jerseys, or sports apparel, unless it is being worn during an event like a basketball clinic

1. Press Release, Nat'l Basketball Ass'n, NBA Player Dress Code (Oct. 20, 2005), www.nba.com/news/player_dress_code_051017.html.

and it is team-identified and approved by the team.[2] Additionally, the NBA prohibits players from wearing sunglasses indoors and from wearing chains, pendants, or medallions draped over their clothes.[3]

Some players consider the ban on such things as gold chains and retro jerseys to be racist, targeting primarily the young Black[4] players who wear hip-hop gear.[5] Others deem it not necessarily a "racist" policy but rather a "racially targeted or racially motivated" act on the part of the NBA because the rule appears to be directed toward Black players.[6] Players like Stephen Jackson regarded the NBA's decision to implement a dress code as a means to disassociate itself from a "negative" public image: "They're saying we need to look more professional, not so 'hood, not so hip-hop. . . . They don't want us to look like thugs. . . . But I'm hip-hop, that's the way I was raised and that's what I like."[7] If in fact the NBA's rationale for implementing the dress code is to disassociate the league from a "negative," "hip-hop," or "thug" image and the policy disproportionately impacts Blacks, is the dress code "racist"? If a significant majority of the players who wear the clothing and jewelry banned by the policy are Black, is the NBA treating Black players differently from non-Black players on the basis of race? What message is the NBA sending to players like Jackson who feel that their clothing is an intrinsic part of who they are and

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2. *Id.*

3. *See id.*

4. Professor Kimberlé Crenshaw has explained that "Black" deserves capitalization because "Blacks like *A*sians [and] *L*atinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate as it "has deep political and social meaning as a liberating term." Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 4 n.12 (1991). I agree with both Professors Crenshaw and Gotanda, and for both reasons, throughout this Article when I reference people of African descent individually and collectively the word, Black, will be represented as a proper noun.

5. Eric Gilmore, *Stern Not Making a Fashion Statement*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Oct. 28, 2005.

6. *See* Bob Kravitz, *Voicing Protest, No Matter the Issue, Is a Critical Right*, INDIANAPOLIS STAR, Oct. 26, 2005, at D1 (calling the dress code "cultural fascism").

7. *Id.*

this revocation of their identity is imbued with negative associations such as "unprofessional," "thug," or "hood"?

The massive amount of attention surrounding the NBA's policy brought to light what courts often consciously reject when deciding Title VII cases: "race"[8] encompasses more than just one's skin color. Historically and contemporarily in America, how one dresses, speaks, behaves, and thinks is also constitutive of race. The NBA's dress code also generates important questions concerning racism, racial discrimination, and employment rights. Specifically, is an "equal employment opportunity" truly equal when employability is contingent upon conformity to the employer's preferred cultural or racial norm? Does an employer's preference for a particular cultural or racial norm, which consequently stigmatizes the affected employees or applicants on the basis of their race, constitute unlawful discrimination under current federal employment discrimination law? This Article proposes that an employer violates Title VII when the following occurs: (1) an employer expressly bars employees from wearing clothing[9] or hairstyles[10] that are often associated with a particular racial or ethnic group;[11] (2) an adverse employment decision such as a termination or failure to hire or promote results because an employee displays these prohibited "mutable" characteristics; (3) an employer's asserted rationale for implementing a policy banning mutable characteristics is grounded in presenting a "conventional" or "conservative" business image or the like; and (4) an employer's policy or decision fosters racial or cultural stigmatization.

Specifically, this Article maintains that characteristics commonly associated with a particular racial or ethnic group should fall into Title VII's current protected categories of race, color, and national origin.[12] Claims involving employment de-

8. Throughout the Article, when I make a specific reference to race it is also inclusive of national origin, color, and ethnicity, as these terms are often intersected and synonymous.

9. For example, chains, pendants, medallions, or any type of clothing and jewelry.

10. For example, corn-rows, dreadlocks, Afros, braids, or "doo rags."

11. *But see* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259–67 (S.D.N.Y. 2002) (holding an employer's policy prohibiting "unconventional" hairstyles which included "dreadlocks," "braids," "corn rolls [sic]," a "dew [sic] rag," and a "ponytail" was not racially discriminatory in violation of Title VII).

12. The support for this argument derives from three Title VII discrimination cases involving claims on the basis of race: *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002); and *Bryant v. Begin Manage Program*, 281 F. Supp. 2d 561

cisions based on the display of racialized, mutable characteristics can be viable under the traditional Title VII analytical frameworks.[13] However, they would only be successful if courts consider race, color, and national origin as encompassing more than "immutable characteristics" such as skin color and, in some cases, hair texture. Additionally, courts must look at the employer's decision within a historical and contemporary social context as well as from the angle of the employee or applicant, rather than simply focusing on the employer's intent to discriminate. In doing so, courts will place the employer's justifications and motivations for making its employment decision under much-needed scrutiny and will force employers to examine whether racial or cultural stereotypes influenced the underlying employment decision.

Part I of this Article delineates a pluralistic approach to examining disparate treatment cases that advances Title VII's statutory aim of "equaliz[ing] the footing of all employees without regard to the employer's subjective perceptions and preconceived ideas"[14] about race, national origin, or color. Part II evinces that courts' maintenance of a perception of race which only constitutes "immutable characteristics" is contrary to earlier courts' depictions of race as well as contemporary understandings of race. Additionally, this view does not sufficiently address Title VII racial discrimination claims. Part III surveys three Title VII cases in which courts failed to adopt or reluctantly adopted a pluralistic analysis of race discrimination claims involving mutable characteristics such as hair and clothing. Parts IV and V present the inherent problems with

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(E.D.N.Y. 2003).

13. In this Article, I will only offer a revised analysis of Title VII individual disparate treatment claims. For detailed discussions of revised analyses of Title VII disparate impact claims involving employment policies which adversely affect mutable characteristics associated with race or national origin, see Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (suggesting that courts adopt a "race/ethnicity performance paradigm" when deciding cases where facially-neutral employment policies have a disparate impact on individuals who voluntarily choose physical traits or perform behaviors that communicate racial or ethnic identity). *See also* Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637 (1998) (offering a revised disparate impact analysis specifically for cases where applicants or employees are denied employment opportunities because of their use of "Black English").

14. Perkins v. Lake County Dep't of Util., 860 F. Supp. 1262, 1278 (N.D. Ohio 1994).

focusing on an actor's discriminatory intent in race discrimination cases. These sections examine the theories of Professors Charles Lawrence and R.A. Lenhardt, which illuminate the harms resulting from a central focus on an actor's intent. Finally, Part VI revisits the three Title VII cases discussed in Part III and evaluates these cases under a revised disparate treatment analysis that incorporates a broader definition of race and a concentration on the plaintiff's perspective and racial stigmatization rather than the employer's intent to discriminate. This revised analysis of individual disparate treatment cases will more adequately protect employees and applicants from being subjected to discriminatory policies and decisions that Title VII proscribes yet are lawful under current Title VII jurisprudence.

I. TITLE VII AND ITS PROTECTIONS

> "Any form of discrimination that affects individuals on the basis of race, gender, sex, religion, or national origin represents the intrusion of a stereotype into employment situations. This is contrary to Title VII's plain language and purpose."[15]

Title VII expressly prohibits discrimination on the basis of race, national origin, sex, color, and religion.[16] The statute makes it "an unlawful employment practice for an employer 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."[17] Congress' principal purpose in enacting Title VII was to prohibit employment discrimination because of race or color.[18] This is clear both from the events leading to President Kennedy's introduction of the legislation to alleviate race discrimination and from the extensive documentation and dis-

15. *See* Ariz. Governing Comm. v. Norris, 463 U.S. 1073, 1107–09 (1983) (O'Connor, J., concurring).

16. 42 U.S.C. § 2000(e)-2(a)(1) (2000).

17. *Id.*

18. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806 & n.6 (1994) (citing 110 CONG. REC. 2556 (1964) (remarks of Congressman Cellar) ("You must remember that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.")).

cussion of race discrimination during congressional debates on the Civil Rights Act of 1964.[19]

However, the full reach of Title VII has not been achieved, as courts have narrowly interpreted Title VII's prohibitions against race, national origin, and color discrimination. Courts have concluded that these prohibitions only refer to "immutable characteristics," such as skin color, as opposed to those characteristics that, even though mutable, are associated with one's race, national origin, or color. For example, courts have rejected Title VII race or national origin claims involving hair,[20] hair color,[21] language,[22] dialect,[23] and accent.[24] How-

19. *Id.* at 806.

20. *See, e.g.*, Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002).

21. *See* Santee v. Windsor Court Hotel Ltd. P'ship, No. Civ.A.99-3891, 2000 WL 1610775, at *3–4 (E.D. La. Oct. 26, 2000) (holding that a Black woman with dyed blonde hair, who was denied employment because her blonde hair violated the hotel's grooming policy banning "extreme" hairstyles, could not establish a prima facie case of race discrimination under Title VII because hair color was not an immutable characteristic and not a protected category under Title VII).

22. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (holding language was not an immutable characteristic and did not constitute ethnic identity; therefore, an employer's policy prohibiting use of Spanish language did not violate Title VII prohibition against national origin discrimination).

23. *See, e.g.*, Kahakua v. Friday, 876 F.2d 896 (9th Cir. 1989) (unpublished table decision), No. 88-1668, 1989 WL 61762, at *3 (9th Cir. June 2, 1989) (declining to decide the issue of whether an employer's decision was based on plaintiff's dialect constitutes race and national origin discrimination where plaintiffs claimed race and national origin discrimination because they were allegedly denied positions as broadcasters because of their Hawaiian Creole accent or dialect). *But see generally* Gaulding, *supra* note 13. According to Gaulding, "Black English is actually a distinct but equally valid dialect of English, which for historical reasons is largely limited to the African American community." *Id.* at 637. Based on scientific evidence, Gaulding also argues that "Black English" is essentially an immutable trait. *See generally id.* Therefore, "employers who reject Black English speakers because of their speech patterns are in fact violating Title VII's prohibition against race discrimination." *Id.* at 637. I agree with Gaulding's argument that there is an identifiable speech pattern many Blacks exhibit and when this speech pattern serves as the basis for an adverse employment action it should be categorized as racial discrimination. Yet, I argue that it is not because of the immutability of the speech pattern, but rather because of the negative socio-cultural associations of the speech pattern denoted to "Blackness."

24. *See, e.g.*, *Kahakua*, 1989 WL 61762, at *3 (declining to decide the "specific question of whether [a plaintiff's] accent is a function of . . . race or national origin within the meaning of Title VII"). See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991), for a detailed discussion advocating for the prohibition of accent discrimination under Title VII. Matsuda argues that accent discrimination perpetuates a hierarchical system by which "foreign" accents are deemed subordinate to "non-foreign" accents. *See generally id.* She opines that a "revitalized interpretation of Title VII" which prohibits accent discrimination and "pro-

ever, when it comes to discrimination on the basis of sex, the Supreme Court has held that Title VII prohibits discrimination based not only on an individual's sex, but also on stereotypes related to the individual's sex (gender stereotypes).[25] Even though discrimination on the basis of race, national origin, and color are similarly motivated by conscious and unconscious stereotypes or preconceived notions about one's physical appearance and behavior, some courts have been less willing to expressly hold that employment decisions based on stereotypes regarding an individual's race, national origin, or color are prohibited by Title VII.[26] In order to fully achieve the goal of Title VII—to ensure that individuals are not denied equal employment opportunities on the basis of race, national origin, and color—courts must recognize that employment decisions based on stereotypes, notions, and associations related to these protected categories, like decisions based on stereotypes related to sex, are proscribed by Title VII.

Additionally, the effectiveness of Title VII in addressing race, color, and national origin discrimination depends on a court's view of the statute's goal and the means to achieve this goal. Some courts advance a pluralist conception of equal op-

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mote[s] linguistic pluralism" comports with both the antisubordination and the radical pluralism principles that serve as the underpinnings of antidiscrimination laws. *See id.* at 1397–1406; *cf.* Gerrit B. Smith, Note, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 263–67 (2005) (arguing that accent is essentially an immutable characteristic and proposing a lowered burden of proof for plaintiffs claiming accent discrimination as well as the abolition of the "customer preference" defense in accent discrimination cases).

25. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

26. *See* Bryant v. Begin Manage Program, 281 F. Supp. 2d 561, 570 n.7 (E.D.N.Y. 2003) (accepting the employee's assertion that being called a "wannabe" within the Black community connotes a negative racial/color stereotype because the assertion went unchallenged by the employer); *see also* Waite v. Bd. of Trs., No. 02-CV-6536, 2003 WL 22303118, at *6 (N.D. Ill. Oct. 8, 2003). In *Waite*, a Jamaican employee offered her African-American supervisor's admission that she accused the employee of having a "plantation mentality" as evidence that the employee was unlawfully terminated because she was Jamaican. *Id.* at *6. The employee explained that she understood the term to imply a negative, cultural stereotype about Jamaicans held by some African-Americans. *Id.* Specifically, she contended "that the term is used by African Americans to refer to Caribbean people, especially Jamaicans, and that she understands it to mean that Jamaican people 'behave like Caucasians and treat African-Americans like slaves.'" *Id.* The court reluctantly accepted the employee's interpretation of the term, but found that the stereotypical remark by itself did not sufficiently demonstrate the employer's reason for terminating the employee was pretext for national origin discrimination. *Id.* Significantly, the *Bryant* and *Waite* cases also reveal the pivotal role slavery has played and continues to play in our understanding of race.

portunity, or a more expansive view of equal opportunity which recognizes and accommodates cultural differences.[27] Others appropriate an assimilationist framework, which is "less inclined to believe that hairstyles, language choices and other characteristics that distinguish ethnic groups from White [or majoritarian] culture stem from rights worth protecting."[28] An assimilationist mode of interpretation permits employers to deny employment opportunities to individuals who do not conform to the preferred racial or cultural norm as well as to perpetuate a hierarchy on the basis of race, color, and national origin which are both antithetical to Title VII's objectives. Therefore, to realize the aims of this important civil rights legislation, courts need to streamline their approaches to achieve a more pluralistic analytical framework for Title VII disparate treatment cases involving race, national origin, and color. Accordingly, courts should first broaden the definition of race, national origin, and color.

In an individual disparate treatment case where circumstantial evidence,[29] as opposed to direct evidence,[30] is offered to show that an impermissible criterion such as race, color, or national origin played a role in an adverse employment decision, the proof construct enunciated in *McDonnell Douglas Corp. v. Green*[31] applies. First, the plaintiff must establish a prima facie case of discrimination.[32] In response to the plaintiff's prima facie case, the employer must articulate a "legitimate, nondis-

27. Michelle L. Turner, Comment, *The Braided Uproar: A Defense of My Sister's Hair and A Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 136 (2001) (clarifying the distinction between an assimilationist and a pluralist framework).

28. *Id.* at 136–37.

29. "Circumstantial evidence of discrimination . . . allows the trier of fact 'to *infer* intentional discrimination by the decisionmaker.' " Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 720 (7th Cir. 2005) (quoting Rogers v. City of Chicago, 320 F.3d 748, 753 (7th Cir. 2003)).

30. " 'Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.' " *Rudin*, 420 F.3d at 720 (quoting Eiland v. Trinity Hosp., 150 F.3d 747, 751 (7th Cir. 1998)). "Direct evidence 'can be interpreted as an acknowledgement of discriminatory intent by the defendant or its agents.' [It] is a 'distinct' type of evidence that uniquely reveals 'intent to discriminate[, which] is a mental state.' " *Id.* (quoting Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)) (internal citations omitted). A classic example of direct evidence of unlawful intentional race discrimination under Title VII is an employer's express statement that it terminated an employee because he is Black. *See, e.g., id.*

31. 411 U.S. 792 (1973).

32. *See id.* at 802.

criminatory reason" for its adverse employment action.[33] The plaintiff must then produce evidence showing that that the employer's asserted reason is pretextual, that the asserted reason is false, or that intentional discrimination was the real reason for the adverse employment action.[34]

Generally, where the adverse employment action is a termination or failure to hire, a prima facie case of discrimination is established when the plaintiff demonstrates he or she: (1) is a member of a protected class, (2) is qualified for the job from which he or she was terminated or for which he or she applied, (3) was terminated or not hired despite his or her employment qualifications, and (4) an individual who is not a member of the protected class replaces the plaintiff or is hired.[35] Because facts differ among Title VII cases, the elements of a prima facie case are not fixed.[36] Therefore, in a Title VII *McDonnell Douglas* type case, the plaintiff's prima facie case must essentially establish a presumption that the adverse employment action occurred because of his or her race.[37] As previously discussed and as will be examined further in this Article, in race discrimination cases where racialized mutable characteristics are primarily implicated in adverse employment actions, courts have held that the plaintiff was unable to establish a prima facie case of unlawful discrimination. Courts have justified their decisions on the basis that clothing and hair texture, for example, are not "immutable characteristics." Thus, the "minimal"[38] burden of establishing a prima facie case is indeed "onerous"[39] in such cases. In order for plaintiffs to establish a viable prima facie case in Title VII race discrimination cases involving mutable characteristics, courts must employ a broader definition of race that is aligned with earlier courts' definitions as well as

33. *Id.*

34. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–48 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . [and] a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated.") (emphasis added).

35. *See McDonnell Douglas*, 411 U.S. at 792; *see also Rudin*, 420 F.3d at 721.

36. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

37. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

38. Bryant v. Begin Manage Program, 281 F. Supp. 2d 561, 569 (E.D.N.Y. 2003) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)).

39. *But see Burdine*, 450 U.S. at 253 (stating that the plaintiff's burden in establishing a prima facie case of disparate treatment is "not onerous").

contemporary understandings of race. The next Part explores historical definitions of race which continue to be appropriated.

II. RACE AS A SOCIAL CONSTRUCT

> "Race must be understood as a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, faces and personal characteristics . . . social meanings connect our faces to our souls."[40]

Throughout American history, skin color has been used to determine an individual's race, but it has not served as the sole marker of one's race. Distinguishable physical markers signifying "whiteness" and "non-whiteness" generated the creation of a hierarchical social system based on race and color, whereby whiteness represented the superior status and non-whiteness the inferior. Accordingly, philosophers and scientists promulgated hierarchical racial nomenclatures based upon discernible corporal traits.[41] These racial classification systems gained credence throughout the seventeenth and eighteenth centuries. For example, in 1797, George Léopold Cuvier theorized that the "Ethiopian" or "negro" race was

> marked by a black complexion, crisped or woolly hair, compressed cranium, and a flat nose. The projection of the lower parts of the face, and the thick lips, evidently approximate it to the monkey tribe; the hordes of which it consists have always remained in the most complete state of utter barbarism.[42]

Whereas the "Caucasian" or "white race" was

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40. Ian F. Haney López, *The Social Construction of Race*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 163, 165 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

41. See generally RACE AND THE ENLIGHTENMENT: A READER (Emmanuel Chukwudi Eze ed., 1997), for a compilation of essays and excerpts of works written by American and European philosophers and scientists formulated during the era coined the Enlightenment Period. The essayists attempted to categorize people within races and nationalities based on "commonly shared" physical, intellectual, and moral characteristics.

42. Georges Léopold Cuvier, *Varieties of the Human Species*, *in* RACE AND THE ENLIGHTENMENT: A READER, *supra* note 40, at 104, 105.

> distinguished by the beauty of the oval formed by its head, varying in complexion and the colour of the hair. To this variety, the most highly civilized nations, and those which have generally held all others in subjection, are indebted for their origin. [43]

And, though Cuvier declared that Native Americans could not be classified within a particular race, he did propound an essentialist portrayal of Native Americans comprising of a "copper-coloured complexion[,] . . . generally black hair . . . defined features, projecting nose, large and open eye."[44]

In early racial determination cases, courts articulated similar comparative characterizations of Blacks, whites, and Native Americans. In 1806, Judge Tucker explained in *Hudgins v. Wrights*, Blacks of "pure" and mixed African ancestry displayed "a flat nose and woolly head;" Native Americans were "copper coloured person[s] with long jetty black, straight hair;" and whites exhibited "a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose."[45] However, it was not the physical markers alone that engendered the relative subordination and empowerment of racial groups; it was the meaning that society attached to these physical markers. These physical markers—skin color, hair texture, the shape of one's lips, nose, eyes and head—fostered notions about the individual's intellectual ability, morality, and humanity. Consequently, society's interpretation of these physical markers, in other words "race," determined the individual's participation and status in society socially, politically, legally, and economically.[46] Whiteness signified positive attributes such as freedom, respectability, civilization; non-whiteness represented the inferior opposite.[47]

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43. *Id.* at 104.

44. *Id.* at 108.

45. 11 Va. (1 Hen. & M.) 134, 140 (Va. 1806) (emphasis omitted).

46. *See* State v. Belmont, 35 S.C.L. (4 Strob.) 445, 449–53 (S.C. Ct. App. 1847) (rationalizing the contrasting rights, privileges, and treatment accorded to Indians, whites, and Blacks on the basis that unlike members of the "Red" or "copper" race (Native Americans) and the "white" race, the "natural" position of African Blacks was a state of inferiority and enslavement because they had come "within the curse of Noah upon Ham and his offspring"—which was marked by their dark skin color).

47. "[In] *Dred Scott* [the Supreme Court] extols [w]hites as human, civilized, and endowed with absolute power over a [B]lack race subject to the 'deepest degradation.' " Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C.

Race provided the basis for American slavery, racial segregation, and the attainment or denial of political, social, legal and economic privileges and rights, including voting, owning property, traveling freely, receiving an education, and even becoming a citizen. Because of interracial unions which produced offspring who destabilized predetermined (and presumably permanent) racial constructs based on physical characteristics, early American courts concluded that "biological" or "immutable characteristics" were not reliable determiners of one's "race."[48] In addition to miscegenation, emancipation threatened the foundations of American slavery: the putative natural inferiority of Blacks and superiority of whites. The independence free Blacks exhibited by establishing schools, churches, and communities, for example, contravened the notions that Blacks were subordinate to whites and the agency of whites was critical to Blacks' survival, and thereby undermined core justifications for the perpetual enslavement of Blacks.[49] In order to retain the privileges restricted to whites, the purity of the white race and, thus, white supremacy, courts promulgated a more "absolute" and "consistent" test to determine one's race by examining one's behavior in relation to other members of society.[50] As a result, daily actions and interactions became ra-

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L. Rev. 635, 646 (2008) (quoting Dred Scott v. Sanford, 60 U.S. 393, 409 (1856)).

48. *See, e.g.*, State v. Davis, 18 S.C.L. (2 Bail.) 558, 560 (S.C. Ct. App. 1831) (holding that whether a person is "mulatto" or a "person of colour" is a "question very proper for the jury," and in deciding this issue, the jury should assess "evidence of inspection as to color, the peculiar negro features; the evidence of reputation as to parentage; and such evidence . . . of the person's having been received in society, and exercised the privilege of a white man").

49. *See generally, e.g.*, IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974).

50. See Rich, *supra* note 13, at 1149–50, for an examination of early racial determination and immigration cases depicting "courts' recognition of the fluid nature of racial and ethnic morphological descriptions and their ability to change the rules of the game when established morphologic descriptions no longer served their intended purposes[:] . . . to maintain the separate tiers of rights accorded to white citizens, [B]lack slaves, and other immigrants." *See also* Ozawa v. United States, 260 U.S. 178, 197 (1922) (rejecting Japanese petitioner's argument that his "white" skin color determined his "race" in order to restrict naturalized citizenship to persons of European descent as well maintain white racial purity). The court stated:

> Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being the darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlap-

cialized and an individual's performance or non-performance of certain behaviors could signify one's race.[51]

In its 1835 decision in *State v. Cantey*,[52] the South Carolina Court of Appeals illustrated this shift from appropriating a "biological" definition of race to determining race based on an individual's "performance" in society through its explicit rejection of a biological construct of race. The *Cantey* court held that an individual's race was not determined by the degree of white or colored "blood" a person possessed but

> by [his] reputation, by his reception into society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.[53]

In 1866, the Michigan Supreme Court in *People v. Dean*[54] expressed similar sentiments depicting a naturally autonomous and universally accepted method of determining an individual's Blackness (or whiteness) by his or her social behaviors. According to the *Dean* court,

> it is very well known that the associations of persons having visible portions of African blood, have generally been closer with each other than with those acknowledged as white. They consider themselves as of one race, and live and act together. This mutual recognition, coupled as it undoubtedly is with a general disposition on the part of white persons to avoid social relations with the mass of mixed, as well as unmixed, races of African descent, furnishes a commentary on the terms *white* and *colored*, which can hardly be resisted.[55]

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ping of races and a gradual merging of one into the other, without any practical line of separation.

Id.

51. *See, e.g., Davis*, 18 S.C.L. (2 Bail.) at 560.
52. 20 S.C.L. (2 Hill) 614 (S.C. Ct. App. 1835).
53. *Id.* at 616.
54. People v. William Dean, 14 Mich. 406 (1866).
55. *Id.* at 418.

As the courts in *Cantey* and *Dean* reveal, genetic inheritance or physical appearance did not simply determine one's race. Conformity with race-based stereotypes and behaviors, which were constructed through group-based social relations as well as the law, also determined one's race. Nevertheless, some contemporary courts consciously reject the fact that one's social interactions, behavior, speech, dress, religious beliefs, and physical traits other than skin color (for example, the texture of one's hair, the shape of one's nose, eyes, or lips) have been racialized throughout history.[56] Courts also overlook the fact that socially mediated constructs of race, developed centuries ago, are deeply imbedded into this nation's fabric and continue to inform definitions of race; yet, at the same time, race is not a fixed or objective concept.[57] As Professor Ian F. Haney López eloquently explains: "race is constructed through the interactions of a range of overlapping discursive communities, from local to national, ensuring that divergent and conflicting conceptions of racial identity exist within and among communities."[58] Therefore, the judicial concept of the "immutability" of race defies society's understanding of race historically and contemporarily. In order to properly address racial discrimination in the employment context, courts must employ a broader definition of race which includes physical appearance, language, cultural activities, or associations.[59] The following Part discusses three

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56. *But see* Abdullahi v. Prada, No. 07-2489, 2008 WL 746848, at *1 (7th Cir. Mar. 21, 2008). According to Judge Posner,

> Iranians and other Central Asians are generally regarded as 'white,' whatever their actual skin color . . . [but] [s]ome Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to provoke the kind of hostility associated with racism.

Id. Implicitly, Judge Posner recognizes that race is a social and relational construct. *See id.* Moreover, the external determination of an individual's race may not develop from the display of a physical, "immutable" characteristic such as skin color; the individual's accent—which is mutable and not physical per se—may also signify his or her race.

57. *See* Rice v. Gong Lum, 104 So. 105, 110 (Miss. 1925) (interpreting the term "colored" used in the state constitution to signify all people who were not white or Caucasian, which included the Chinese even though, when drafted, legislators specifically contemplated the term to denote those individuals who were "negroes and those having negro blood"), *aff'd*, 275 U.S. 78 (1927).

58. Ian F. Haney Lopez, *Race and Erasure: The Salience of Race to Latinos/as*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 39, at 369, 373.

59. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (2007) which defines national origin discrimination broadly "as

Title VII race discrimination cases involving mutable characteristics that illustrate the need for a more pluralistic judicial analysis.

III. SURVEY OF TITLE VII CASES INVOLVING MUTABLE CHARACTERISTICS

Rogers v. American Airlines, Inc.,[60] *Eatman v. United Parcel Service*,[61] and *Bryant v. Begin Manage Program*[62] are all Title VII cases in which the plaintiffs challenged their employers' grooming and appearance codes (an informal policy in the case of Bryant) which banned the display of racialized, yet mutable characteristics. For Rogers and Eatman, their employers' prohibitions against the exhibition of mutable characteristics, namely hair styles, were the crux of their claims. Yet, Bryant's claim involved not only mutable characteristics but also skin color, which courts have deemed an "immutable characteristic" and, thus, constitutive of race.

Rogers, a Black woman and an American Airlines employee of eleven years, wore her hair in "corn row[s]."[63] American Airlines implemented a policy prohibiting employees in certain employment categories from wearing an all-braided hairstyle.[64] Rogers sued American Airlines under Title VII, claiming that American Airlines' policy discriminated against her as a woman and, more specifically, as a Black woman.[65] She asserted that American Airlines' policy, though race-neutral on its face, had a disparate impact on Black women because the corn-row style, similar to an Afro, "has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[66] A federal district court articulated several grounds for rejecting Rogers' claim that American Airlines' policy was racially discriminatory.

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including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."

60. 527 F. Supp. 229 (S.D.N.Y. 1981).
61. 194 F. Supp. 2d 256 (S.D.N.Y. 2002).
62. 281 F. Supp. 2d 561 (E.D.N.Y. 2003).
63. *Rogers*, 527 F. Supp. at 231.
64. *Id.*
65. *Id.*
66. *Id.* at 231–32.

First, it held the "grooming policy applies equally to members of all races, and plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by black people."[67] Essentially, the court pronounced an insurmountable standard for the viability of Rogers' race discrimination claim: unless evidence is presented that the corn-row hair style is worn exclusively or predominantly by Blacks, the alleged racial trait would not be protected under Title VII. Inevitably, the court determined that Rogers was unable to satisfy this burden since Bo Derek, a white actress, wore an all-braided hairstyle in the movie *10*.[68] The court further rationalized its holding by drawing a flawed distinction between an Afro and an all-braided hair style: an Afro is natural and thus "immutable," whereas, a braided hairstyle is not "immutable," because it is an "easily changed characteristic."[69] According to the court, Title VII only proscribes employment policies that discriminate on the basis of "immutable characteristics."[70] The court's summary dismissal of the notion that race, color, and national origin are also defined by mutable ethnic or sociocultural traits resulted in a finding by the court that Rogers did not establish a prima facie case of unlawful race discrimination under Title VII.[71]

Moreover, the court recognized American Airlines's reason for implementing the policy—"to help American [Airlines] project a conservative and business-like image"—as a bona fide business purpose.[72] The court also held that "[b]ecause [Rogers] could have altered the all-braided hairstyle in the exercise of her own volition, American Airlines was legally authorized to force that choice upon her."[73] Since American Airlines did not require Rogers to restyle her hair and allowed her to pull her hair into a bun and wrap a hairpiece around the bun during work hours, this "accommodation" did not "offend a sub-

67. *Id.* at 232.

68. *Id.* The court even accepted the employer's contention that Rogers was attempting to mimic Bo Derek because she began wearing corn-rows "soon after the style had been popularized by [the] white actress." *Id.*

69. *Id.* Accordingly, the court acknowledged that "an employer's policy prohibiting the 'Afro/bush' style might offend Title VII." *Id.*

70. *Id.*

71. *See id.*

72. *Id.* at 233.

73. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 378–79 (1991) (discussing the *Rogers v. American Airlines, Inc.* decision).

stantial interest" Rogers may have possessed.[74] The court came to this conclusion even in light of Rogers' complaint that the hairpiece she wore caused severe headaches.[75]

Similarly, in *Eatman v. United Parcel Service*, the court determined that United Parcel Service's ("UPS's") decision to implement a grooming code requiring its drivers to cover their "unconventional" hairstyles, which included dreadlocks, braids, corn rows, a doo rag, and a ponytail, did not violate Title VII.[76] Seventeen out of eighteen employees subject to this policy were African-American, and eleven of the seventeen affected employees in the New York metropolitan area wore dreadlocks.[77] After Eatman, a UPS employee, began wearing dreadlocks, various UPS managers "told him that he looked like an alien and like Stevie Wonder, twice compared his hair to 'shit,' linked his hair to 'extracurricular' drug use, requested a pair of scissors (as if to cut off the locks), and pulled his hair . . . ."[78] An unnamed UPS employee also hung a derogatory sign on his UPS truck.[79] Eatman continued to wear the dreadlocks but refused to wear the required wool cap because it caused him to feel faint, it gave him headaches in warm weather, and it damaged his locks.[80] UPS terminated Eatman for failing to comply with UPS's grooming code.[81] Consequently, Eatman brought a race discrimination claim under Title VII against his former employer.[82] He asserted several Title VII claims of discrimination:[83] (1) the policy was facially discriminatory against African-Americans, (2) the policy had a disparate impact on African-Americans, and (3) he was intentionally discriminated

74. *Rogers*, 527 F. Supp. at 233.

75. *Id.* In fact, the Court summarily opined that Rogers should obtain a larger hairpiece. *See id.* (stating "[a] larger hairpiece would seem in order").

76. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002).

77. *Id.* at 264.

78. *Id.*

79. *Id.* Eatman specifically alleged that "in the area on his UPS truck where the driver's name plate was supposed to be there was a plate that read 'ASSWIPE.'" *Id.*

80. *Id.* at 260.

81. *Id.* at 260–61.

82. *Id.* at 261–62. Eatman also brought a religious discrimination claim under Title VII. *Id.* at 267–68.

83. *Id.* at 262. Part IV of this Article discusses in greater detail the two categorical theories of employment discrimination law—disparate treatment and disparate impact—and the methods of proving these theories of discrimination.

against and terminated on the basis of his race (an individual disparate treatment claim).[84]

Despite the fact that Blacks represented ninety-four percent of the employees affected by UPS's grooming code, the court held UPS's policy was not facially discriminatory, and it did not disparately impact Blacks in violation of Title VII.[85] Regarding Eatman's individual disparate treatment claim, the *Eatman* court, like the *Rogers* court, rationalized its holding by accepting and articulating the notion that race is an immutable characteristic.[86] Therefore, in order to present a viable prima facie case of race discrimination, Eatman first had to demonstrate that prohibited hairstyles, specifically dreadlocks, were "unique" to African-Americans.[87] The court also stated that, in light of evidence presented, African-Americans were not the only persons who lock their hair.[88] Even if UPS's policy explicitly *discriminated* against locked hair, it would not violate Title VII on its face.[89] And even though the court found the derogatory comments made about the Eatman's hair to be "hurtful, sophomoric and insulting," the court held that these comments were not racially discriminatory because they did not mention his race.[90]

In both *Rogers* and *Eatman*, "[t]he court conceived of race and the legal protection against racism almost exclusively in biological terms."[91] Therefore, neither Rogers nor Eatman were able to demonstrate a viable prima facie case of race discrimination under Title VII. However, in *Bryant v. Begin Manage Program*,[92] the court defined race socio-culturally, and the plaintiff was able to demonstrate a viable prima facie case.[93] On several occasions while working for Begin Manage Program, Bryant, a Black woman, was called a "wannabe" by her supervisor, who was also a Black woman.[94] Bryant pos-

84. *Id.* Eatman also claimed that he was subjected to a racially hostile work environment and that he was retaliated against in violation of Title VII. *Id.* at 261, 269.
85. *Id.* at 262, 264–67.
86. *Id.* at 262.
87. *See id.*
88. *Id.*
89. *Id.* (emphasis added).
90. *Id.* at 265.
91. Caldwell, *supra* note 71, at 378.
92. 281 F. Supp. 2d 561 (E.D.N.Y. 2003).
93. *Id.* at 570.
94. *Id.*

sessed a lighter skin complexion (allegedly lighter than her eventual replacement).[95] She also dyed her hair blond and did not wear "Afrocentric" attire like her supervisor.[96] Instead, she wore business suits even when not required to do so.[97]

According to Bryant, her supervisor repeatedly made snide comments about her blonde hair color and suggested that Bryant change her style of dress to be more in line with her Afrocentric attire.[98] Bryant was denied a transfer and eventually terminated by her supervisor.[99] Bryant then claimed that she was discriminated against because of her race in violation of Title VII.[100] Specifically, Bryant contended that she was denied a transfer and terminated because she was "not sufficiently 'Afrocentric' and because of [her] lighter skin color."[101] Moreover, Bryant claimed "she was treated differently because she was [B]lack—that she suffered an adverse employment action because, as a [B]lack woman, she was obligated to dress in a particular manner, despite the fact that the dress code was flexible as applied to others."[102]

The court held "to the extent that any adverse employment action arose out of [the supervisor's] *views* of how a [B]lack employee should dress (or not dress) the resulting adverse employment action would be actionable under Title VII."[103] In so doing, the court acknowledged that Bryant's "race" encompassed not only her skin color but also her style of dress. Yet, the court reluctantly submitted to the idea that concepts of "Blackness" and "whiteness" are comprised of mutable characteristics commonly associated with a particular racial group. The court accepted Bryant's claim that referring to a Black person as a "wannabe" is a "common phrase in the [B]lack community" meaning "wanting to be white."[104] However, the court conceded to Bryant's definition only because the employer did not challenge the validity of her assertion.[105] In fact, the court declared, "the term 'wannabe' is perhaps widely used

95. *Id.* at 564.
96. *Id.* at 565.
97. *Id.*
98. *Id.* at 565–66.
99. *Id.* at 567–68.
100. *Id.* at 568.
101. *Id.* at 564.
102. *Id.* at 570.
103. *Id.* (emphasis added).
104. *Id.* at 565.
105. *Id.* at 570 n.7.

without any negative racial connotations, [but since it was unchallenged] it can be reasonably interpreted so in the context alleged by [the employee]."[106] Therefore, the supervisor calling Bryant a "wannabe" *in conjunction* with the comments about her hair and style of dress provided the requisite "prohibited animus giving rise to an inference of discrimination."[107] In order for Bryant to make a case of race discrimination, a specific race-based comment needed to be asserted.[108] Thereby, the *Bryant* court, like the *Eatman* court, inhibited the viability of race discrimination claims involving mutable characteristics such as hair style and dress.

If courts viewed race within its proper socio-historical context, the limitations placed on Title VII plaintiffs like Bryant, Eatman, and Rogers to articulate viable claims of racial discrimination would be greatly diminished in number and force. Applying a socio-historical or contemporary definition of race is fundamental to the viability of Title VII cases involving mutable racial characteristics. Equally important to the livelihood of these cases is the courts' shift in focus from an employer's intent to discriminate to the effect the employment policy or decision has on the employee or applicant. The following Parts delineate the importance of shifting the concentration in race

106. *Id.*

107. *Id.* at 570.

108. The assertion of an attendant race-specific comment by a decision-maker may not be required for a "race-neutral" appellation to be deemed sufficiently probative of discriminatory animus in light of the Supreme Court's decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (per curiam). In *Ash v. Tyson Foods*, a plant manager who made the disputed adverse employment decisions called each of the two Black petitioners "boy." *Id.* at 456. The United States Court of Appeals for the Eleventh Circuit held that the use of the word "boy" was not evidence of discriminatory animus without it being modified by a racial classification like "[B]lack" or "white." *Id.* However, the Supreme Court overruled the Court of Appeals' holding, finding that "modifiers or qualifications are [not] necessary in all instances to render the disputed term probative of bias." *Id.* Importantly—and central to one of the principal contentions throughout this Article—the Court acknowledged that in order to ascertain whether the term is probative of an unlawful action made because of race, a word's intended or conveyed meaning cannot be analyzed independent of social, historical, or contextual circumstances. *Id.* The Court noted that "[a]lthough it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.* As a result, courts may permit the plaintiff to produce evidence that frames the employer's action within a historical or contemporary social milieu, thereby demonstrating that the employer's "race-neutral" actions are in fact infused with ideals of race, racism, and racial hierarchy.

discrimination cases from an employer's intent to the stigmatizing effects of employment policies and decisions on the plaintiff.

IV. AN EMPLOYER'S INTENT: CONCSCIOUS OR UNCONSCIOUS

> "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[109]

The two categorical theories of employment discrimination law are disparate impact and disparate treatment.[110] Disparate impact is characterized as "discrimination without intent, reflecting Title VII's broad remedial goals to eradicate the effects of unlawful discrimination."[111] Under the disparate impact analysis, the court assesses whether the employer's use of facially neutral devices, tests, standards, and criteria unintentionally, but disproportionately, deprives individuals of employment opportunities.[112] Statistical evidence demonstrating that a device, criteria, test, or policy disproportionately harms a protected group is presented as evidence of unintentional discrimination.[113] The lack of requisite discriminatory intent for disparate impact cases is the distinguishing factor between Title VII disparate impact cases and Title VII disparate treatment cases. Similarly, the lack of requisite intent is the major

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109. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 274 (1995) (Ginsberg, J., dissenting) (footnote omitted).

110. *See* K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L. Q. 89, 105 (1999) (stating that "[t]he two standards of employment discrimination—disparate treatment and disparate impact discrimination—have amicably coexisted under the roof of Title VII for nearly three decades"). Additionally, the hostile work environment theory is advanced by plaintiffs to enforce and seek relief under Title VII. "[H]ostile work environment . . . protects employees against harassing conduct that rises to the level of a hostile environment." Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 655 (2005).

111. Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 811 (1987).

112. *See id.* at 811–12; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (explaining that courts do not err by examining an employer's intent, "but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

113. *See Griggs*, 401 U.S. at 430–32.

difference between the disparate impact analysis under Title VII and the disparate impact analysis for discrimination claims brought under the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment.[114]

In the Title VII context, disparate treatment "supposes that the defendant has chosen to act in a discriminatory fashion."[115] According to Professor Peter Brandon Bayer, there are three modes of proof under a disparate treatment theory: (1) per se discrimination, (2) individual disparate treatment, and (3) systemic disparate treatment (pattern and practice).[116] This Article only discusses individual disparate treatment. Per se discrimination occurs when an employer's policy, term, condition, or practice overtly discriminates on the basis of one of the five forbidden criteria.[117] Under current Title VII jurisprudence, disparate treatment often concerns intentional but covert discrimination against an individual or group.[118]

When analyzing a disparate treatment claim, "a court reviews a series of seemingly neutral events to discern if those events hide intentional discrimination."[119] Without direct evidence that an impermissible factor played a role in the employer's decision, discriminatory animus is inferred from a series of outwardly neutral occurrences.[120] In *McDonnell Douglas Corporation v. Green*,[121] the Supreme Court outlined the first proof construct to be used in such cases: (1) the plaintiff must first bring forth a prima facie case of discrimination, which creates a presumption that the employer unlawfully discriminated against the plaintiff; (2) the employer rebuts this presumption by producing a legitimate, nondiscriminatory reason for its adverse employment action; and (3) the plaintiff must then produce evidence showing that that the employer's asserted reason is a pretext for discrimination.[122]

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114. *See* Bayer, *supra* note 109, at 812.

115. *Id.* at 796.

116. *Id.*

117. *Id.* at 797.

118. *See, e.g.*, Jean Fielding, Note, *Discrimination Law—Impermissible Use of the Business Necessity Defense and the Bona Fide Occupational Qualification*, 12 W. NEW ENG. L. REV. 135, 136 (1990).

119. Bayer, *supra* note 109, at 799.

120. *Id.* at 804.

121. 411 U.S. 792 (1973).

122. Bayer, *supra* note 109, at 799–803. There are several methodologies available to demonstrate unlawful employment discrimination under Title VII. In

The judiciary has interpreted Section 1981 of the 1877 Civil Rights Act,[123] the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Fourteenth Amendment as prohibiting only "intentional" or "purposeful" discrimination.[124] In doing so, courts have ignored social science evidence that demonstrates discriminatory actions may not be the result of a conscious intent to discriminate against a particular individual but rather the result of an unconsciously held bias about the individual's race.[125] Therefore, legal scholars have proposed, similarly to Justice Ginsberg, that fully addressing racial inequality and discrimination requires courts to consider not only purposeful acts to subordinate an individual or to deny a tangible benefit on the basis of

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1989, the Supreme Court developed an analytical framework for disparate treatment cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the *Price Waterhouse* framework, if the plaintiff proves that a protected characteristic was a substantial factor for the challenged employment action, the burden shifts to defendant to prove that it would have made the same decision even had it not considered the protected characteristic. *Id.* at 250. After *Price Waterhouse*, Congress adopted an amended "mixed motive" analytical framework for proving disparate treatment cases in the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(m) (2000). The plaintiff must prove that a protected characteristic was a motivating factor for the challenged employment action. *See id.* Upon a plaintiff making this showing, the defendant bears the burden of proving that it would have taken the same action even had it not considered the protected characteristic. *See id.* § 2000e-5(g)(2)(B). The Supreme Court ruled in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003), that direct evidence is not required for a mixed-motive jury instruction under 42 U.S.C. § 2000e-2(m). After the *Desert Palace* ruling, some courts have interpreted *Desert Palace* as having abolished the *McDonnell Douglas* analysis and others have argued that the *McDonnell Douglas* framework remains applicable. *See, e.g.*, Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1192 (N.D. Iowa 2003) (discussing the division within district courts on whether to apply the *McDonnell Douglas* burden-shifting paradigm in post-*Desert Palace* cases). The Supreme Court, however, has not expressly overruled *McDonnell Douglas*. Accordingly, in this Article, I will limit my discussion to proving Title VII disparate treatment discrimination under the *McDonnell Douglas* framework.

123. *See* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389 (1982) (holding Section 1981 "reaches only purposeful discrimination").

124. *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976) (declaring that the Fifth Amendment's Due Process Clause "contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups," therefore a claimant must establish a discriminatory purpose to assert a viable constitutional claim of racial discrimination); *see also* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 265 (1977) (holding "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

125. *See generally, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

race but also unconscious racism.[126] Most notably, in his groundbreaking article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,[127] Professor Charles Lawrence illuminates the concept of unconscious racism and the judiciary's need to recognize its existence when presented with Equal Protection Clause violations.

Professor Lawrence seeks to demystify the Supreme Court's concentration on the governmental actor's conscious and purposeful intent to discriminate against racial minorities when analyzing whether governmental actions are racially discriminatory in violation of the Equal Protection clause. Primarily basing his propositions on Sigmund Freud's psychoanalytical theory and cognitive psychology theory, Lawrence explains that racial discrimination is not only the product of conscious, purposefully motivated racism, but it is also largely created by "unconscious racial motivation."[128] He further explains that Americans "inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions" in light of the hegemonic role race has played throughout America's historical and cultural experience.[129] Most often, these shared beliefs about race influence our decisions without our knowledge.[130] Therefore, unconsciously held beliefs about race, which will inevitably influence the implementation of facially race-neutral policies that disproportionately impact minorities, can inflict the same harm on minorities as policies enacted with a purposeful intent to discriminate.[131]

According to Professor Lawrence, courts should appropriate a "cultural meaning" test to evaluate whether unconscious racism operated in the development of the race-neutral policy.[132] The courts' charge is "to see if [the race neutral policy]

126. *See generally id.*
127. *Id.*
128. *Id.* at 322.
129. *Id.*
130. *Id.*
131. *See id.* at 343–44.
132. *Id.* at 324. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the Supreme Court held that a race-neutral policy disproportionately impacting a racial group amounts to a constitutional violation only when a showing of purposeful intent is made. Lawrence's proposal responds to this pronouncement and thereby specifically deals with race-neutral policies that disproportionately impact a particular racial group and are challenged under the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment. Instead of focusing on the impact of the policy on racial groups, the Court has fo-

conveys a symbolic message to which the culture attaches racial significance."[133] Accordingly, a court would first review the social and historical context surrounding the case.[134] If a court determined that a significant part of the community would see the challenged action or policy as racially motivated, it would " 'presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers.' "[135]

Professor Lawrence's "cultural meaning test" and exposition of unconscious racism provide excellent starting points for courts to develop legal inquiries that will address the operation of racism and discrimination. Appropriately, his test requires scrutiny of a policy decision from a socio-historical perspective. In doing so, one can ascertain whether racism or the "complex of historical, sociocultural associations with race"[136] played a role in the decision.

However, if a court were to adopt Professor Lawrence's suggestion in Title VII disparate treatment cases, would the assessment of a decision maker's unconscious racism effectuate the goals of Title VII? Should the focus of the inquiry remain on the employer's intent—unconscious or conscious? Or, should the courts analyze seemingly "race-neutral" facts from the perspective of the employee or applicant? Additionally, should the court determine if an employment decision is unlawful based on its consequences—economic, psychological, or emotional—on the employee or applicant? Professor Lawrence's propositions, though extremely insightful and influential, do not fully address racial discrimination in the employment context or achieve the objectives of Title VII. Accordingly, the following Part encapsulates the work of Professor R.A. Lenhardt,

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cused on the decision maker's intent in formulating the policy. Thus, Lawrence demonstrates that impermissible considerations like race are not always conscious or purposeful, but rather unconscious and unknowing. *See generally* Lawrence, *supra* note 123. Consequently, he has developed the "cultural meaning" test which is meant to illuminate whether a decisionmaker's unconscious racism played a role in his or her policy decision. *Id.* at 324. As previously explained, in Title VII disparate impact cases, an employer's intent to discriminate plays no role in assessing liability. Accordingly, in discussing Lawrence's "cultural meaning" test, I am discerning whether it would be useful in disparate treatment cases where the court focuses on the employer's intent.

133. Lawrence, *supra* note 123, at 356.

134. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004).

135. *Id.* at 887 (quoting Lawrence, *supra* note 123, at 356).

136. Caldwell, *supra* note 71, at 378.

which extracts from Professor Lawrence's seminal scholarship and the social science work of Erving Goffman.[137] Professor Lenhardt maintains that diminishing racial inequality requires courts deciding race discrimination cases to consider the racially stigmatic harm imposed on the affected individual(s) rather than the actor's intent to discriminate.[138] In doing so, courts must analyze the contested policy within its proper social context—past, present, and future.[139]

V. RACIAL STIGMATIZATION

> "[T]he past is crucial to understanding the present . . . . Understanding racial stigma and racial stigmatization requires an appreciation of all the contexts—past, present, and future—in which an event occurs."[140]

In her path-breaking piece, *Understanding the Mark: Race, Stigma, and Equality in Context*, Professor Lenhardt proclaims that the main source of racial harm in America is racial stigma—not intentional discrimination.[141] She explains that "rather than . . . unconscious racism per se," recent "social science research focuses on the cognitive processes linked to racial stigma"[142] and "dehumanizing meanings associated with race [which] operate at a largely pre-conscious level to distort perception and spoil social interactions between racially stigmatized and nonstigmatized individuals."[143] According to Professor Lenhardt, "[t]hese meanings, rather than the existence of bad motive or intent, explain the active instances of discrimination committed against racial minorities."[144] Racial stigma causes intentional discrimination; however, courts view racial stigma as one of the harmful effects of intentional discrimination.[145] "[R]acial stigma imposes real, concrete harms on African Americans and other racial minorities that negatively af-

137. Lenhardt, *supra* note 132, at 803.
138. *See generally id.*
139. *Id.* at 811.
140. *Id.* at 864.
141. *Id.* at 809.
142. *Id.* at 809–10.
143. *Id.* at 847.
144. *Id.*
145. *Id.* at 875; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (holding state-sanctioned racially segregated public schools unconstitutional in part because of the stigmatizing effects on Black children).

fect them in their personal lives and also operate at a group level to deny them certain tangible and intangible benefits," like employment opportunities.[146]

Like Professor Lawrence, Professor Lenhardt believes the Supreme Court's "current focus on intentional discrimination cannot adequately address the way that race and racial injury operate in this society."[147] Therefore, "courts must take the social science insight that most racialized conduct or thought is unconscious, rather than intentional, into account in their constitutional analyses of acts or policies challenged on the grounds of race."[148] However, Professor Lenhardt opines that "the dehumanizing meanings associated with race itself, and not just racialized behavior per se, are the source of [racial injury]."[149] In examining the racially stigmatic meaning of an act or policy in race discrimination cases, "judges would be required to gather information that would provide insight into the likelihood of racial stigmatization in a given case."[150] According to Professor Lenhardt,

> [U]nderstanding the meaning of racial stigma will require knowing more than the basic outline of a particular case or set of interactions. To understand racial stigma, one must understand the cultural norms and meanings surrounding race. That is, there must be a focus on the present situation, as well as on the cultural and historical events that help to give it meaning.[151]

She also opines, "stigmatic harm occurs when a given act or policy sends the message that racial difference renders a person or a group inferior to Whites, the category constructed as the racial norm."[152] However, this Article proposes that stigmatic harm occurs whenever an act or policy informs any individual that his or her race or race-based conduct is inferior or non-compliant with the superior, preferred racial norm—whether that norm is white or Black, Asian or Hispanic. This proposition is clarified in the next Part, which revisits the *Bryant* case, in which "Blackness" was expressed as the preferred

146. Lenhardt, *supra* note 132, at 848.
147. *Id.* at 887.
148. *Id.* at 803.
149. *Id.* at 888.
150. *Id.* at 891.
151. *Id.* at 851 (citations omitted).
152. *Id.* at 803.

racial norm, and the *Eatman* and *Rogers* cases, in which "whiteness" was implicitly conveyed as the preferred racial norm in the workplace.[153]

VI. A REVISED DISPARATE TREATMENT ANALYSIS

Like Professor Lenhardt, I argue that in order to realize equal employment opportunity for all races, courts must take into account racial stigma in Title VII disparate treatment cases. Specifically, when analyzing individual disparate treatment cases, courts should construe Title VII to prohibit employment policies and decisions that render stigmatic harm on an individual or group because such an interpretation advances the stated Congressional intent underlying Title VII: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[154] Accordingly, in individual disparate treatment race, national origin, and color discrimination cases, courts must also evaluate evidence of stigmatic harm to the plaintiff. In cases where racial or cultural identity is an issue, courts must first look at the factual situation from a historical and contemporary social perspective to determine if the challenged physical appearance or behavior is constitutive of race. Second, the primary focus of the legal inquiry must depart from ascertaining the conscious or unconscious racism of the employer and focus on the harm imposed on the plaintiff. Therefore, the unlawfulness of an employment policy or decision would not rest on the employer's intent to discriminate, but on whether the employment policy or decision inflicts negative racial meaning or stigma on an individual or group.

As previously explained, the establishment of a prima facie case in a *McDonnell Douglas*-type individual disparate treatment case creates a presumption of unlawful discrimination.[155] The employer rebuts this presumption by producing, through admissible evidence, a legitimate, nondiscriminatory reason for

153. *See supra* Part III.

154. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In *Griggs*, the United States Supreme Court first recognized the disparate impact theory as a cognizable theory of discrimination under Title VII. *See id.* Even though the Court's expression of the Congressional impetus for Title VII occurred in a disparate impact case and not an individual disparate treatment case, I argue that the Court's stated statutory directive remains consistent notwithstanding the theory of discrimination articulated at the outset of a case.

155. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

its adverse employment action.[156] However, the plaintiff is able to revive the presumption of discrimination by presenting sufficient evidence that the employer's articulated reason for the adverse employment action is false or is a pretext.[157] The plaintiff may also revive the presumption even when the plaintiff does not demonstrate the falsity of the employer's asserted reason.[158] A plaintiff is able to restore a presumption of discrimination when he or she provides sufficient evidence challenging the race-neutrality of the proffered reason.[159] The traditional *McDonnell Douglas* framework is not meant to be a rigid proof construct; rather, it is intended to be fluid and to be crafted to the specific facts of a particular disparate treatment case.[160] Thus, "[t]he ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base [its employment actions] on race, or simply did so because of unthinking stereotypes or bias."[161] Accordingly, the revised disparate treatment analysis, with its focus on racial stigmatization and historical and contemporary social context, ascertains more efficaciously whether an employer's treatment of an employee or applicant is "because of race" in violation of Title VII and in opposition to Title VII's objectives.

By revisiting *Rogers*, *Eatman*, and *Bryant*, one can appreciate how courts can incorporate these suggestions when evaluating Title VII individual disparate treatment cases. If courts viewed the definition of race from a historical and contemporary social perspective, courts would have to acknowledge that race encompasses more than "immutable characteris-

156. *See id.* at 255 (holding once "the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted . . . ").

157. *See id.* at 256 (explaining that a plaintiff may succeed in a Title VII individual disparate treatment case "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence").

158. *See id.*

159. *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 57–58 (1st Cir. 1999) (holding that a plaintiff's challenge to the racial neutrality of the employer's legitimate nondiscriminatory reason rather than the falsity of the asserted reason is a cognizable form of proving disparate treatment under Title VII).

160. According to the Supreme Court, the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

161. *Thomas*, 183 F.3d at 58 (internal citation omitted).

tics" and is not an absolute or stable construct. Race includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not "uniquely" or "exclusively" "performed" by, or attributed to a particular racial group. Accordingly, courts would have to abolish the requirement that plaintiffs demonstrate the asserted racial characteristic—in Rogers' case, her corn rows, and in Eatman's case, his dreadlocks—is "unique" to African-Americans. Thus, in cases like Rogers' and Eatman's, courts could no longer preclude a finding of race discrimination simply because non-African-Americans can also "perform" or "adopt" the racial characteristic.[162]

Historically and contemporarily, dreadlocks and corn rows have been associated with "Blackness." According to Professor Paulette Caldwell, "African in origin, the practice of braiding is as American—[B]lack American—as sweet potato pie."[163] Therefore, just as an Afro connotes Blackness within the lay community, and an employer's negative reference to an Afro alone can provide a sufficient basis for a race discrimination claim,[164] corn rows, dreadlocks, braids, or "doo rags" are equally indicative of Blackness in the lay community. Therefore, an employer's prohibition against these hairstyles would demonstrate a prima facie case of race discrimination. Similarly, the supervisor's references to Bryant's style of dress and blond hair in conjunction with her lighter skin color would likewise demonstrate a prima facie case of race or color discrimination under the proposed framework.[165] The essential

162. Under a revised disparate treatment analysis, a prohibition against hairstyles or any other physical appearance or characteristic associated with a particular race, national origin, or color could also be deemed per se discrimination, as the employer's policy is overtly linked to an impermissible criterion under Title VII.

163. Caldwell, *supra* note 71, at 379.

164. *See* Jenkins v. Blue Cross Mut. Hosp. Ins. Co., 538 F.2d 164, 168 (7th Cir. 1976). In *Jenkins*, the plaintiff asserted a Title VII race discrimination claim because her supervisor denied her a promotion, informing her that she "could never represent Blue Cross with [her] Afro." *Id.* The court held that the supervisor's lone statement was sufficient to support a race discrimination claim because "[a] lay person's description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination." *Id.*

165. As will be explained further, in the African-American community, the supervisor's reference to her "Afrocentricity" and denigration of Bryant's style of dress and hair color in conjunction with Bryant's lighter skin tone would have been sufficient evidence that Bryant was being treated differently on the basis of

function of a prima facie case is for the plaintiff to demonstrate that the adverse employment action resulted from the plaintiff's display of a race-based characteristic.

After the plaintiff demonstrates a prima facie case of discrimination, the burden would shift to the employer to produce a legitimate, nondiscriminatory reason for its action. In cases involving grooming codes, however, an employer's assertion, like American Airlines' and UPS's—"the policy was adopted to project a conservative or business-like image" or to prohibit "unconventional" or "unprofessional" appearances—would not satisfy the employer's burden of production. Often these statements are code for the dominant, structural cultural norm—"whiteness"—which thereby diminishes the race-neutrality of such "legitimate, nondiscriminatory" reasons.[166]

To renew the presumption of unlawful discrimination created by the prima facie case, the court would allow the plaintiff to place the facts within a historical and/or contemporary social context to determine if the employer's actions perpetuate a racial stigma. This prong is consistent with the basic elements of antidiscrimination analysis:

> a focus on group history; identification of recurring patterns of oppression that serve over time to define the social and economic position of the group; analysis of the current position of the group in relation to other groups in society; and analysis of the employment practice in question to determine whether, and if so, how it perpetuates individual and group subordination.[167]

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her race and color. Being called a "wannabe" could have been used as pretextual evidence that Bryant's race and color motivated her supervisor's disparate treatment.

166. *See generally* Green, *supra* note 108. Professor Green argues American workplaces dominated by white males are likely assembled along a white, male cultural norm. *See id.* at 648. In these workplaces, employers' imposition of behavioral expectations—often evidenced through appearance codes requiring employees to exhibit a "conservative," "conventional," or "business like" image—are seemingly race-neutral. *See id.* at 659. Yet, according to Professor Green, these "race-neutral" descriptors define standard workplace behavior along a white, male norm. *See id.* at 672. Thus, an employee's forced conformity to this racialized (as well as gender-based) norm engenders a discriminatory work culture. *See id.* at 643–44, 663–64.

167. Caldwell, *supra* note 71, at 377 (citing L. THUROW, THE ZERO SUM SOCIETY: DISCRIMINATION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 184–89 (1980)).

If the plaintiff is able to establish a prima facie case and provide evidence that the employer's action perpetuates a racial stigma, the plaintiff would have satisfied his or her burden of production and persuasion.[168]

For example in *Rogers*, evidence that negative associations have historically and presently been designated to Blacks' natural hairstyles should have been sufficient to establish liability. Professor Paulette Caldwell explains,

> For [B]lacks, and particularly for [B]lack women, such choices also reflect the search for a survival mechanism in a culture where social, political, and economic choices of racialized individuals and groups are conditioned by the extent to which their physical characteristics, both mutable and immutable, approximate those of the dominant racial group.[169]

Because of the negative terms used to refer to "Black" hair, such as "nappy," "kinky," and "unclean," Blacks (and non-Blacks) have been stigmatized for their naturally coiled hair. Therefore, in order to "'crossover' from the private world of segregation and colonization . . . into the mainstream of American life"—to be accepted by and to assimilate into white majoritarian society—Blacks have (and continue to) "cut off, straighten[ ] out, curl[ ] up, [and] cover[ ]" their hair.[170] Providing such evidence would demonstrate that American Airlines' policy was not only influenced by the combination of negative associations with Blackness generally, and Black womanhood more specifically, but, more importantly, continues to perpetuate the negative meanings associated with these categories, making the policy and the resulting adverse employment action unlawful under Title VII.

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168. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding a Title VII plaintiff retains the burden of persuasion throughout the employment discrimination case).

169. Caldwell, *supra* note 71, at 383.

170. *Id. See also* Turner, *supra* note 26, at 138 (discussing John Kang's "White Aesthetics" ideology which "maintains that because of their 'aesthetic inferiority' people of color will continue to be subordinated" and also discussing Professor Janice Kenyatta's theory that "White Aesthetics" derived from the days of American slavery when "slave owners taught African-Americans that their skin color, facial features, and hair texture were 'abnormal and unacceptable' [which] led [Blacks] to believe that the texture of their hair, among other characteristics was inferior . . . [and thus] Whites were able to denigrate the self-esteem of Blacks").

Eatman actually produced sufficient evidence of stigmatization under a revised disparate treatment analysis. He contended that he was the target of repeated verbal and physical assaults by his managers: "various managers told him that he looked like an alien and like Stevie Wonder, twice compared his hair to 'shit,' associated his hair with 'extracurricular' drug use, requested a pair of scissors (as if to cut off the locks), and pulled his hair . . . ."[171] The court even admitted that the invectives Eatman endured because of his dreadlocks were "hurtful, sophomoric, and insulting."[172] This case illustrates that criminalized behavior, specifically marijuana use, is often associated with wearing dreadlocks.[173] However, to demonstrate the racially stigmatizing effects of UPS's grooming policy, Eatman did not have to rely upon a historical argument that wearing dreadlocks has implicated negative stereotypes in the past. Rather, he was able to produce evidence confirming that wearing dreadlocks presently elicits derogatory stereotypes and associations. The employment policy banning uncovered, "unconventional" hairstyles that essentially affected employees displaying hairstyles associated with Blacks, along with the managers' offensive references to the employee's dreadlocks, perpetuated pejorative stereotypes about "Blackness": unacceptable, unclean, criminal, and inferior.[174] Thus, UPS's conduct perpetuated racial stigmatization, which had deleterious consequences for Eatman—actual economic consequences since he was terminated, and potential emotional and psychological effects; therefore, UPS's actions should have been deemed a violation of Title VII.[175]

171. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 264. (S.D.N.Y. 2002).

172. *Id.* at 265.

173. *See id.* at 264.

174. *See* Lenhardt, *supra* note 132, at 851–64 (providing what she describes as a "'critical memory' of racial stigma" as it pertains to Black Americans, which explains the creation and continued propagation of denigrating stereotypes and images of Blackness via the enactment of positive law, absence of law—for example, the lack of anti-lynching laws despite the pervasive mutilation of Black bodies throughout the nineteenth and twentieth centuries—literature, and media).

175. The court held that even though ninety-four percent of the employees affected by the policy in the New York metropolitan area were Black, this statistical evidence did not support a finding of discriminatory intent against African-Americans. *See Eatman*, 194 F. Supp. 2d at 264. This finding is simply another indication that the court's singular focus on the employer's intent in disparate treatment cases does not fully redress racial, color, or national origin discrimination under Title VII.

Bryant is simultaneously parallel and opposite to the *Eatman* and *Rogers* cases. It is similar in that America's racial history played a crucial role in a present day employment decision that perpetuated racial stigmatizations involving "whiteness" and "Blackness." All of the cases illuminate the salience of a racial hierarchy created to license behavior and appearance associated with "whiteness" and to prohibit behavior and appearance associated with "Blackness." In *Rogers* and *Eatman*, American Airlines's and UPS's grooming and appearance policies conformed to these deeply entrenched norms (whether these policies were consciously or unconsciously adopted is unknown); in *Bryant*, the employer's informal policy deliberately attempted to supplant these constructs.[176] In *Bryant*, the employer did not deem "Blackness" as the subordinate aesthetic norm, but rather, the employer elevated characteristics associated with "Blackness" to the privileged norm. Bryant did not wear Afrocentric clothing like her supervisor but rather regularly wore "business attire" even on "dress down" days.[177] Bryant's supervisor repeatedly disparaged Bryant for dying her hair blond and told Bryant that she "should dress like [her while] pointing to herself . . . [and to] what Bryant characterized [as] an Afrocentric attire."[178] Bryant was allegedly of a lighter skin color than her replacement.[179] According to Bryant, her replacement was a "dark skinned woman . . . with the dreadlock hair . . . [and] Afrocentric dress."[180] Aside from the usage of the race-based appellation "wannabe," the "race-neutral" fact pattern analyzed from a socio-historical perspective, as well as from the plaintiff's perspective, demonstrates that Bryant's supervisor discriminated against her because of the stereotypes or preconceived notions the supervisor held about "Blackness" and "whiteness": Bryant's lighter skin color, blonde hair color, and style of dress challenged the former and conformed to the latter.[181]

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176. As this Article maintains, the fact that these grooming and appearance policies, despite the employer's conscious or unconscious intent, render negative consequences—economic, physical, and/or psychological in nature—illustrates that an employer's intent to discriminate should not be the focus of courts in Title VII disparate treatment cases on the basis of race, national origin, or color.

177. Bryant v. Begin Manage Program, 281 F. Supp. 2d. 561, 565 (E.D.N.Y. 2003).

178. *Id.* at 565–66 (internal quotations omitted).

179. *Id.* at 567.

180. *Id.*

181. See generally Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47

In *Slaves Without Masters*, acclaimed historian Ira Berlin elucidates the negative meaning episodically associated with lighter skin color within the Black community.[182] During slavery, whites distinguished darker skin Blacks from lighter skin Blacks, affording Blacks with lighter skin more privileges, and promoted differences between free Blacks and slaves.[183] Blacks embraced these distinctions and perpetuated them.[184] A schism within the Black community developed during slavery and sustained after slavery's end.[185] The presence of slavery and an inescapable racial hegemony where whites held positions of power—a paradigm developed to institute and sustain racial slavery in America—influenced the establishment of at least two divergent group identities within the Black community in the South. One faction of Blacks who were wealthy and light-skinned aligned themselves with whites, "mimicked white values[,]. . . accepted 'whiteness' as the standard of superiority and looked down on all [B]lacks, free and slave . . . [and] seemed to regard themselves as physically distinct from Blacks."[186] The other group of Blacks did not seek the acceptance of whites, but rather embraced "Blackness" and advocated Black racial solidarity.[187] Thus, Berlin describes the derivation of a social psychological phenomenon whereby some Blacks ascribe to the notion that "whiteness" is to be achieved and "Blackness" is to be denied in order to gain full acceptance by whites.[188] Hence, the contextual origin of the term "wannabe," the name Bryant was called by her supervisor.

In the *Bryant* case, the court disingenuously maintained that the term "wannabe" may not confer a negative connotation in another context, but the court failed to elaborate what other context that might be. Yet, if the court analyzed the facts of

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UCLA L. REV. 1705 (2000), for a survey of employment discrimination cases involving claims of "colorism" or skin tone discrimination.

182. *See* BERLIN, *supra* note 48, at 271–83.

183. *See id.* at 273.

184. *See id.* at 271–83.

185. *See id.* at 388–90.

186. *Id.* at 277.

187. *See id.* at 388 (explaining that after the abolition of slavery "[t]he light-skinned scions of the free Negro caste [who were free before the general Emancipation] continued to marry among themselves, imitate the style of life of the white upper class they so admired, and boast of their white ancestry. . . . Although subject to much of the same racial oppression that entrapped poorer [B]lacks, this 'crème de la crème of the Southern light colored aristocracy' rarely joined the movement for racial uplift.").

188. *See id.* at 282.

the *Bryant* case within the proper American socio-historical context, undoubtedly it would not have been motivated to assert such a tangential point. Indeed, on several levels, the employer perpetuated pejorative meanings assigned to race and color. Bryant's supervisor called her a "wannabe," terminated her, and replaced her with an individual who was "sufficiently Black." In doing so, Bryant's supervisor not only espoused deeply imbedded negative (and often times destructive) associations attached to lighter skin color, hair color, and style of dress within the Black American community but also allowed them to dictate her treatment of Bryant.

For Bryant's supervisor, Bryant's style of dress, lighter complexion, and hair color elicited a negative connotation: Bryant's disassociation from her "Blackness." Whiteness in the "racial" sense, according to Bryant's supervisor, was inferior, unacceptable, and undesirable and Blackness was superior, privileged, and desired. Consequently, Bryant's termination reinforced racial stereotypes and a racial hierarchy. Bryant was terminated for acting in conformity with the racial image her style of dress, skin color, and hair color signified to her Black supervisor—whiteness—and for failing to act in conformity with her race, "Black."

Furthermore, the stream of adverse employment actions resulting from Bryant's disobedience to a racial norm and obedience to a color norm imbedded in the individual and collective psyche of many Black Americans—an effect of a complex racial/color hierarchy designed centuries ago—could indeed cause individual stigmatic harm to Bryant and like employees. The negative employment actions Bryant suffered at the hand of her Black supervisor likely injured Bryant emotionally and psychologically, for her supervisor attempted to redefine and devalue Bryant's self-image and racial identity. Therefore, under a revised Title VII disparate treatment framework, Bryant's termination would be deemed unlawful.

Rogers, *Bryant*, and *Eatman* all involved employers who affirmatively implemented preferred cultural or racial norms in the workplace. All demonstrated the harm in allowing unconscious or conscious stereotypes about a particular race, color, or national origin to dictate employment decisions. More importantly, these cases affirm that employment decisions that sustain negative meanings associated with "Blackness," "whiteness," "Asianness," and other racial identities, render not only

economic but also emotional and psychological harm, which is antithetical to the thrust of Title VII and should be prohibited.

Refusing to attend to the problem of racial stigma has consequences—individual and collective—for the people it affects.[189] "In failing to adopt a consistent approach to racial stigma, the [courts] in a very real sense become[ ] complicit in its perpetuation."[190] According to Professor Lenhardt, "the fact that judges have an obligation to consider the effects of racial stigma makes them a logical, if not the best, place to focus preliminary efforts to eliminate or at least minimize the incidence of racial stigma."[191] "Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior."[192] Consequently, "racial stigmatization results in increased racial disparities and disadvantage."[193] "Often, the most obvious harm [of racial stigma] is the denial of the opportunity to secure a desired benefit"—in the instant cases, employment.[194] Thus, it is the responsibility of the courts to eliminate racial stigma in order to fully remedy racial discrimination in the employment context and to realize the goals of Title VII: dismantling barriers to equal employment opportunities on the basis of race or color.

CONCLUSION

I have a friend who is currently looking for employment. My friend is a Black woman who has obtained a Master's Degree in Teaching and a Ph.D. in Biochemistry; clearly, she is smart, intelligent, and industrious. However, one of her primary concerns is not whether she is capable of fulfilling the job qualifications and duties in her field but whether she will satisfy the physical appearance standards often imposed by employers. Therefore, she has decided not to wear her natural hair in a braided hair style in the event an employer contacts her for an immediate interview.

Recently, I decided to wear my hair in its "natural" state to work rather than in a straightened style. As I walked down the halls of the law school, a very accomplished African-

189. *See* Lenhardt, *supra* note 132, at 877.
190. *Id.*
191. *Id.* at 881.
192. *Id.* at 883 (citations omitted).
193. *Id.*
194. *Id.* (citation omitted).

American female student stopped me to compliment my hairstyle. Thereafter the student confided that she, too, wanted to no longer permanently straighten her hair and desired to wear her hair in a short, natural style. But, since it was fall "interview season" she felt that she could not afford to do so. If an employer elected not to hire my friend or the law student because it found their natural hairstyles to be "unprofessional" or "unconventional," the protections of Title VII, to be free from racial stigmatization and thus racial discrimination in the employment context, would have failed both women.

Unfortunately, in light of current Title VII jurisprudence, for these two qualified Black women, the threat of being denied an employment opportunity because of their race is not conjectural; it is still very much a reality. Indeed, the NBA's implementation of a dress code has revealed the prevalence of grooming and dress codes in American workplaces as well as the resulting instances of employment discrimination which have been inadequately addressed by America's courts. Accordingly, it is imperative that courts adopt a more pluralistic analysis for Title VII individual disparate treatment cases in which employers ban the display of mutable, yet nonetheless racialized, characteristics and an adverse employment action, such as a failure to hire or promote or a termination, ensues because of the display of these prohibited characteristics.

The traditional *McDonnell Douglas* framework can still be applied in such cases. In fact, the revised analysis that I propose throughout this Article demonstrates its survival. This pluralistic approach first necessitates the courts' expansion of the definition of race to one that is representative of the historical and contemporary understandings of race, and thereby inclusive of mutable and "immutable" characteristics. Secondly, this revised analysis requires employers to assert a more substantial reason for implementing grooming and appearance policies than that they seek to present a "conservative" or "business-like image." Finally, courts must shift their focus from the employer's intent to discriminate to the perspective of the plaintiff. In doing so, courts must consider the stigmatizing effects of the grooming and appearance policy and resulting adverse employment action on the applicant or employee.

The intense media attention devoted to the NBA's dress code provoked significant commentary about racism, racial stigmatization, and racial stereotyping. Hopefully, these poignant observations will encourage courts to engage in a

more contemplative evaluation of Title VII race, color, and national origin discrimination claims involving similar employment policies proscribing race-based characteristics—before Title VII's progress is further hindered and gains are lost.