

#FREETHEHAIR: HOW BLACK HAIR IS TRANSFORMING STATE AND LOCAL CIVIL RIGHTS LEGISLATION

D. Wendy Greene*

INTRODUCTION

Like one's skin color, African descended people's natural hairstyles have served as a basis of African descendants' racial enslavement, segregation, stigmatization, and discrimination throughout the United States since they arrived on this land—in most cases, forcibly and brutally so. More contemporarily, the denial of educational opportunities, employment, and access to public accommodations on the basis of their natural hairstyles or hair texture is a common occurrence for African descended women,¹ girls,² men,³ and boys.⁴

* Professor of Law, Drexel University Thomas R. Kline School of Law.

¹ See *infra* Part I.

² During the span of one week in the spring of 2017, private school administrators in Florida and Massachusetts punished African descendant girls for donning their hair in afros and braids respectively. Lanetra Bennett, *Local Teen Told Afro is 'Extreme' and Can't be Worn at School*, WCTV (May 19, 2017, 3:30 PM), <http://www.wctv.tv/content/news/Local-teen-told-cant-wear-hairstyle-at-school-423232994.html>; Nadra Nittle, *It's Time to Stop Hair-Policing Children of Color*, RACKED (May 25, 2017, 10:32 AM), <https://www.yahoo.com/style/time-stop-hair-policing-children-143201370.html>; *School Asks Teen to Change Her Natural Hair Style*, FOX 32 CHI. (May 18, 2017), <http://www.fox32chicago.com/news/254824241-story>.

³ See Chicago Commission on Human Relations In re. Scott v. Owner of Club 720 and Lyke v. Owner of Club 720 (February 16, 2011), <https://www.cityofchicago.org/content/dam/city/depts/cchr/DataPortalDocs/09P002Feb162011.pdf> (finding that a Chicago night club's ban against braids adorned by African descendant men violated the Chicago Human Rights Ordinance's prohibitions against race discrimination in part because the night club "disfavored a hairstyle associated with one racial group based on stereotypical assumptions about wearers of the hairstyle, imposing an additional burden on that group in order to enjoy the full use of the public accommodations it offered"). See also Constance Dionne Russell, *Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons*, 24 HARV. BLACK LETTER L.J. 189, 197–99 (2008) (discussing Black women's denials of service by hair salons that exclusively serve a white clientele and do not employ hair stylists with experience styling Black hair).

⁴ See generally, *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511 (S.D. Tex. 2020) (holding that African descended male high school students presented actionable claims of race discrimination and infringement upon cultural expression or heritage in violation of the Fourteenth and First Amendments respectively and enjoining the enforcement of school grooming policy that would effectively compel the students to cut off their locs in order to matriculate). I had the privilege of serving as a legal expert in this case brought by

However, legal recourse for this systemic form of racial discrimination under federal civil rights statutes is either non-existent or disparate at best. Natural hairstyles such as twists, locs, braids, and afros are commonly, historically, and contemporarily associated with Blackness, African ancestry and/or African heritage and have long served as a marker of such, like one's skin complexion. Yet, unlike racial discrimination on the basis of skin color, race-based natural hair discrimination has remained *lawful for centuries*.⁵

For over a decade, I have published a body of authoritative legal scholarship illustrating the inequity as well as the harms of race-based natural hair discrimination, while proffering actionable legal and policy interventions to redress this longstanding form of racial discrimination.⁶ Additionally, I have traveled throughout the country and across four continents raising public awareness around race-based natural hair discrimination and advocating for stronger civil rights protections against “grooming codes discrimination.”⁷ My

the NAACP-Legal Defense Fund on the students' behalf wherein the federal district court judge expressed that the groundbreaking ruling was informed by my “persuasive historical and sociological evidence showing that ‘hair texture, like one's skin color, has long served as a racial marker.’” *Id.* at 516.

⁵ Like individuals possessing a darker skin complexion, legal and social institutions imputed a badge of perpetual servitude upon individuals who possessed a tighter curl pattern or “woolly” hair texture because they were classified as African or African descendants. In a widely examined freedom suit, *Hudgins v. Wrights*, three women argued before the Virginia Supreme Court in 1806 that they were wrongfully enslaved because they were the daughter, granddaughter, and great-granddaughter of an indigenous woman named Butterwood Nan. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 134–35 (1806). In ruling that these three women were likely Butterwood Nan's descendants and indigenous, and thereby deserving a presumption of freedom, the *Hudgins* Court espoused a persisting belief that despite one's skin complexion, a “woolly head of hair...was so strong an ingredient in the African constitution,” it marked a person as African descendant and presumptively enslavable. *Id.* at 139. Alternatively, a person who possessed white skin and hair texture “not woolly or inclining thereto” among other physical characteristics would be presumed white, indigenous or of indigenous and white ancestry and thus free. *Id.* at 140. Consequently, a legal presumption of African ancestry and slave status would be imputed upon a person possessing a hair texture that either appeared “woolly” or had the propensity to become “woolly” despite a fair or white skin complexion. *Id.*

⁶ D. Wendy Greene, *Rewritten Opinion of Rogers v. American Airlines*, in *CRITICAL RACE JUDGMENTS: REWRITTEN US COURT OPINIONS ON RACE AND THE LAW* 159 (Bennett Capers et.al eds., 2022); D. Wendy Greene, *Rewritten Opinion of EEOC v. Catastrophe Management Solutions*, *FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS* 146 (Ann McGinley & Nicole Porter eds., 2020); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 *MIAMI L. REV.* 1 (2017) [hereinafter Greene, *Splitting Hairs*]; D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 *FIU L. REV.* 333 (2013); *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 *J. GENDER, RACE & JUST.* 405 (2011); and D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 *U. COLO. L. REV.* 1355 (2008) republished in 92 *U. COLO. L. REV.* 1276 (2021) [hereinafter Greene, *Title VII*].

⁷ A term I coined to describe the “specific form of inequality and infringement upon one's personhood resulting from the enactment and enforcement of formal as well as informal ap-

scholarly advocacy has culminated in the #FreeTheHair social media hashtag and movement, which are now internationally recognized. The #FreeTheHair movement is a part of a contemporary, global civil rights movement to combat the systemic discrimination that African descendants around the world endure on the basis of their natural hairstyles and hair texture. These collective efforts aim to foster and protect African descendants' freedom to express a fundamental part of their racial, cultural, and sometimes religious personhood—a source of positive affirmation that is too often policed, denigrated as “bad,” “unkempt,” “unprofessional,” “distracting,” or “unacceptable,” and the basis for undignifying treatment in personal, professional, social, and legal spheres.

Beginning with the first C.R.O.W.N. Act signed into law—California's Senate Bill 188 introduced by then Senator Holly J. Mitchell⁸—I have had the privilege of serving as a legal expert testifying on behalf of or as a legal advisor for twenty bills, including the federal C.R.O.W.N. Act⁹ and Nevada's version, S.B.327¹⁰, which was signed into law in June 2021 and became effective October 1, 2021. Since 2019, a complement of groundbreaking state and municipal civil rights legislation are serving as critical measures to help redress race-based hair discrimination and other forms of grooming codes discrimination, which federal civil rights statutes do not adequately cover.¹¹ Indeed, without these state and local reforms, countless individuals may suffer the *lawful* loss of employment, education, housing, access to public accommodations and other forms of discriminatory treatment, but also daily intrusions upon their economic security, psychological well-being, dignity, and freedom which America's civil rights laws are designed to prevent and redress.

This Article will briefly examine the legal impetus for civil rights legislation popularly known as “C.R.O.W.N. Acts” or “Creating a Respectful Workplace/World for Natural Hair Acts”; the legal and social significance of these historic pieces of civil rights legislation; and the general contours of Nevada's Senate Bill 327, and its impact.

I. FEDERAL COURTS' “HAIR SPLITTING” LEGAL DECISIONS

At the height of the twentieth century civil rights movement, Congress passed several pieces of legislation, like the Voting Rights Act of 1965 and the Civil Rights Act of 1964, to address longstanding racial exclusion, subordina-

pearance and grooming mandates, which bear no relationship to one's job qualifications and performance. However, such mandates implicate protected categories under antidiscrimination law like race, color, age, disability, sex, and/or religion.” See Greene, *Splitting Hairs*, *supra* note 6 at n.12.

⁸ S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019) (Creating a Respectful Workplace for Natural Hair Act).

⁹ CROWN Act of 2022, H.R. 2116, 117th Cong. (2022); CROWN Act of 2021, S. 888, 117th Cong. (2021).

¹⁰ S.B. 327, 81st Leg., Reg. Sess. (Nev. 2021).

¹¹ See generally Greene, *Title VII*, *supra* note 6.

tion, and segregation in spheres like employment, housing, voting, education and public accommodations.¹² With Title VII of the 1964 Civil Rights Act, Congress sought to remove arbitrary barriers to Black Americans' equal access to employment opportunities and their corresponding economic security and enjoyment of freedom.¹³

Soon after Congress enacted this seminal piece of civil rights legislation, Black women and men publicly challenged workplace grooming policies barring their natural hairstyles as forms of racial and sex discrimination as well as an infringement upon their cultural expression.¹⁴ Indeed, in 1976, the U.S. Court of Appeals for the Seventh Circuit ruled that a Black woman who was denied a promotion because her supervisor stereotyped her as being unfit to represent the company while donning an Afro presented an actionable Title VII claim of race discrimination.¹⁵ In 1981, a federal district court in *Rogers v. American Airlines* agreed that if an employer discriminated against a Black worker for wearing an Afro, that could amount to unlawful race discrimination; however, the court held a workplace grooming policy barring a Black woman's cornrow braids did not violate federal civil rights protections against race discrimination.¹⁶ Since 1981, federal courts have reified this hair-splitting legal distinction by employing a judicially created doctrine—the immutability doctrine—and in doing so, limited Title VII's protection against race discrimination to discrimination on the basis of “immutable characteristics—characteristics with which one is born”; one cannot change; or shared by all or

¹² Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964); Voting Rights Act of 1965, 52 U.S.C. § 10101 (1965).

¹³ According to Paul Mollica,

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with “the plight of the Negro in our economy.” ... Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs “which have a future.”

Paul W. Mollica, *The Unfinished Mission of Title VII: Black Parity in the American Workforce*, 23 J. GENDER RACE & JUST. 139, 143 (2020) (citing *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202–03 (1979) (first quoting 110 CONG. REC. 6548 (1963) (remarks of Sen. Humphrey); then quoting *id.* at 7204 (remarks of Sen. Clark))).

¹⁴ See, e.g., In 1969, United Airlines suspended and ultimately terminated a Black female employee because she refused to change her Afro hairstyle, citing that her Afro did not comply with the company's grooming policy requiring “short hair.” *Negro Fired for Hairstyle*, The Semi-Weekly Spokesman-Review, Sept. 25, 1969 (article on file with author). In 1981, Dorothy Reed, a San Francisco based newscaster, publicly challenged her suspension from a television station for refusing to change her cornrow braided hairstyle. According to Ms. Reed, “[t]he issue [with the television station's decision] is racism, and their definition of what I should be as a black woman reporter . . . ‘no cornrows or dreadlocks’ is discrimination and denies me the right to express my heritage through hairstyle.” *Cornrow Controversy*, The Miami News, Jan. 30, 1981 (article on file with author).

¹⁵ *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976).

¹⁶ *Rogers v. Am. Airlines*, 527 F. Supp. 229, 231, 234 (S.D.N.Y. 1981).

only individuals who identify as a member of a particular racial group.¹⁷ However, there is no physical characteristic that a person cannot change nor is there one characteristic that all people who identify with a particular racial group possesses. Thus, I have argued that this strict immutability doctrine is a legal fiction and that its application in race (and national origin) discrimination cases should cease.¹⁸ 2021 marks the fortieth year that this misinformed view of race, almost uniformly espoused in federal cases challenging race-based natural hair discrimination, has diluted the efficacy of federal civil rights protections against racial discrimination.¹⁹

For four decades, federal courts have ruled that if an employer fires a Black woman because she wears an Afro, this adverse employment action would constitute unlawful race discrimination.²⁰ However, once a Black woman locks, braids, or twists her Afro and is terminated for doing so, this adverse employment decision does not constitute unlawful race discrimination.²¹ According to federal courts, natural hairstyles, which are not Afros, are mutable, cultural characteristics that an employer is free to regulate since federal civil rights laws do not prohibit discrimination on the basis of culture.²² Most recently in *EEOC v. Catastrophe Management Solutions, Inc.*, the Eleventh Circuit Court of Appeals fortified this hair-splitting legal distinction by declaring: Title VII protects African descendants from racial discrimination on the basis of Afros because Afros are an immutable hair *texture* of African descendants, whereas an employer's rescission of a Black woman's employment offer because she refused to cut off her locs did not violate Title VII because her locs were deemed a mutable, cultural hair *style*.²³ Consequently, employers are essentially free to demand that African descended men and women alter, cover, or cut off their natural hairstyles as a condition of employment.²⁴ Employers are also free to discipline, harass, and deprive Black workers promotions and related compen-

¹⁷ See Greene, *Splitting Hairs*, *supra* note 6 at 987, 992, 1029.

¹⁸ See *id.* at 1029–30 (“Strict immutability, therefore, serves as a ‘legal fiction’: a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion . . . [and] superficially narrow[ing] the purview of protection against race discrimination under current anti-discrimination laws . . .”).

¹⁹ See *Rogers v. Am. Airlines*, 527 F. Supp. 229, 229, 231 (S.D.N.Y. 1981).

²⁰ See, e.g., *id.* at 232; *Equal Emp. Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016).

²¹ See, e.g., *Rogers*, 527 F. Supp. at 231; *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at *1–2 (N.D. Ga. May 26, 1981); *Pitts v. Wild Adventures Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

²² *Pitts*, 2008 WL 1899306, at *5.

²³ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030 (“[D]iscrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not.”).

²⁴ Maria Perez, *Teen Claims Six Flags over Texas Denied Him Job Because His Dreadlocks Are an ‘Extreme Hairstyle,’* NEWSWEEK (Mar. 29, 2019, 11:21 AM EDT), <https://www.newsweek.com/teen-six-flags-texas-job-dreadlocks-extreme-hairstyle-1380118>.

sation for simply donning their hair as it naturally grows—unless it is an Afro.²⁵ Moreover, since federal courts have generally ruled grooming policies barring or regulating natural hairstyles beyond Afros do not constitute unlawful race discrimination, federal courts have likewise held that federal civil rights protections against retaliation for challenging workplace discrimination do not cover employees who oppose grooming policies that discriminate against African descended workers' natural hairstyles as unlawful employment practices on the basis of race.²⁶ Therefore, employers are free to retaliate against such employees who oppose natural hair bans as racially discriminatory employment practices—except arguably workplace prohibitions against afros.²⁷

II. #FREETHEHAIR: A LEGISLATIVE RESPONSE TO FEDERAL COURTS' "HAIR-SPLITTING" LEGAL DECISIONS

Unbeknownst to many, our civil rights protections barring race discrimination generally do not define a key concept: race.²⁸ The definition of race and consequently the scope of unlawful racial discrimination are left to interpretive bodies like human rights enforcement agencies, administrative law judges, as well as federal and state court judges to decide.²⁹ Civil rights legislation popularly known as "C.R.O.W.N. Acts" or "Creating a Respectful and Open World

²⁵ Greene, *supra* note 6, at 347; Jeffery Martin, *Judge Rules Petition Calling Black Woman's Natural Hair 'Unprofessional' Is Offensive, but Not Discrimination*, NEWSWEEK (Oct. 25, 2019, 9:53 PM), <https://www.newsweek.com/judge-rules-petition-calling-black-womans-natural-hair-unprofessional-offensive-not-1467913>; Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black*

People Based on Hairstyles, 36 HARV. BLACK LETTER L.J. 27, 31 (2020).

²⁶ See, e.g., *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at *1–2 (N.D. Ga. Sept. 19, 1996) (rejecting plaintiff's Title VII retaliation claim by holding that the plaintiff's opposition to her employer–temporary staffing agency's policy of not referring "qualified applicants with 'braided' hairstyles for employment positions" was not protected activity because such policy as a matter of law did not violate Title VII's proscriptions against race–based employment practices). See also *Pitts*, 2008 WL 1899306, at *8 (citing to *McBride* as precedential support for denying plaintiff's retaliation claim based upon her opposition to informal and formal regulations of her natural hairstyles).

²⁷ See *McBride*, 1996 WL 755779, at *2–3; see also *Pitts*, 2008 WL 1899306, at *8.

²⁸ Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (The 1964 Civil Rights Act does not define the terms race, color, or national origin).

²⁹ See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 261–62 (S.D.N.Y. 2002); *Bryant v. Begin Manage Program*, 281 F. Supp. 2d 561, 570 (E.D.N.Y. 2003); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 799–800 (1987); *Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/racecolor-discrimination> (last visited Apr. 16, 2022). See also the New York City Commission on Human Rights enforcement guidance issued in February 2019, which pronounces discrimination on the basis of natural hair or natural hairstyles closely associated with African descendants' racial, cultural, or ethnic identities violates the city's prohibitions against racial discrimination in housing, public accommodations, schools, and employment. <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf> (last visited June 2, 2022).

for Natural Hair Acts,” make clear that discrimination on the basis of natural and protective hairstyles African descendants commonly wear like Afros, braids, twists, and bantu knots constitutes race discrimination. In so doing, these historic pieces of civil rights legislation also provide a clarifying definition of race—an antidote likewise proposed in my 2008 article, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do with It*.³⁰ In response to federal courts’ narrow understanding of race and racial discrimination, in this article, I posited that when interpreting our civil rights laws, race should be understood as:

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.³¹

Eleven years later, federal, state, and municipal legislation include a definition of race that adopts this understanding of race.³² Since 2019, nineteen states, the U.S. Virgin Islands,³³ and over thirty municipalities have enacted

³⁰ Greene, *Title VII*, *supra* note 6, at 1385.

³¹ *Id.*

³² States: S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019); H.B. 20-1048, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); H.B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021); S.B. 32, 151st Gen. Assemb., Reg. Sess. (Del. 2021); H.B. 1444, 441st Gen. Assemb., 2020 Reg. Sess. (Md. 2020); Legis.B. 451, 107th Leg., 1st Sess. (Neb. 2021); S.B. 327, 2021 Leg., 81st Sess. (Nev. 2021); S.B. 3945, 218th Leg., 2018-2019. Reg. Sess. (N.J. 2019); S.B. 6209A, 242d Leg., 2019-2020 Legis. Sess. (N.Y. 2019); H.B. 1514, Gen. Assemb., 2020 Sess. (Va. 2020); H.B. 2602, 66th Leg., 2020 Reg. Sess. (Wash. 2020); H.B. 29, 66th Leg., 1st Sess. (N.M. 2021); and, H. B. 2935, 81st Legis. Assemb., 2021 Reg. Sess. (Or. 2021). On August 13, 2021, the Governor of Illinois signed into law the “Jett Hawkins Law”: legislation named after a Black student, Gus “Jett” Hawkins, who at four years was instructed by his Chicago-based school to remove his braids because they violated the school’s dress code. Brian Good, *Illinois Passes New Law Banning ‘Hairstyle Discrimination’ in Schools*, DIVERSITYINC (Aug. 17, 2021), <https://www.diversityinc.com/illinois-passes-new-law-banning-hairstyle-discrimination-in-schools/>. The “Jett Hawkins Law” prohibits schools in Illinois from issuing rules regarding hairstyles that are “historically associated with race and ethnicity, such as braids and twists.” *Id.* In May 2022, Maine became the 15th state to enact its version of the CROWN Act. Susan Farley, *Crown Act Seeks to End Hair Discrimination in Maine*, FOX22: WFVX BANGOR (May 4, 2022), <https://www.foxbangor.com/news/item/crown-act-seeks-to-end-hair-discrimination-in-maine/>. Tennessee’s CROWN Act became law July 1, 2022. Bria Bolden, *CROWN Act Made Law in Tennessee*, WLOX (July 2, 2022), <https://www.wlox.com/2022/07/02/crown-act-made-law-tennessee/>. In March 2022, I testified on behalf of Alaska’s legislation, and I also served as the legal expert for Louisiana’s civil rights law, which is the first of its kind enacted in the Deep South. Alaska’s and Louisiana’s versions of the legislation were enacted in the summer of 2022 alongside Massachusetts. See Chris Marr, *Black Hair Bias Laws Spread, Including in Handful of Red States*, BLOOMBERG NEWS (August 1, 2022), (<https://news.bloomberglaw.com/daily-labor-report/black-hair-bias-laws-spread-including-in-handful-of-red-states>).

³³ See Simone R.D. Francis, *U.S. Virgin Islands Enacts CROWN Act to Ban Discrimination on the Basis of Hair Texture and Protected Hairstyles*, NAT’L L. REV. (Apr. 18, 2022), <https://www.natlawreview.com/article/us-virgin-islands-enacts-crown-act-to-ban-discrimination-basis-hair-texture-and>.

C.R.O.W.N. Acts or parallel civil rights legislation³⁴ to address racial discrimination that African descendants systemically endure when donning natural hairstyles. For example, the C.R.O.W.N. Acts in effect in California,³⁵ New Jersey,³⁶ New York,³⁷ Virginia,³⁸ and Montgomery County, Maryland³⁹ define race as “traits historically associated with race, including, but not limited to, hair texture and protective hairstyles” and specify that the term “‘protective hairstyles,’ includes, but is not limited to, such hairstyles as braids, locks, and twists.” Washington State’s law defines race as inclusive of “traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles.”⁴⁰ The federal C.R.O.W.N. Act, passed twice by the United States House of Representatives in 2020 and 2022, clarifies that for the enforcement of federal civil rights statutes prohibiting race and national origin discrimination in workplaces, housing, public accommodations, and institutions receiving federal funds, the definition of race and national origin embodies “hair texture[s] and hairstyle[s] that are commonly associated with race or national origin.”⁴¹ Notably, in March 2021, Governor Michelle Lujan Grisham of New Mexico signed into law a similar bill governing race-based grooming codes discrimination in workplaces and schools.⁴² New Mexi-

³⁴ States: Cal. S.B. 188; Colo. H.B. 20-1048; Conn. H.B. 6515; Del. S.B. 32; Md. H.B. 1444; Neb. Legis. B. 451; Nev. S.B. 327; N.J. S.B. 3945; N.Y. S.B. 6209A; Va. H.B. 1514; Wash. H.B. 2602; and Or. H.B.2935. Good, *supra* note 32.

Municipalities: Phila., Pa., Code of Ordinances § 9-1102 (m.1) (2020); PITTSBURGH, PA., Code of Ordinances § 659.02–659.04 (2020); Akron, Ohio, Code of Ordinances § 38.01 (25)(2020); Columbus, Ohio, Code of Ordinances §2331.01 (23) (2020); Cincinnati, Ohio, Code of Ordinances § 914-1-T1 (2020); Covington, Ky., Code of Ordinances § 32.041 (2020); Durham, N.C., Code of Ordinances §34-3 (2021); Greensboro, N.C., Code of Ordinances § 12-111, 12–132 (2021); Kansas City, Kan., Ordinance 200837 (2020); Clayton County, Ga., Ordinance 2021-32 (2021); Stockbridge, Ga., Code of Ordinances §11.28.020, 11.28.030, 11.28.040, 11.28.050 (2020); Albuquerque, N.M., Bill No. O-20-47 (2021); New Orleans, La., Code of Ordinances § 86-1.5 (2020); Broward County, Fla., Ordinance 2020-45 (2020); Montgomery Cnty., Md., Bill 30-19 (2019); Toledo, Ohio, Code of Ordinances § 554.01 (2019).

³⁵ S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

³⁶ S.B. 3945, 218th Leg., Reg. Sess. (N.J. 2019).

³⁷ S.B. 6209, 242d Leg., Reg. Sess. (N.Y. 2019)

³⁸ H.B. 1514, 2020 Leg., Reg. Sess. (Va. 2020).

³⁹ Montgomery County, Md., B.30-19 (Nov. 5, 2019) https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2019/20191105/20191105_4B.pdf [<https://perma.cc/ERU9-KKP9>].

⁴⁰ H.B. 2602, 66th Leg., Reg. Sess. (Wash. 2020).

⁴¹ CROWN Act of 2020, H.R. 5309, 116th Cong. (2020) (passed); CROWN Act of 2019, S. 3167, 116th Cong. (2020) (as introduced). CROWN Act of 2021, H.R. 2116, 117th Cong. (2022) (passed); CROWN Act of 2021, S. 888 (117th Cong. (2021) (referred to the U.S. Senate Committee on the Judiciary as of June 2022).

⁴² Press Release, Office of the Governor, Gov. Lujan Grisham Signs Bill Banning Discrimination Based on Hair or Cultural Headdress (Apr. 5, 2021) <https://www.governor.state.nm.us/2021/04/05/gov-lujan-grisham-signs-bill-banning-discrimination-based-on-hair-or-cultural-headdress>.

co's legislation is not denominated a C.R.O.W.N. Act and provides a more inclusive definition of race than the original C.R.O.W.N. Acts which states: " 'race' includes traits historically associated with race, including hair texture, length of hair, protective hairstyles or cultural headdresses."⁴³ Cultural headdresses are defined as "burkas, head wraps or other headdresses used as part of an individual's personal cultural beliefs."⁴⁴ Allegheny County, Pennsylvania's ordinance extends even further by expressly prohibiting discrimination on the basis of hairstyle in employment, housing, real estate transactions, public accommodations, medical care, and public education.⁴⁵ "Hairstyle" is defined as "any characteristic, texture, form, or manner of wearing an individual's hair if such characteristic, texture, form or manner is commonly associated with a particular race, national origin, gender, gender identity or expression, sexual orientation, or religion."⁴⁶

Like many seminal anti-discrimination laws combating racial discrimination, C.R.O.W.N. Acts and parallel civil rights legislation are rooted in the experience of African descendants, yet they afford legal protection *for all* against the myriad manifestations of discrimination. Indeed, while these legal reforms help to close untenable gaps in federal civil rights protections against race-based grooming codes discrimination, they are also attending to other forms of grooming codes discrimination as well as retaliation. With respect to the latter, these state and local civil rights measures also better ensure that covered individuals who oppose or file complaints about grooming codes discrimination engaged in by covered entities are protected against unlawful retaliation.⁴⁷

It is important to note that even though these groundbreaking legislative interventions have moved relatively fast, this state and local legislative movement is the product of decades of collective and interdependent advocacy of countless individuals—from Black women, men, and children who have challenged race-based natural hair discrimination in schools, workplaces, public accommodations, housing and even jury selection to cosmetologists, psychologists, dermatologists, legal scholars, lobbyists, lawyers, legislators, advertising

⁴³ H.B. 29, 55th Leg., 1st Sess. (N.M. 2021).

⁴⁴ *Id.*

⁴⁵ ALLEGHENY CNTY., PA., ALLEGHENY CNTY. CODE ORDINANCES div. 2, ch. 215 (enacted Oct. 20, 2020).

⁴⁶ ALLEGHENY CNTY., PA., ALLEGHENY CNTY. CODE ORDINANCES, div. 2, ch. 215, § 215-31 (enacted Oct. 20, 2020).

⁴⁷ Generally, U.S. employment discrimination laws provide protection against discrimination on the basis of protected characteristics, like race, as well as retaliation for engaging in "protected activity" which generally consists of opposing unlawful employment practices, policies, or decisions as well as participating in the investigation of or proceedings related to such unlawful discrimination. Accordingly, civil rights statutes that facially declare discrimination on the basis of natural hair texture or hairstyles constitutes unlawful race discrimination or has been interpreted as such by enforcement bodies will likewise afford protection against retaliation for challenging an employment policy or practice that discriminates against an individual's natural hair texture or hairstyle or because of their participation in a relevant investigation or proceeding.

and marketing specialists, and grassroot organizers from diverse racial, educational, and socio-economic backgrounds whose personal and professional experiences have inspired their efforts to dismantle this centuries-old form of racial discrimination.

III. #FREETHEHAIR NEVADA: SB 327

In the fall of 2020, the Director of the Nevada Equal Human Rights Commission, Kara Jenkins, invited me to deliver a presentation on race-based appearance and grooming codes discrimination alongside current legal reforms enacted to address these common forms of discrimination. In November 2020, I presented to the Nevada State Equal Rights Commission Board Members, elected officials, and guests which included Nevada State Senator Dina Neal. Afterwards, Senator Neal expressed interest in introducing statewide legislation to address race-based natural hair discrimination and other forms of racial discrimination based upon mutable characteristics like language, clothing, and accents.⁴⁸ We delineated the mechanics of crafting bill language that reflected the intersectional and multi-dimensional nature of grooming codes discrimination; indigeneous peoples as well as those who identify as Latinx or Hispanic similarly experience race-based discrimination on the basis of their hair styles and hair coverings and this discrimination often implicates other protected classifications like religion or national origin. While discussing the benefits of stronger civil rights protections against racial discrimination, we too explored the real challenges that often present themselves when advancing this unique kind of legislation and how to overcome them. In the spring of 2021, Senator Neal introduced S.B. 327 with co-sponsor Nevada State Senator Dallas Harris. S.B. 327 amends Nevada laws governing employment and education by first providing a clarifying definition of race: “traits associated with race, including, without limitation, hair texture, and protective hairstyles.”⁴⁹ The term, “[p]rotective hairstyle includes, without limitation, hairstyles such as natural hairstyles, afros, bantu knots, curls, braids, locks and twists.”⁵⁰ S.B. 327 applies to public employers (state, county & municipal) and private employers with 15 or more employees; schools (public and charter); labor organizations; employment agencies; governmental contractors; board of trustees of school districts; housing; and public accommodations.⁵¹ In response to some employers’ concerns, S.B. 327 makes clear that covered employers’ adherence does not preempt or contravene the enforcement of health and safety regulations set forth in federal or state law.⁵² However, employers cannot use health and safety concerns as a pretextual reason to prohibit natural hairstyles or hair coverings and/or force

⁴⁸ See generally Greene, *Title VII*, *supra* note 6.

⁴⁹ S.B. 327, 81st Leg., Reg. Sess. (Nev. 2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

employees to cut off their hair or remove their hair coverings based upon generalized assumptions or stereotypes.⁵³

Notably, the definition of race in S.B. 327 departs from the original state-level C.R.O.W.N. Acts of California, New York, and New Jersey, as it does not include the qualifier, “historically.”⁵⁴ I explained to Senator Neal and other legislators that this qualifier could have the unintended consequence of imposing heightened evidentiary burdens on race discrimination plaintiffs by having to prove that a racialized characteristic, which is the basis of discrimination, is historically associated with race or racial identity.⁵⁵ In some cases, to fulfill this evidentiary standard, it may be incumbent of race discrimination plaintiffs to enlist experts, which again, imposes an unequal and unnecessary burden on race discrimination plaintiffs, especially pro se plaintiffs. Indeed, other discrimination plaintiffs are not required to demonstrate a historical nexus. For example, if an older worker alleges that she was discriminated against because of her gray hair, she need not demonstrate that gray hair is historically associated with age; gray hair is simply associated with age, namely with someone who is older.

Another notable distinction of S.B. 327 is its express governance over grooming policies in public and charter schools. Section 16 of the legislation states:

A dress code or a policy that requires pupils to wear uniforms may not discriminate against a pupil based on race...whereby a pupil’s hair texture, hairstyle, including, without limitation, a protective hairstyle or other trait associated with race violates the dress code or the policy.⁵⁶

Section 24 of the legislation states that “a pupil enrolled in a public school may not be disciplined, including, without limitation,...based on the race of the pupil...[which] includes traits associated with race, including, without limitation, hair texture and protective hairstyles.”⁵⁷ Additionally, Sections 21, 22, and 25 prohibit discrimination on the basis of traits associated with race for enrollment in a charter school, a university school for profoundly gifted pupils, or the Nevada System of Higher Education.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Letter from Wendy Greene, Drexel Univ. Thomas R. Kline Sch. of L., to Senator Dina Neal (Mar. 25, 2021), <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/ExhibitDocument/OpenExhibitDocument?exhibitId=50215&fileDownloadName=SB327%20Memo%20Wendy%20Greene%20Drexel%20University%20Thomas%20R%20Kline%20School%20of%20Law.pdf>. I have also similarly advised other state legislators of these unintended consequences and they, too, have removed the term “historically.” See *id.* Maryland’s C.R.O.W.N. Act, which was passed in March of 2020, defines race as “traits associated with race, including hair texture, afro hairstyles, and protective hairstyles.” See also, H.B. 1444, 2020 Leg., Reg. Sess. (Md. 2020).

⁵⁶ S.B. 327, 81st Leg., Reg. Sess. (Nev. 2021).

⁵⁷ *Id.*

⁵⁸ *Id.*

The bill's language and its substantive protection against race-based natural hair discrimination and other forms of racial discrimination are critically important. However, equally important is the legislation's educative function. Having testified on behalf of S.B. 327 before two legislative committees and similar legislation across the country, I can personally attest to the new and heightened levels of awareness for not only legislators, but also members of the broader public around race-based natural hair discrimination in schools, workplaces, and other public domains. Though a common experience of African descendants and other people of color, until more recently, this experience of discrimination and its harms were often marginalized or simply unknown to many. The legislation has engendered, for example, public testimonies of Black female lawyers like Delilah Clay⁵⁹ and Torri Jacobus⁶⁰ who explained the pressures of maintaining straightened hair as legal professionals alongside the testimonies of Black female legislators, like Senator Neal and Senator Harris, who were cautioned against wearing their hair in natural or protective hairstyles during legislative session. Also, during the legislative hearings for S.B. 327, Black youth like Nevada high school student, Naika Belazaire, explained that one of her teachers instructed her to leave class and sent her to the principal's office on two occasions when she freely wore her hair in its naturally curly state to school. The directives Senator Neal, Senator Harris, and Naika received and the straight hair expectations lawyers Clay and Jacobus spoke of are often shaped by longstanding, negative stereotypes associated with African descendants' natural hair texture and hairstyles—that they are “unprofessional” and “distracting.” To not only be told to suppress this fundamental part of your identity but to also be subject to stigmatization, regulation, and retaliation for simply wearing your hair as it grows is injurious to one's emotional well-being and sense of self. The collective testimonies illuminate that the discrimination that African descendant women suffer because of their hair occurs globally and along a continuum—from childhood to adulthood in spaces that are critical to their full citizenship and personhood. Such powerful narratives of Black women and girls often inspire deeper, personal introspection on the part of the listener concerning conscious as well as unconscious biases of what is professional, attractive, and acceptable and the ways in which they may shape their decision-making, policies, practices and cement institutionalized barriers to employment, education, housing, and access to public accommodations. In

⁵⁹ Annie Pancak, *Wearing Natural Hair in BigLaw*, LAW360 (Oct. 19, 2020), <https://www.law360.com/articles/1315600/wearing-natural-hair-in-biglaw>. Notably, Ms. Clay is a California-based lobbyist who alongside California-based lobbyist Leah Barros, served as the lobbyists for the California C.R.O.W.N. Act.

⁶⁰ Notably, Ms. Jacobus, the Managing Assistant Attorney for the Office of Civil Rights for the City of Albuquerque, was instrumental in the passage of the New Mexico bill and an accompanying ordinance for the City of Albuquerque. *Mayor Keller Thanks Community Advocates, Signs CROWN Act Into Law*, CITY OF ALBUQUERQUE, <https://www.cabq.gov/office-of-equity-inclusion/news/mayor-keller-thanks-community-advocates-signs-crown-act-into-law> (last visited Apr. 14, 2022).

Spring 2022]

#FREETHEHAIR

1129

turn, this re-education leads to the reformation of beliefs and ideals, which activates the reformation of institutional policies, practices, and norms. Moreover, civil rights legislation like S.B. 327 resonates with countless individuals as a reaffirmation of their human right to express freely their racial, ethnic, and cultural identities, influencing personal and cultural change domestically and abroad.

CONCLUSION

The federal government is often viewed as the guarantor and protector of civil rights, namely one's right to be free from racial discrimination. Accordingly, great attention has been afforded to federal civil rights legislation like the Civil Rights Act of 1964. However, states and localities have played an underappreciated though vital role in conferring and preserving legal protection against racial discrimination when federal policy has been non-existent or ineffective, and they continue to do so. The recent legislative interventions to #FreeTheHair—to combat race-based natural hair discrimination—throughout the United States exemplify the criticality of state and local civil rights legislation to our greater exercise of freedom and full citizenship as well as to past, present, and future civil rights movements.

[THIS PAGE INTENTIONALLY LEFT BLANK]