

5-2019

# Passively Black, Actively Unprofessional: Beyond a Fault-Based Conception of Black Women's Identity and Hairstyling in Title VII Jurisprudence

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Passively Black, Actively Unprofessional:  
Beyond a Fault-Based Conception of Black Women's Identity and Hairstyling in Title VII  
Jurisprudence

An Honors Thesis

Presented to

The Faculty of the Department of Philosophy and  
The Faculty of the Department of Gender and Sexuality Studies

Bates College

In partial fulfillment of the requirements for the

Degree of Bachelor of Arts

By

Kayla Jackson

Lewiston, Maine

March 20th, 2019

## Acknowledgements

There are so many people who contributed to this final thesis product, far more than I can properly name in a single page. However, I'd like to extend my gratitude to some of the people whose contributions were essential to this project.

First and foremost, I would like to thank my incredible advisor, Prof. Susan Stark. Your help both during and outside of the thesis process has been so critical to my development as an academic. Your attention to clarity and argument structure pushed me to be a better writer and a better philosopher. Your continued encouragement throughout this sometimes confusing, often frustrating intellectual process made this consolidation of research possible. Thank you for believing in me and for helping me create something I can be proud of.

Secondly, I would like to thank all the other Bates professors who have worked with me throughout this research. In particular, I am grateful for conversations with Prof. Mark Okrent, Prof. Melinda Plastas, Prof. Stephen Engel, and Prof. Rebecca Herzig, who offered advice and material that helped shape this thesis to what it is today. I am especially grateful for Prof. Paul Schofield, who has given me so much guidance throughout my academic journey. Paul, if I've said it a million times, I haven't said it enough: your commitment to your students is incredibly admirable, and I appreciate your support immensely.

I am also grateful for the Creating Connections Consortium program and its members at the University of Chicago and the University of California, Berkeley. To all my fellow Mellon and C3 associates, thank you for supporting my research in its earliest forms and for creating an intellectual environment where I could feel comfortable talking about such an intimate issue. I'd also like to thank the Bates Philosophy department and Gender and Sexuality Studies department for allowing me to undertake this project and supporting me through its completion.

Additionally, I'd like to thank all of my friends at Bates and beyond who have encouraged me and believed in me. To Dan, for telling me that researching hair "is not weird" two years ago when I first started this project, and for being the first person to make me feel like this research could be something special. To my roomies- Yeymi, Emily, and Afia- for helping me to remember how to laugh and have fun even in the midst of thesis meltdowns. To Abby, for being my honor-thesis struggle buddy, my ARC struggle buddy, and my bread co-chef. To Alex, for keeping me sane and grounded these past few months as senioritis set in, and for reminding me what I'm capable of, even when I'm not quite sure. To all my other friends, thanks for being part of this journey with me and for constantly inspiring me.

Last, but not least, thank you to my family, without whom none of this would be possible. It is thanks to you all that I am the stubborn, argumentative but, mostly importantly, strong woman I am today. I am so lucky that I had plenty of examples to look up to. I hope that I continue to make you proud.

## Abstract

Title VII of the 1964 Civil Rights Act bans employment discrimination on the basis of race, sex, religion, and national origin. Employees use this to challenge workplace grooming policies regulating their appearance while on duty. To determine what aspects of appearance fall under protected identity characteristics, courts reference “immutability”, defined as attributes that cannot be changed or are essential to an identity group. This thesis centers around cases of black women who faced employment discrimination because of hairstyling, in which courts treat hair as unprotected because of its “mutability.” In doing so, courts ignore the gendered and racialized ideals surrounding “professional” hair and its exclusion of socioculturally black hairstyles. Through analysis of anti-discrimination law, the concept of identity, and the historical importance of black women’s hair, I form a three-part argument: 1) the purpose of anti-discrimination law ought to be to combat discrimination on the basis of oppressive hierarchical evaluations; 2) the “immutability” understanding of identity, and the notion of fault it relies on, excludes agential enactments of identity, leaving marginalized populations vulnerable to implicitly biased discriminatory action; and, 3) insofar as the “immutability” criterion for identity prevents anti-discrimination law from fully combatting discrimination, it ought to be removed. Instead, I posit a two-part approach to identity emphasizing the importance of both how individuals are passively identified (i.e. identification absent agent action) and actively identified (i.e. identification based on agent action), the validity of which I demonstrate through the ways black women have been historically perceived and identified by others.

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## Introduction

*I want to know my hair again, to own it, to delight in it again, to recall my earliest mirrored reflection when there was no beginning and I first knew that the person who laughed at me and cried with me and stuck out her tongue at me was me. I want to know my hair again, the way I knew it before I knew that my hair was me, before I lost the right to me, before I knew that the burden of beauty-- or lack of it-- for an entire race of people could be tied up with my hair and me.*

Paulette Caldwell, *A Hair Piece*<sup>1</sup>

### ***Case Study***

In 2010, a black woman named Chastity Jones submitted an online application for a customer service position at a claims processing company in Mobile, Alabama, called Catastrophe Management Solutions (CMS). Jones, a qualified candidate, was invited to interview at CMS, where she was eventually hired. This, however, did not last long. On a visit to the human resources manager, Jeannie Wilson, to discuss the scheduling of Jones' pre-work tests, Wilson questioned whether Jones' hair was styled in dreadlocks. Jones, whose hair was styled in short dreadlocks at the time, affirmed that they were. At this point, Wilson stated that CMS could no longer hire her due to her hairstyle, saying, "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about"<sup>2</sup>. Wilson cited the CMS grooming policy, a policy that outlines the company's expectations of employee appearance, which had banned unprofessional or "excessive" styles. On its face, the wording of this grooming policy seemed to be neutral. For Jones, however, it had left her with only two options: cut off her dreads and secure her employment or refuse to change her hair, thereby losing her new job at CMS. Jones chose the latter.

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<sup>1</sup> Caldwell, Paulette M. 1991. "A Hair Piece: Perspectives on the Intersection of Race and Gender." *Duke Law Journal* 1991 (2): 365.

<sup>2</sup> EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (2016)

Jones later brought this case to the Equal Employment Opportunities Commission (E.E.O.C.), a legal body created to enforce anti-discrimination law in the employment realm, which took her case to court. Arguing that the grooming policy of CMS and the ultimatum Jones was given with regards to her hair was discriminatory against black individuals, the E.E.O.C. cited this as a violation of Title VII. Title VII is a statute which prohibits discrimination in the workplace on the basis of sex, race, national origin, and religion. This statute is part of a larger body of laws known as the Civil Rights Act of 1964, which encompasses a set of 10 statutes created with the intention of outlawing discrimination in U.S. public society. In representing Jones' case, the E.E.O.C. argued that dreadlocks were a socioculturally significant trait to black persons that is both common and more "suitable" for black hair texture<sup>3</sup>. They pointed to the historical significance of the term "dreadlocks," which could be traced back to the times of slavery when slave traders would refer to the hair of the African people as "dreadful," following the hours of inhumane shipping conditions where Africans were chained and forced to lay in their own vomit and feces. Additionally, the E.E.O.C. highlighted how choosing not to straighten one's hair would leave black persons vulnerable to stereotypes that deemed them "radicals" or "troublemakers"<sup>4</sup> because of their natural hair texture or hairstyling choices.

From these arguments, the court gathered one fact: that the E.E.O.C. "did not allege that dreadlocks are an immutable characteristic of black persons"<sup>5</sup>. This conclusion referenced the numerous case precedents in which Title VII had become synonymous with the protection of the

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, the E.E.O.C. additionally mentions stereotypes of "not being team players" or "not [being] sufficiently assimilated into the corporate and professional world of employment."

<sup>5</sup> *Ibid.*

immutable, or that over which an individual has no control or responsibility<sup>6</sup>. Praised as the fundamental premise of the American legal system<sup>7</sup>, the immutability criterion ensures that the imposition of additional burdens on an individual occurs only when that individual can be attributed responsibility for a given action. Courts often absolve individuals of responsibility for two types of identity traits: unchangeable identity characteristics and essential identity characteristics. Unchangeable identity characteristics are often biological or physical features viewed as unalterable (whether or not this is the case) that mark an identity. So, for example, skin color is often construed as an unchangeable characteristic that marks an individual's racial identity.

Over time, however, the court has expanded unchangeable beyond its stricter definition to include those characteristics for which “changing would involve great difficulty, such as requiring major physical change”<sup>8</sup>. Similarly, essential identity characteristics are understood as those which are displayed or are considered to be important by all members of a given group, where changing a trait might involve a “traumatic change of identity”<sup>9</sup>. There have been, at this point, no legal cases where a trait of this nature has been identified as it relates to race. Some scholars, such

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<sup>6</sup> *Ibid*, In terms of race, the court defines the immutable as "characteristics [that] are a matter of birth, and not culture" citing previous decisions such as *Rogers v. American Airlines* (1981), a discrimination case in which a black woman, Renee Rogers, was fired from her job at American Airlines for wearing cornrows. The court ruled in favor of the company.

<sup>7</sup> See *Weber v. Aetna Cas. & Surety Co.* (1972), where judge Justice Powell states “...imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth...”. (*Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164).

<sup>8</sup> This language comes from the case *Watkins v. U.S. Army* (1989) where the court clarifies that an individual might be *able* to change traits that still also hold incredible importance. In delivering the opinion, Judge Norris states: “Although the Supreme Court considers immutability relevant, it is clear that by “immutability” the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class...At minimum, then, the Supreme Court is willing to treat a trait as immutable if changing it would involve great difficulty, such as requiring major physical change or a traumatic change of identity” (*Watkins v. United States Army*, 847 F.2d 1329).

<sup>9</sup> *Ibid*.

as D. Wendy Greene<sup>10</sup>, have argued that the burden of essentiality is an impossible one for racial identity, as every black person does not conceptualize their blackness in the same ways.

However, the concept of essential characteristics proves useful in understanding how the immutable distinction is applied to religion, which courts take to be an essential identity trait that an individual ought not be faulted for.

The burden in these grooming policy discrimination cases is to prove that any external characteristics or actions, whether it be a hairstyle, a clothing choice, or way of speaking, falls into one of these two categorizations of immutability. Because the E.E.O.C. could not show that dreadlocks were an immutable characteristic, the court decided that this hairstyle did not fall under the protection of anti-discrimination law. Chastity Jones had made a “mutable choice”<sup>11</sup> in the court’s eyes, which, by virtue of her agential decision to style her hair in a certain manner, was no longer protected by law. Citing a legal decision over 30 years prior, the court further asserted this by affirming a companies’ right to define their “image”:

But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity....If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.<sup>12</sup>

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<sup>10</sup>Greene, D. Wendy. 2017. “Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions.” *University of Miami Law Review* 71 (4): 51.

<sup>11</sup> *Ibid* note 2, “...discrimination 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.”

<sup>12</sup> *Willingham v. Macon Telegraph Publishing Co.* (507 f.2d 1084, 1091, 5th cir. 1975), an anti-discrimination case in which a man, Alan Willingham, was fired for having long hair. The court ruled that hair was mutable and the grooming policy was neutral.

Thus, Chastity Jones' appeal was rejected. In doing so, the Eleventh Circuit court reaffirmed a long history of case precedent surrounding black women's hair: it was not exempt from workplace regulation. As early as 1976<sup>13</sup>, the relationship between workplace grooming policies and black women's hair had become a subject of legal consideration. This produced a number of conversations about how we define identity within our law and what this means for both the groups Title VII was originally created to protect as well as the groups that have utilized Title VII to gain legal recognition to this day. Cases such as *E.E.O.C. v. CMS* (2016), *Rogers v. American Airlines* (1981)<sup>14</sup>, *Santee v. Windsor Court Hotel Ltd. P'Ship* (2000)<sup>15</sup>, *Pitts v. Wild Adventures* (2008)<sup>16</sup>, as well as others<sup>17</sup> have highlighted a recurring struggle for courts to reconcile the understood purpose of anti-discrimination law and Title VII with the evolving understandings of sex and racial identity. More specifically, these cases have forced the courts to contend with the intersectional identity of black women, who throughout history have faced erasure not only in legal, but also political and social, discourses, and the importance of their hairstyling choices to their identity formation.

### ***Thesis Project***

The argument of this thesis can be understood in three parts: 1) I argue that anti-discrimination law's purpose ought to be to combat discrimination on the basis of oppressive

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<sup>13</sup> *Jenkins v. Blue Cross Mut. Hospital Ins., Inc.*, 538 F.2d 164, a case in which a black woman, Beverly Jenkins, was told she could "never represent Blue Cross with [her] afro." The courts agreed that this comment and the actions taken on the basis of it constituted racial discrimination, but notably, denied her claim to also try it as sex discrimination).

<sup>14</sup> *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (1981)

<sup>15</sup> *Santee v. Windsor Court Hotel Ltd. Pshp.* 2000. U.S. Dist. LEXIS 15960

<sup>16</sup> *Pitts v. Wild Adventures, Inc.* 2008. U.S. Dist. LEXIS 34119.

<sup>17</sup> See *Hollins v. Atl. Co.* (1999) *Carswell v. Peachford Hosp.* (1981), and *Burchette v. Abercrombie & Fitch Inc.* (2000).

hierarchical evaluations; 2) I argue that the “immutable” criterion, and the notion of fault it relies on, incorrectly defines social identity through its exclusion of agential enactments of identity, leaving marginalized peoples and culture vulnerable to implicitly biased discriminatory action; and 3) I argue that insofar as the immutability criterion does not allow for discrimination to be combated in its *entirety*, it ought to be removed from courts’ frameworks for adjudication.

The first portion of the argument involves an explanation of the legal history of anti-discrimination law and the ways its purpose has been interpreted by both courts and legal scholars. In this portion of my argument, I am making a normative claim about how I believe anti-discrimination law ought to be understood based on different legal readings of its purpose. This normative claim about how anti-discrimination law ought be understood then provides the background for the relevancy of my claims about both the immutability criterion and identity more generally. The justification of what the role of the law and courts ought be in combating discrimination is necessary for showing how current interpretations are failing this purpose and why it is we ought to care about these failures. My understanding of discrimination is couched in my understanding of social relations as hierarchical. I believe social identities within a culture correspond to a given social position, which references the power and value placed onto that social identity, relational to other social identities. This hierarchy of social positions informs how discrimination occurs, where identities and cultures associated with lower positions are more vulnerable to discrimination. This conception of discrimination informs my analysis of the purpose of anti-discrimination law, which I believe ought be committed to combating said social hierarchies.

The second portion of the argument then moves on to explain how the immutability criterion plays a role in the miscarriage of justice, especially under my understanding of anti-discrimination law. Injustice occurs, I argue, when courts rely on immutability to understand identity, as it reduces identity to what I call passive through its focus on fault. In doing so, courts exclude, in my terms, active identity, which includes how individuals choose to present themselves. It is not that passive identity is not relevant to discrimination. On the contrary, I think it is the unique connection between passive and active identity that shapes how individuals are understood socially by others, in relation to historical conceptions of identity and culture.

Throughout this thesis, I refer to these two aspects of identity as passive identification and active identification. The word “identification” is significant because it describes an act being done to the individual in question by other people: the identification of a person with a certain social identity, whether based on passive markers or active choices. Examples of these types of identifications are *black* or *woman* or *black woman*, which all relate back to social identities. The language of identification is important when discussing discrimination, as discrimination necessarily relates to how people are identified by others, whether consciously or unconsciously, and are then treated differently on the basis of this identification.

My decision to focus on identification, under my given definition, means that my analysis often ignores the individual’s understanding of their own identity and the importance of certain enactments to that understanding. To be clear, this is not because I believe that self-recognition is not important or valuable or that it ought not to be considered in courts’ analysis. In fact, I believe that people’s grasp of their own identities often shape the ways they enact their identities and how they relate themselves to the world. These enactments, informed by one’s self-understanding, then

can contribute to how one is perceived and treated by others. Additionally, though, one's sense of self, and the difficult journey some must undertake to be comfortable with this sense, is something that ought not be devalued. This is especially true for individuals whose identities generally face discrimination and devaluation within society such as gender, racial, and sexual minorities. The project of my thesis, however, centers around the aspects of social identity most relevant to acts of discrimination, which I believe rely more heavily on the identification and then treatment, of individuals by others rather than the individual's understanding of themselves.

Continuing with the second portion of my argument, the "immutability" criterion, which is used to determine what external features are important to identity and therefore are protected, solely focuses on passive identification, I argue. By passive identification, I am referring to identification that occurs unrelated to individual choices and often relates to visible markers, like skin color. Discrimination on passive features is included within the scope of immutability, as immutability's protection extends to the point of agent fault. Individual's active, agential choices (e.g. hairstyling, dress, etc.) are defined as mutable and therefore are excluded from protection under the immutabilities criterion. This is problematic, as these individual, so-called "mutable" choices importantly contribute to how different people are socially identified and how they experience the world because of it, which is what I define as active identification. When immutability ignores these choices and their social significance, the criterion misses a large portion of discriminatory actions that occur based on these active choices. Specifically, it misses how enactments of identity associated with cultural identities that have been historically devalued or deemed lesser are more likely to incur worse perceptions and treatments by others.

Once I have demonstrated that the immutable understanding of identity is insufficient in capturing how discrimination can be experienced in its entirety, the conclusion of my argument follows. If the purpose of anti-discrimination law is to combat discrimination, and the immutable understanding of identity prevents it from being able to do so completely, it is clear that it must be rejected. My own dual-layered analysis of identity offers a philosophical model from which a possible replacement definition could be formed.

It is important to note, however, that I am not arguing for an understanding of identity that allows for any and all personal decisions to be justified, nor am I trying to draw a clear line between what enactments of identity are essentially related to identity and those which are not. Rather, my project aims to show why, in whatever framework for identity anti-discrimination law decides to adopt, agential decisions, and their historical significance, must have some place in the analysis. This would allow for individuals bringing discrimination cases to have more freedom in their argumentation concerning how the discrimination occurred, rather than being confined to limiting frameworks such as the immutability criterion. Additionally, though, any form of anti-discrimination law that does not account for agential enactments of identity allows for marginalized groups, such as black women, to be further oppressed within our white, able-bodied, cis-heteropatriarchy. This occurs at the point where these groups can be discriminated against because of the identification of certain enactments, e.g. styling one's hair in dreads, with particular identities, e.g. blackness. If we do not protect for discrimination of these types, we can never truly challenge the discriminatory value-laden social hierarchies that underlie how individuals are perceived and treated by others which extend throughout every choice individuals make moving through this world.

### *Arriving at My Topic*

In writing this thesis, I had to make a number of decisions in terms of what cases and laws I wanted to focus on and those I did not. To explain my decisions, it is easiest to return to how I first arrived at my topic. Two years ago while in a research program at the University of Chicago, I knew I wanted to explore the relationship between the law and our understanding of personhood. Law, in my eyes, has incredible power in defining the social positions of individuals in a society. This is especially true within the U.S., where the allocation of rights and the protection of said rights can indicate larger social values (e.g. free speech) or social prejudices (e.g. same-sex marriage only recently being legalized).

As I began to explore this relationship, I came across an article<sup>18</sup> about an army grooming policy known as Army Regulation 670-1 which included a ban on dreadlocks. This section of the policy had been repealed after widespread criticism from black servicewomen. In reading about this ban and its subsequent repeal, I was struck by how racialized the grooming policy clearly was; it banned dreadlocks and placed strict regulations on braids, both of which are socioculturally black hairstyles. Further research on racialized grooming policies brought me to the case *Equal Employment Opportunities Commission v. Catastrophe Management Solutions* (2016), which became a central case study of how black women's hairstyling decisions are particularly vulnerable to racialized and gendered understandings of professionalism and what "good" hair looks like. As highlighted in the beginning of this introduction, the language of immutability was explicitly used as a metric for determining the validity of Chastity Jones' case, as well as a variety of similar cases such as *Rogers v. American Airlines* (1981), *Hollins v. Atl Co.*

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<sup>18</sup> Mele, Christopher. 2018. "Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice." *The New York Times*, January 20, 2018, sec. U.S.

(1999), *Burchette v. Abercrombie & Fitch Inc.* (2000), *Santee v. Windsor Court Hotel Ltd. P'Ship* (2000), and *Pitts v. Wild Adventures* (2008), all cases involving black women and racialized grooming policies regulating their hairstyling choices.

I had three main reasons for deciding to focus on the experiences of black women with grooming policy discrimination and anti-discrimination law. First, as a woman of color myself, my drive to write this thesis reflects my own personal experiences with coming to love and appreciate my own hair. Like many other black feminist scholars on this topic, this journey of self-acceptance is what motivates me to do my research for all the other black women who are still being told, both by others and by themselves, that their hair isn't "good". Secondly, though, I choose to focus on black women to the exclusion of black men because of black women's position at the intersection of two marginalized identities, black and woman. This marks them differently from black men and white women and has often left them uniquely unrepresented in discussions separately discussing racism and sexism.

Furthermore, societal conceptions of how black women ought to look, act, or be, reflect their position at this intersection in a way that cannot be accounted for through analysis that begins with any other group. Though these are not the only identity categories that black women can hold, i.e. class, ability, and sexuality are also always at play, I focus on their position solely as black women to analyze the relationship between their hair and beauty standards, where, in American beauty standards, sexism *and* racism both manifest. By examining how anti-discrimination law currently fails to account for these intersections of oppression experienced by black women because of its definition of identity, I believe this demonstrates how limited its protection currently is.

Third, regarding my reasons for focusing on black women and not other communities impacted by the concept of immutability, I want to make sure that black women's voices and experiences are heard. Centering black women's experiences through my analysis has been an important way to do that. However, while I focus on black women for my thesis, this in no way indicates that my work or arguments stop there. I believe this analysis of immutability can also be applied to other groups who are similarly unprotected from discrimination on traits not deemed immutable, such as other women of color, black men, LGBTQ+, and minority cultures and religions. For example, recent administrative steps are being taken to define gender as immutable, thereby putting the rights and safety of transgender and gender non-conforming people at risk<sup>19</sup>. For the sake of not making generalizations about the unique ways in which different identities are formed or how enactments of identity are interpreted, I limit the scope of my thesis to black women and their relationship to hair, allowing me to make distinct historical references to bolster my arguments about active identity formation.

### ***Structure of this Thesis***

Excluding the introduction and conclusion, this thesis consists of 5 chapters. The first chapter presents the legal history of anti-discrimination law, describing different interpretations of its purpose and the principles that have steered its development. Specifically, I engage with the principles of anti-classification and anti-subordination, which are two critical interpretations of the 14th Amendment of the Constitution and, in my eyes, anti-discrimination law's purpose. In discussing these principles, I explain how other scholars have seen them as being related to

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<sup>19</sup>Green, Erica L., Katie Benner, and Robert Pear. 2018. "'Transgender' Could Be Defined Out of Existence Under Trump Administration." *The New York Times*, October 23, 2018, sec. U.S.

the interpreted purpose of anti-discrimination. Further, I posit my own reasoning for why I see an anti-subordination principle, rather than anti-classification, as being most important to the goals of anti-discrimination as I interpret them. To further cement the relationship between the general history of anti-discrimination and the interpretations of Title VII, I demonstrate how this shift in the understanding of anti-discrimination law would be particularly useful in grooming policy cases, where the problem is not simply one of classification, but of what classifications mean for individual enactments of identity. As I discuss in this chapter, violations of Title VII, and therefore the Civil Rights Act of 1964, are statutory rather than constitutional violations. However, I believe that understanding the constitutional interpretations of anti-discrimination law and the court's general attitudes towards anti-discrimination law can illuminate the principles that courts use to evaluate statutory claims.

In my second chapter, I elucidate the concept of immutability and its role in Title VII grooming policy cases. This first involves laying out how immutability emerged as a legal concept and its general meaning within anti-discrimination law. Following this, I lay out how other scholars have interpreted the concept of immutability and its problems, especially in cases involving culture and cultural identity. I then distinguish the issue I am taking with immutability, its focus on agent fault, from the critiques of other scholars. I lay out how this concept of fault can be viewed through the legal history of immutability, and introduce the concept of legal accountability and its relation to identity. To once again re-contextualize this concept of accountability within my cases of study, I explain what accountability looks like between employees, their grooming decisions, and the businesses they work for.

My third chapter discusses the concept of identity. For the purposes of this thesis, any mention of identity is referring to social identity, the definition of identity that I see as being most relevant to discrimination. In this chapter, I talk about what social identity is and how it is constructed, utilizing the analyses of feminist philosophers such as Judith Butler, Linda Alcoff, and Charlotte Witt. I then begin my two-tiered definition of identity as I see it relating to discrimination: identification, passive and active. I see passive identification as being the understanding relevant to immutability, while active identification falls outside of its purview through immutability's fault-based conception of identity. Throughout this chapter, I situate my abstract analyses of identity in the historical meaning of the identification of *black woman*. I explain how hair, as an embodied signifier, has played a role in identification for black women and how the act of hairstyling, an agential decision, has directly impacted this identification. By the end of this chapter, I demonstrate how agential decisions in identity enactment must be analyzed as equally important to how discrimination, and the perpetuation of oppressive, value-laden social hierarchies, occurs in the present day.

The fourth chapter of my thesis relates my definition of identification back to the concept of immutability and anti-discrimination law more generally. I discuss how my understanding of identity is different from the way the immutability criterion is being mobilized in grooming policy case in my inclusion of agential, and therefore faultable, decisions. Additionally, I explain how this approach would better adhere to the anti-subordination interpretation of anti-discrimination law by not stripping marginalized groups of their agency. My approach prioritizes the individual's ability to enact their identity in the face of unjustifiable and discriminatory grooming policies. To clarify how this approach would work and how it would more successfully combat discrimination

in the workplace, I re-approach the case, *E.E.O.C. vs. CMS* (2016), demonstrating how my analysis could be used to both broaden the arguments made by the plaintiffs as well as the analytical framework of the court used to make its decision.

The last constructive chapter of my thesis considers possible objections that one could have, either to my understanding of identity or my normative legal argument about the importance of anti-subordination. Some objections I will address include a discussion of business' right to control their image and the possible misuses of active identification that might attempt to justify any individual's choice as being essential to identity. My responses to these objections will clarify how I see my analysis playing a role in future anti-discrimination cases.

Finally, I will conclude by bridging the connections between all my chapters and the ideas within them. In doing so, I will highlight areas which could be expanded upon given more time, and discuss how my arguments could be applied to other types of discrimination cases. Furthermore, I briefly discuss how some of the larger issues I highlight in anti-discrimination, namely the idea that people cannot be protected for the actions they *choose* to take, might require additional investigation to see how they may manifest themselves in other parts of anti-discrimination law.

## Chapter 1: Legal Background of Anti-Discrimination Law

“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”

Justice J. Brown, *Plessy v. Ferguson*<sup>20</sup>

No consensus currently exists on what legal principles ought to govern anti-discrimination advocacy. What constitutes unlawful discrimination and what does not is constantly changing in historical jurisprudence, as demonstrated through the development of anti-discrimination law in reference to segregation, affirmative action policy, and workplace regulations. Often, those in disagreement about anti-discrimination law and its purview disagree about how to read the 14th Amendment, one of the primary amendments cited in anti-discrimination cases. This Amendment laid the Constitutional foundations for both the social advocacy for and legal background of laws such as the Civil Rights Act of 1964. Throughout 14th Amendment jurisprudence, two main readings of its purpose have emerged: anti-classification and anti-subordination. The intention of this chapter is to outline how these two readings translate into the understood purpose of anti-discrimination law. To do this, I have broken this chapter into three sections: 1) origin and principles of anti-discrimination law, 2) other scholars’ interpretations of anti-discrimination law and its purpose, and 3) my interpretation of anti-discrimination law and its purpose.

The first section serves to lay out the history of anti-discrimination law and the anti-subordination and anti-classification principles. I detail the emergence of anti-discrimination law as it relates to the passage of the 13th and 14th Amendments and the subsequent usage of these amendments in legal cases. In particular, I highlight the cases of *Plessy v. Ferguson* (1896)

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<sup>20</sup> *Plessy v. Ferguson* 163 U.S. 537 (1896).

and *Brown v. Board of Education* (1954) in which the principles of anti-subordination and anti-classification are first articulated. I then connect the articulation of the principles in these cases to their later usage in cases such as *Regents of the University of California v. Bakke* (1979), and *Adarand Constructions, Inc. v. Peña* (1994), which demonstrate the courts shift towards an anti-classification reading of the 14th Amendment at the expense of anti-subordination. The second section describes other legal scholars' opinions on anti-classification and anti-subordination. These scholars' discussions of the two principles serve to highlight the implications, both legal as well as philosophical, of the different readings of anti-discrimination law's purpose. Additionally, these conversations inform my perspective, which I express in the third section, on how anti-discrimination law ought to be read. To conclude, I explain why I see arguments for the anti-subordination reading of anti-discrimination law's purpose to be the most persuasive, especially within the context of grooming policy cases.

### ***Origins and Principles of Anti-Discrimination Law***

Together, the Thirteenth and Fourteenth Amendments were meant to signify a new era of more just and equal race relations within the United States. The Thirteenth Amendment, passed in 1865, outlawed slavery (excluding those imprisoned by the state), which was one of the clearest markers of the racial subordination of African Americans during the antebellum period. Three years later in 1868, the Fourteenth Amendment established a right of all persons in the U.S., citizens or not, to due process and equal protection under the law<sup>21</sup>. The Fourteenth Amendment

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<sup>21</sup> Both the two clauses as well as the extension of these rights to citizens and non-citizens alike is established in Section 1 of the 14th Amendment which states: "No state shall...deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (US Const. amend. XIV, sec. 1).

seemed especially promising in securing racial equality within U.S. public society. In theory, this Amendment seemed to offer African Americans equal access to the law and its protection as offered to their white counterparts. In its application, however, the liberatory impacts seemed more limited. The case of *Plessy v. Ferguson* (1896), is exemplary of the Amendment's limitations. In this case, Homer Plessy, a mixed race individual, challenged a Louisiana statute that called for "equal but separate accommodations for white and colored races"<sup>22</sup> on train cars. In discussing the constitutionality of this 'separate but equal' doctrine under the Fourteenth Amendment, Justice J. Brown states,

The object of the [Fourteenth] [A]mendment was undoubtedly to enforce absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either<sup>23</sup>.

This interpretation of the equal protection doctrine as ideologically consistent with systems of segregation persisted through more than half of the 20th century, with segregation and Jim Crow laws ensuring the racial 'purity' of white society and the relegation of black Americans to a lower social stratum. Over 50 years later, the seminal *Brown v. Board of Education* cases brought the question back to court, this time concerning segregation in public education. In deciding *Brown*, however, the court reached a different verdict: segregation in public education was deemed unconstitutional. Whether or not *Brown* was decided because of the court's more progressive reading of the Fourteenth Amendment or because of its political palatability and the

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<sup>22</sup> *Ibid*, note 20.

<sup>23</sup> *Ibid*, note 20.

convergence of interests of civil right activists and American politicians<sup>24</sup>, *Brown* set a significant precedent for challenging the constitutionality of segregation in the public sphere.

Furthermore, the decision in *Brown* highlighted two key readings<sup>25</sup> of anti-discrimination law that would be utilized in cases for years to come: anti-classification and anti-subordination. The anti-classification principle “protects individuals from racial classifications,”<sup>26</sup> framing the purpose of anti-discrimination law as the elimination of policies that classify individuals on the basis of race. In *Brown*, classifications of this sort manifested in the policies that relegated students to certain schools on the basis of race, i.e., black students to black schools and white students to white schools. This principle is first referenced in the dissent of Justice J. Harlan in the *Plessy* case, where Harlan states, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”<sup>27</sup>. The second principle, anti-subordination, is also referenced in Harlan’s dissent in *Plessy*, where he states: “...in the eye of the law, there is in this country no superior, dominant, ruling class of citizens”<sup>28</sup>. The purpose of anti-discrimination law under a anti-subordination reading is to combat policies that support racial hierarchies. In *Brown*, the court viewed the segregation of the schools as imposing psychological subordination on black

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<sup>24</sup> In her article, “Degregation as a Cold War Imperative,” Mary L. Dudziak examines the relationship between the *Brown* decision and the national and international politics during the time. Rather than simply understanding it as a sign of changing times, Dudziak suggests that the “Cold War American culture” further pushed lawmakers to support school desegregation (64). It could be informative to further consider how the inception of anti-discrimination as a result of “interest convergence” rather than a genuine social shift might inform its purpose and application.

<sup>25</sup> This analysis and framing comes from a class lecture given by Prof. Stephen Engel titled, “The Slow Demise of Separate but Equal” given on January 15th, 2019, at Bates College in his *Constitutional Law II: Rights and Identities* course in conjunction with the textbook for the class “*Processes of Constitutional Decisionmaking: Cases and Materials*” (2014) by Paul Brest, Sanford Levinson, Jack. M Balkin, Akhil Reed Amar, and Reva B. Siegel.

<sup>26</sup> Brest, Paul, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar, and Reva B. Siegel. 2014. *Processes of Constitutional Decisionmaking: Cases and Materials*. 6th edition. New York: Aspen Publishers. 1104.

<sup>27</sup> *Ibid* note 20.

<sup>28</sup> *Ibid* note 20.

students because of the fewer resources afforded to black schools, which often led to comparatively lower quality education than offered in white schools.

Though anti-classification and anti-subordination are able to work in tandem in *Brown*, the ideological alignment of anti-classification and anti-subordination is not always a given. Legal cases surrounding affirmative action in education and affirmative action in employment<sup>29</sup> have highlighted how these two principles can come into conflict, where classifications based on race have been called unconstitutional, even when directed at remedying past discrimination and oppression. Within the education realm, the famous case, *Regents of the University of California v. Bakke* (1979) deemed a University of California-Davis medical school affirmative action quota unconstitutional under the idea that “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color”<sup>30</sup>. While still affirming the educational importance of diversity<sup>31</sup>, the language in this decision reflects an aversion of courts to recognize different suspect classifications, such as race, as requiring different standards of evaluation. Thus, laws that pick out, or classify, black individuals as a group are treated the same as laws that pick out white individuals as a group.

This conception of equality under law, where there is little regard for the idea that classifications for some groups do not have the same histories or implications as others, continues into employment policy in the case *Adarand Constructions, Inc. v. Peña* (1994). This case

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<sup>29</sup> These cases and framing of analysis come from a class lecture given by Prof. Stephen Engel titled, “Affirmative Action in Education and Employment” on January 31st, 2019 in his *Constitutional Law II: Rights and Identities* course.

<sup>30</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

<sup>31</sup> In *Bakke*, Powell states, “The atmosphere of “speculation, experiment and creation” -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the “nation's future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.” (Citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

involved a federal policy, Section 8(a) of the Small Business Act, that offered more money to primary contractors if they subcontracted minority businesses for jobs that would normally go to the lowest bidder. Despite the fact that this policy was aimed at remedying the disproportionately low numbers of minority businesses being subcontracted, the court ruled that “...all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”<sup>32</sup>. Strict scrutiny, a concept I will discuss further in the chapter on immutability, is a harsher form of judicial review where policies are generally discarded unless they can be proved to be narrowly tailored and aimed towards a compelling government purpose.

The ruling in *Adarand* made it significantly harder for remedial policies classifying by race to be constitutionally justified. This placed remedial and discriminatory policies on essentially equal legal ground in the eyes of anti-discrimination law insofar as both triggered strict scrutiny through the use of any racial classifications. However, it is clear that the social implications for classifications codified in cases like *Plessy*, where the central aim is keep black people out of white spaces, versus cases like *Bakke*, where the aim is to increase the presence of racial minorities in a higher education institution, or *Adarand*, where the aim is to support minority businesses, are vastly different. Thus, the decisions in *Adarand* and in *Bakke* demonstrate how the anti-classification and anti-subordination principles have come into conflict, where courts take more issue with the classification itself rather than the significance of or social positioning implied by one’s classification.

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<sup>32</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

***Other Scholar's Interpretations of Anti-Discrimination Law's Purpose***

To further demonstrate how the principles of anti-classification and anti-subordination differ, scholars such as Abigail Nurse have argued that the anti-subordination principle can be compatible with classifications made in policy so long as they don't foster "social hierarchies"<sup>33</sup>. Nurse frames the relevant difference in the principles as relating to the importance of histories of discrimination. Under the anti-classification principle, "intergroup dynamics are not relevant" meaning that "there is no reason to look at the history or political context of the groups involved"<sup>34</sup>. Thus, the only important factor in an anti-classification framework is whether a policy is picking out people based on identity classes such as race or sex. Anti-subordination, on the other hand, values "history and context,"<sup>35</sup> taking into account group status and how it is reaffirmed through policy actions. In arguing that an anti-subordination approach to anti-discrimination is the more apt measure, Nurse praises the anti-subordination principle for its ability to "acknowledge that individuals are grouped by hierarchical social categories (like race) that continue to have an impact on the lives of individuals in those groups"<sup>36</sup>.

In his piece, "A Critique of 'Our Constitution is Color-Blind,'" Neil Gotanda takes a similar oppositional stance to the anti-classification principle. Gotanda lays out a critique of "color-blind constitutionalism,"<sup>37</sup> a reference to the anti-classification principle, and the push for social actors to "not consider race"<sup>38</sup>. In practice, color-blind constitutionalism prioritizes a

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<sup>33</sup> Nurse, Abigail. 2014. "Anti-Subordination in the Equal Protection Clause: A Case Study." *New York University Law Review* 89 (1): 293-336.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Gotanda, Neil. "A Critique of 'Our Constitution Is Color-Blind.'" *Stanford Law Review* 44, no. 1 (1991): 1-68. 2.

<sup>38</sup> *Ibid* at 6.

transition to law and policy that reference any racial differences, but rather are applied in a (seemingly) neutral manner.

To explain the issue with this color blindness in law, Gotanda develops the concept of non-recognition<sup>39</sup>. The idea of non-recognition is that, in order for social actors to ignore race as to not let it impact their decisions, there must first be a recognition of difference. So, to not consider race, one must first recognize that the difference of race is there and needs to be ignored:

This technique of “noticing but not considering race” implicitly involves recognition of the employee’s racial category and a transformation or sublimation of that recognition so that the racial labor is not “considered” in the employer’s decisionmaking process.<sup>40</sup>

Color-blind constitutionalism ignores the fact that this initial recognition of race has social implications for the person being marked. Thus, Gotanda suggests that, by virtue of focusing on not classifying the individual which ignores that the individual will be classified racially regardless, this obscures the racial subordination that occurs on the basis of said classifications: “Nonrecognition fosters the systematic denial of racial subordination and the psychological repression of an individual’s recognition of that subordination, thereby allowing such subordination to continue”<sup>41</sup>.

In addition to questioning which principle, anti-classification or anti-subordination, if not both, is most relevant to the understanding of anti-discrimination law’s fundamental purpose, legal scholars have also highlighted other relevant tensions in approaches to anti-discrimination law and its goals. Particularly essential to the work of this thesis, critical legal theorist Kimberlé Crenshaw offers two possible interpretations of anti-discrimination law: the expansive view and

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<sup>39</sup> *Ibid* at 16.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

the restrictive view<sup>42</sup>. The expansive view of anti-discrimination law focuses on creating equality through the elimination of oppression, both past and present. This involves dealing with both the conditions that have created inequality, as well as discrimination that occurs in the present day.

The restrictive view, on the other hand, deals only with current discrimination, focused on preventing future harm rather than dealing with the harm that has already been done. In the restrictive view, anti-discrimination law does not concern itself with the structural forms of oppression, but rather conceptualizes of discrimination as individual actions that differ from the assumed equal norm.

An example of how Crenshaw's two views might come into conflict is within grooming policies, especially those related to the banning of socioculturally black hairstyles. While the expansive understanding of anti-discrimination law might recognize the white supremacist coding of these bans and the historical relevance of black image in relation to the workplace, a restrictive notion might not concern itself with the entrenched, normative social values of proper workplace presentation. Rather, under a restrictive view, courts might focus instead on quantifying the harm occurring to individuals in the present and make their decisions based on that. This distinction in perspectives is key because, depending on how the purpose of anti-discrimination law is understood, it shapes the framework of its application. If we adopt a restrictive view, discrimination is treated as circumstantial and isolated. Anti-discrimination law then becomes a retroactive remedy for particular individual actions, without any regard for how these actions reflect larger social ideals. If we adopt an expansive view, discrimination is treated as a product of historical and structural oppression. Thus, anti-discrimination law becomes a proactive body that

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<sup>42</sup> Crenshaw, Kimberlé. "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law." *Harvard Law Review*, no. 7 (1988): 1331.

continuously questions why our society works the way it does, recognizing equality as an ongoing process rather than an achieved end.

### ***My Reading of the Purpose of Anti-Discrimination Law***

I similarly believe that anti-subordination is the necessary principle to which we must adhere, especially when considering discrimination cases involving cultural traits. In cases such as these, policies are often less explicit with their racial classifications, and rather rely on facially neutral policies that can be imposed unequally on members of different racial and sex groups. Such is true with the grooming policy cases, where policies that, on their face, only say that “excessive” or “unprofessional” styles are banned, are implemented and weaponized against socioculturally black hairstyles. This especially harms black women, as they incur not only racist but also gendered, conceptions of “professionalism” and norms about what “business-appropriate” women’s hair must look like.

Furthermore, *E.E.O.C. v.s. CMS* and similar cases demonstrate how the immutability criterion leads the courts to focus on the classification of an individual (e.g. their race, sex, etc.) and the qualities seen as being essential to that identity (e.g. hair texture, skin color, etc.). This approach universalizes the identity in question by solely defining it through the characteristics shared by all members, reducing identity to its passive, unenacted form. By doing so, courts then ignore how social identity manifests itself beyond these universal features in individual choices, such as through dress, hairstyle, or bodily adornments. Just as explicit discrimination against racial, gender, religious, and sexual minorities has occurred in the past, and currently, throughout

the law, the social interpretations of individual enactments of personal identity by others can be steeped in discriminatory histories.

So how then do I see anti-subordination as a principled reading of anti-discrimination law as being relevant to grooming policy cases? I appreciate Nurse's framing of anti-discrimination as concerning social status and social hierarchies. As she states well, "The problem with purported neutrality is that the world is not neutral: hierarchies continue to shape everyone's existence, regardless of whether they are acknowledged or not"<sup>43</sup>. Fundamentally, I think that is the issue in these grooming policy cases: because of the ways that blackness generally, but also black culture and black beauty, have been devalued in this country, black women entering the workplace face incredible stigma against any enactments of identity that further tether them to black identity. Courts fail to recognize how these racialized and gendered evaluations of socioculturally black hairstyles are discriminatory when they focus on concepts like immutability, as the immutability criterion excludes agential decisions such as hairstyling. The focus on how to classify one as part of a racial group and the use of a universal standard strips the individual of their agency in identity enactment. This harms those who are most likely to need anti-discrimination law for protection of their agential enactments of identity: the people whose identities are marginalized, pushed to the bottom of social power hierarchies, and whose culture falls outside the dominant norms.

Anti-subordination provides a better framework because it challenges these hierarchies, recognizing that what is at issue is not simply what the identity classification is, but what that *means* for the individual when they interact with society. My identification by others as a woman

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<sup>43</sup> *Ibid* note 33.

of color goes beyond a simple designation; it frames how I interact with the world and how the world interacts with me. Because communities form culture and culture also can be related to different identities, it is necessary to recognize how the meaning of a certain identification relates to how actions that further identify an individual with a group, like a hairstyle, are given social value. Approaching issues of this kind from an anti-subordination lens would allow courts to consider how social standing and social hierarchies come into play, introducing a more historically nuanced understanding of how identification and discrimination work. This fits in with Crenshaw's discussion about the restrictive versus expansive readings of anti-discrimination law's purpose as well. I interpret my formation of identity as fitting within the expansive view for its attention to history and historical oppression. The current immutability standard falls under the restrictive view, in my eyes, as it leaves individuals vulnerable to a number of unjustifiable workplace policies, like workplace bans on dreadlocks because of their subjectively defined "unprofessionality".

Gotanda's analysis of non-recognition relates well to the construction of "neutral" grooming policies. A "neutral" grooming policy is one that imposes grooming standards on all employees "equally", even if the policy calls for different regulations for different groups. For example, this means that a company can have different grooming standards for men and women so long as they have standards for both of them. An example of this is the case *Willingham v. Macon Publishing Company* (1975)<sup>44</sup>, where the court dismissed the discrimination claim of a man who was not hired because of his long hair. In the decision in *Willingham*, which has been cited in various grooming policy cases involving black women's hair, the court relied on the fact

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<sup>44</sup> *Ibid* note 12.

that grooming policies also existed for female employees. This meant, in their eyes, that the grooming policy could not be discriminatory<sup>45</sup> insofar as there were standards of appearance for both groups.

Not only is this burden easily filled, but this standard ignores that neutrality in language does not always mean neutrality in application. Words such as “professional,” “business-like,” and “conservative” are subjective and leave ample room for biases in how companies choose to articulate them, which often through a white normative framework. This reflects what Barbara Flagg calls the “transparency phenomenon,”<sup>46</sup> where whiteness implicitly codes white people’s normative understanding of the world: “Whiteness is the racial norm. In this culture, the black person, not the white, is the one who is different. The black, not the white, is racially distinctive”<sup>47</sup>. When normative concepts such as “professionalism” and “conservative” are then included in the language of grooming policies, this allows for businesses, many of which are white-run, to impose these policies using white norms as their standard. To be conservative or professional, in essence, is to be white.

Furthermore, in thinking about the impact of white neutrality, it is important to consider who businesses tailor their image to. When businesses also assume a white customer as their consumer, this leads them to then tailor their grooming policies towards what they believe reflects white customer preferences<sup>48</sup>. As Gotanda points out in his discussion of non-recognition, there is

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<sup>45</sup>*Supra* note 44, at 1020, Judge Bootle states: “From all that appears, equal job opportunities are available to both sexes. It does not appear that the defendant fails to impose grooming standards for female employees; thus in this respect each sex is treated equally.”

<sup>46</sup> Flagg, Barbara J. 1998. *Was Blind, but Now I See: White Race Consciousness & The Law*. Critical America. New York: New York University Press.

<sup>47</sup>*Ibid* at 2.

<sup>48</sup> Banks, Taunya Lovell. 2002. “The Black Side of the Mirror: The Black Body in the Workplace.” In *Sister Circle: Black Women and Work*, edited by Sharon Harley. New Brunswick, N.J: Rutgers University Press.

nothing gained by pretending that race is not a consideration. This only obscures how deeply racism and sexism are embedded into many of our normative concepts, from basics such as *good* and *bad*, to more complex ones such, *conservative* and *unprofessional*.

In evaluating black women's grooming policy cases, however, courts are often more concerned with the stated neutrality of a policy rather than how it is imposed differently on individuals. In this case, I argue courts mistake a lack of classification for a lack of identification, which I believe is an inescapable aspect of social identity. To focus on whether or not classification is occurring in the grooming policy itself misses that a classification of the individual is occurring anyway by the people who actually control the meaning of the grooming policy. If courts were to shift away from what I read as an anti-classification reading of Title VII through the use of the immutability criterion, they would recognize how these seemingly neutral policies can be enforced through a discriminatory lens, where unprofessional becomes synonymous with black hair.

It is worthy to note that the anti-subordination and anti-classification principles are readings of the 14th Amendment, the violation of which occurs on the constitutional level. Grooming policy cases using Title VII, on the other hand, occur on the statutory level. Despite this, I believe that these two principles have deeply impacted how courts interpret discrimination and their own duty to combat it. Furthermore, how we conceptualize anti-discrimination law at the constitutional level sets the ideological foundation for how we conceptualize it at the statutory level, as many statutes reference principles in the Constitution that are thought to be fundamental to our values as a nation. Thus, critically engaging with the different readings of the purpose of

anti-discrimination law creates a normative framework with which I believe current applications of the Civil Rights Act of 1964 can be problematized.

To conclude, the anti-subordination principle serves as a helpful normative legal framework to evaluate grooming policy cases, where discrimination is occurring despite a “neutral” policy which doesn’t explicitly classify individuals. To employ an anti-subordination framework to cases of discrimination against black women’s hair, courts must consider the social position of black women in relation to the historical significance of their hairstyling decisions. In the following chapter, I describe the immutability criterion which is currently being used to evaluate black women’s discrimination claims in grooming policy cases. In defining immutability and its use throughout these cases, I demonstrate how the evaluative framework immutability necessitates ultimately goes against the principle of anti-subordination. In doing so, I lay the groundwork to offer a new formation of identity, active and passive identification, that I believe would better accomplish what I interpret to be anti-discrimination law’s goals: eliminating discriminatory social hierarchies within society, and specifically under Title VII, within the workplace.

## Chapter 2: Immutability

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

Judge Jordan, *E.E.O.C v. CMS* (2016)

In the previous chapter, I discussed different readings of the purpose of anti-discrimination law, namely the anti-classification and anti-subordination principles, in order to establish a normative legal framework to evaluate courts’ decisions in grooming policy cases. In this chapter, I discuss the standard courts have used in my cases of study: the immutability criterion. To clarify what the immutability criterion is, I first explain how immutability emerged as a concept within anti-discrimination law, which relates to the strict scrutiny form of judicial review mentioned in the previous chapter. Following this, I trace the conversations of legal scholars who have debated the usefulness of the immutability standard and the possible alternatives that could take its place. This chapter also positions my analysis within this existing literature, distinguishing my critiques of immutability from those of other scholars. As opposed to the concerns about cultural rights or essentialism that characterize other discussions of immutability, my research focuses on how immutability invokes the concept of fault. Fault, I argue in this chapter, is essential to immutability’s definition. To demonstrate the relevance of fault to this thesis, I then connect this discussion of fault to the grooming policy cases, ultimately questioning what it means to be legally accountable for external appearance.

### ***The Emergence of “Immutability”***

The concept of immutability was developed in relation to a form of judicial review known as strict scrutiny, which calls for “more searching judicial inquiry” on laws impacting “discrete and insular minorities”<sup>49</sup>. First conceptualized in *United States v. Carolene Products Co.* (1938), the main idea behind strict scrutiny is that laws that pick out individuals who have been marginalized in U.S. society ought be differently evaluated than those that pick out non-marginalized groups. This follows from the view that courts ought to be more attentive to laws impacting marginalized groups because of their vulnerable social position as a non-dominant group. To combat laws or policies that might capitalize on this vulnerability and unfairly pick out and harm marginalized peoples, strict scrutiny subjects laws or policies that trigger it to a more demanding form of judicial review. The legal burden in these cases, which was defined and refined throughout a number of cases following *Carolene*, is to prove that the law or policy is both aimed at achieving a compelling government interest and is narrowly tailored towards that goal. As demonstrated in cases such as *Bakke* and *Adarand* in the previous chapter, policies to which strict scrutiny is applied often fail to pass both these requirements.

To determine whether a law ought be subjected to strict scrutiny, there are two understandings of identity that courts rely on: suspect classification and suspect class. Suspect classifications include race, religion, and national origin. The distinction of suspect class is afforded to groups who fill four criteria: a history of discrimination, immutability, political powerlessness, and irrelevance<sup>50</sup>. Immutability within this context references the relationship

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<sup>49</sup> *United States v. Carolene Products Co.* 304 U.S. 144 (1938)

<sup>50</sup> Sonu Bedi outlines the four criteria for the suspect class designation in his book, *Beyond Race, Sex, and Sexual Orientation: Legal Equality Without Identity* (2013). At 38, he states, “The four criteria that underlie the Court’s suspect class framework are history of discrimination, immutability, political powerlessness, and irrelevance...once

between some unchangeable or non-faultable characteristic and a given identity (e.g. skin color and race). To be a suspect class, however, a group must demonstrate a shared immutable characteristic in addition to the other three criteria. The difference between suspect classification and suspect class can be further demonstrated when considering the example of race and skin color<sup>51</sup>. When thinking about suspect classifications, a policy that picks out white people by their race would be similarly problematic as a policy that picked out black people by their race, as both classifications would trigger strict scrutiny. With the suspect class distinction, however, it would be the larger context of the black community's position in U.S., having faced both a history of discrimination and of political powerlessness, that would distinguish policies that picked black people by race from those picking out white people by race.

While immutability finds its origin in the suspect class distinction, which tends more to the historical positioning of a group, the criterion has faced a number of critiques regarding the lack of protection it offers in practice to marginalized groups. In the following section, I discuss critiques of immutability offered by legal scholars and black feminist scholars alike.

### ***Legal Scholars on Immutability***

Critics of the immutability standard have taken a number of different approaches to problematize its conception and use. Many of these critics have also posited possible legal alternatives that could replace immutability. In this section, I will outline some of the views that

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the Court determines that a group has met these criteria, rendering it a suspect class, laws that invoke the relevant classification or identity marker are subject to higher scrutiny.”

<sup>51</sup>These example come from a class lecture given by Prof. Stephen Engel titled, “Affirmative Action in Education and Employment” on January 24th, 2019 in his *Constitutional Law II: Rights and Identities* course.

my work interacts with and builds upon in order to both engage with the conversations already existing on this topic as well as to distinguish the focus of my thesis from that of other scholars.

Kenji Yoshino<sup>52</sup> developed his response to “immutability” in reference to the legal case *Rogers v. American Airlines* (1981). In this case, Renee Rogers, a black woman working for American Airlines, was told that she could not wear her hair in cornrows while on duty according to the company’s grooming policy. Rogers challenged this policy in a discrimination suit against American, stating that her hairstyle, “has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society”<sup>53</sup>. The court, however, did not see it this way. Challenging Rogers on both the historical and personal importance of her hairstyle, they deemed braids “easily changed characteristics” that were “not the product of natural hair growth but of artifice”<sup>54</sup>. Because hair was not an immutable trait of black women (or rather, not of black individuals nor women), the court decided that the American Airlines policy banning braids was not discriminatory.

Yoshino takes problem with immutability on account of how it excludes different definitions of race from its consideration. To demonstrate how this occurs, Yoshino relies on Neil Gotanda’s different categories of race-- “formal” race and “culture” race<sup>55</sup>-- where formal race refers to the categories of race (i.e. black, white, etc.) without attention to social history or social meaning, and culture race refers to culture and community practices<sup>56</sup>, from cultural dialects to artistic traditions to modes of dress. Immutability as a standard is reflective of formal race, where

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<sup>52</sup> Yoshino, Kenji. 2001. “Covering.” *Yale Law Journal* 111 (769).

<sup>53</sup> *Ibid* note 14.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* note 37.

<sup>56</sup> *Ibid* at 4, Gotanda defines formal race as “socially constructed formal categories...unconnected to social attributes such as culture, education, weath, or language” and culture race as “broadly shared beliefs and social practices; community refers to both the physical and spiritual senses of the term.”

race is understood through its biological markers like skin tone or hair texture, rather than through its cultural markers, like hairstyle or dress. In “treatment” cases such as *Rogers*, where courts are questioning how one is being treated based of an “already stipulated”<sup>57</sup> race, Yoshino argues that courts are more likely to use the formal understanding of race. These treatment cases are distinct from “formal” cases, or “cases in which determining the racial identity of the party is the issue”<sup>58</sup>. An example of formal cases include the U.S. race trials, where individuals would try to prove themselves to be of a certain race (often either white or not-black) in order to gain social privileges. In formal cases, Yoshino argues, culture race often plays the most important role in determining what race someone falls into.

The use of culture race to define racial categories is reflected in the decision of the legal case *Ozawa v. United States* (1922). In this case, a Japanese-American man named Takao Ozawa was denied his appeal for citizenship, which was not available to people of Asian descent at the time. Ozawa tried to bypass this limitation by arguing that he was indeed a white American by virtue of his skin color. In denying Ozawa’s whiteness, the court stated,

Manifestly, the test [of race] 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 darker than many of the lighter hued persons of the brown or yellow races.<sup>59</sup>

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<sup>57</sup> Ibid note 52, at 904.

<sup>58</sup> Ibid note 52, at 905.

<sup>59</sup> *Ozawa v. United States*, 260 U.S. 178 (1922). Further comment on these types of cases and the concept of biological race can be found in Ian F. Haney López’s article, “Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994), where he argues for a understanding of race as a “social phenomenon” (7).. More of López’s work will be discussed in the later chapters on identity.

In not recognizing the importance of culture in forming not only racial identities, but also sexual orientation and gender identities, Yoshino believes that anti-discrimination law currently does not protect marginalized peoples from policies that would push them to assimilate and “cover”<sup>60</sup> aspects of their identity. This pressure to cover one’s identity is particularly pernicious for aspects of identity that are considered mutable, where a “descriptive claim that a group can assimilate because of the mutability or invisibility of its defining trait transmutes into the prescriptive claim that the group should assimilate...”<sup>61</sup> To prevent this forced assimilation, especially for sexual, gender, and racial minorities, then, Yoshino argues for the inclusion of cultural identity under the protected categories of anti-discrimination law.

This is not an uncontroversial approach. Other scholars, like Roberto J. Gonzalez<sup>62</sup> and Richard Thompson Ford<sup>63</sup>, offer many critiques of legal definitions of culture and cultural rights. In direct response to Yoshino, Gonzalez argues that any attempt of courts to accommodate for cultural rights would simply not “reflect” the cultural realities of the groups in question. Additionally, Gonzalez believes that by attempting to define culture, courts would also “form”<sup>64</sup> the identity in question by marking off what cultural traits are important and which are not. Ford echoes this complaint in his critique of positing universal blackness, which he warns creates an equally oppressive and confining conception of race which excludes those don’t fit neatly under

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<sup>60</sup> Ibid note 52, at 772, Yoshino defines “covering” as a phenomenon where “the underlying identity is not altered nor hidden, but is downplayed.”

<sup>61</sup> Ibid at 877.

<sup>62</sup> Gonzalez, Roberto J. 2003. “Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine.” *Stanford Law Review* 55 (6): 2195–2227.

<sup>63</sup> Ford, Richard. 2005. *Racial Culture: A Critique*. New Jersey: Princeton University Press.

<sup>64</sup> Ibid note 61, at 2206-2207. Gonzales further clarifies this critique on 2210, stating, “Thus, when a court is called upon to recognize a cultural right, it may do so only by endorsing a partial and contested image of that group’s identity, thereby placing a heavy thumb on one side of a group’s internal struggle over its self-narrative.”

its purview. Ford uses the example of *Rogers* and the cornrow hairstyle to explain why treating hairstyles as culturally essential traits could be problematic:

For the black woman who dislikes cornrows and wishes that no one-- most of all black women-- would wear them, the right [to group difference] not only hinders her and deprives her of allies, but it also adds insult to injury by proclaiming that cornrows are her cultural essence as a black woman.<sup>65</sup>

Rather than supporting the inclusion of cultural rights in anti-discrimination law, Gonzalez posits an alternative to immutability that centers on the implication of disparate impact in Title VII cases, where the relevant question is whether a policy harms a particular group disproportionately to other groups. Disparate impact, Gonzalez believes, offers groups access to protection of mutable characteristics, as a policy can be shown to be discriminatory on the statutory level if it clearly harms one group at a much greater rate than others. Gonzalez calls for an expansion of disparate impact theory and the replacement of the immutability criterion by a consideration of the “adversity”<sup>66</sup> caused to the individuals asked to change said trait. This shift could, according to Gonzalez’s framework, offer more protection to marginalized groups under anti-discrimination law.

Returning to the *Rogers* case, Gonzalez does recognize some of the downfalls of disparate impact with regards to protection of mutable characteristics. In *Rogers*, the court determined that cornrows could not be tied to black women specifically because it had been adorned (and in their flawed understanding, popularized) by a white actress, Bo Derek, thus limiting the use of a

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<sup>65</sup> Ibid note 63, at 25.

<sup>66</sup> Supra note 62, at 2217-2218, Gonzalez explains the relationship of this new “adverse” impact idea in relation to immutability: “According to [the immutability] requirement, if a workplace policy burdens a mutable trait, it will normally not be considered to have an adverse impact, as the law assumes that one can easily choose to comply with such a policy or that any difficulty in doing so will be de minimis.”

disparate impact claim. As Paulette Caldwell points out in one of the seminal pieces of black feminist literature on these grooming policies cases<sup>67</sup>, the court ignored the fact that a black actress, Cicely Tyson, had actually been one of the first public figures to wear cornrows in popular media. Furthermore, they also denied the cultural, historical, and personal significance of styling hair in a particular manners more generally for Renee Rogers and black women.

An approach like that of Gonzalez might allow for courts to sidestep essentializing notions of what discrimination looks like, as in Rogers were the court decided the American Airlines policy could not be discriminatory because cornrows weren't unique to black culture. Using Gonzalez concept of adversity, courts could shift their focus on the extra burdens placed on black women with regards to hair. Physical damage to hair and to black women's body as described by Caldwell could easily fit within this description of adversity: "many of us risk losing [our hair] permanently after years of chemical straighteners; or perhaps... we fear that the entry of chemical toxins into our bloodstreams through our scalps will damage our unborn or breastfeeding children"<sup>68</sup>. The physical adversity caused by having change one's hair can also translate into cultural adversity, where adversity is distinctly caused to black women because of the cultural significance of hair. In conducting an ethnographic study on black women's relationships to their hair, Ingrid Banks argues that there is a different "quality"<sup>69</sup> to black women's concerns about their hair as opposed to white women's:

Certainly white women have concerns with their hair, but their concerns do not involve the actual alteration of hair texture to the extent that it is an expression of their cultural consciousness. Within a broader context, they do not have to deal

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<sup>67</sup> *Ibid* note 1.

<sup>68</sup> *Ibid*.

<sup>69</sup> Banks, Ingrid. 2000. *Hair Matters : Beauty, Power, and Black Women's Consciousness*. New York : New York University Press, c2000. 38.

with cultural and political constructions of hair that intersect with race and gender in relationship to mainstream notions of beauty, putting a great number of black women outside of what is considered beautiful in U.S. society. For black women, hair matters embody one's identity, beauty, power, and consciousness.<sup>70</sup>

However, even if the courts incorporated this conception of adversity into their evaluation of discrimination cases, there are still a number of problems with how the court views identity. As occurs in much of anti-discrimination law's framework, identities such as black women's are pulled apart for the purpose of analysis under the more easily understood categories of race and sex. This issue is described well within the work of Kimberlé Crenshaw. In highlighting the inconsistencies across how courts treat black women's discrimination claims, Crenshaw argues that anti-discrimination law currently can only understand black women's experiences in respect to their similarities with black men's or white women's: "sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics"<sup>71</sup>. Such is the case in *Rogers*, where Renee Rogers' claim was legally interpreted as two distinct claims: one of race discrimination and one of sex discrimination<sup>72</sup>. Some courts have taken this reductionist stance of black women's identity, where being a black woman is reduced to being black *and* being a woman, stating that Title VII is not meant to create a new identity for black women. Crenshaw cites the case of *Degraffenreid v. General Motors* (1976) as representative of this reduction, a case dealing with hiring discrimination against black women, in

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<sup>70</sup> *Ibid.*

<sup>71</sup> Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *University of Chicago Legal Forum* 1989, no. 1 (n.d.): 31. 151.

<sup>72</sup> *Supra* note 14, the court first considers how American has grooming policies for both men and women, therefore showing that it is not sex discrimination, then moves on to consider whether this is a race discrimination claim. In considering the race discrimination claim, they consider Roger's status as a black woman, but solely through the lens of whether her hair is an immutable racial characteristic, ultimately falling back into the rigid categories.

which the plaintiffs were denied the right to try their case *as* black women. In response to the idea of black women as an identity class, the court stated:

The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of ‘black women’ who would have a greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora’s box.<sup>73</sup>

This understanding of black women’s identity is further cemented through the immutability doctrine, which, in the words of D. Wendy Greene, creates a “‘legal fiction’: a judicially created rule which is not based in fact yet is treated as such in legitimizing zones of legal protection and inclusion”<sup>74</sup>. This legal fiction is created through an understanding of identity as immutable that relies solely on biological or genetic distinctions, thus missing the ways that mutable characteristics contribute to one’s identity. Additionally though, for black women, this legal fiction conceals how, as Kimberlé Crenshaw explains at length, black women’s experiences cannot be simply understood through the additive framework of black men’s oppression plus white women’s oppression. This fact is further concealed at the point where immutability looks to classify subjects into clear identity categories, such as race and sex, in order to determine what characteristics are immutable. To better equip anti-discrimination law to better understand both black women’s claims, but also discrimination claims surrounding racial culture more generally, Greene posits a social constructivist view of identity which also understands “mutable characteristics such as skin color, hair, language, and dress as constitutive of race”<sup>75</sup>, which is similar to the cultural rights approach taken by Yoshino.

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<sup>73</sup> *Degraffenreid v. General Motors*, 413 F Supp 142 (E D Mo 1976)

<sup>74</sup> *Ibid* note 10.

<sup>75</sup> *Ibid* at 1023.

### *Shifting Focus to Fault*

As demonstrated in the last section, there have been a variety of critiques and alternatives offered in response to the immutability criterion. Scholars such as Yoshino, Gotanda, Greene, and Caldwell critique immutability for its inability to recognize cultural identity and push for an expansion of the legal understanding of anti-discrimination law to include protection of culture. Scholars such as Gonzalez and Ford, on the other hand, worry about the implications of legally defined cultural rights. They argue that allowing courts to define culture can lead to harmful essentialism which could be as oppressive to the groups it claims to describe as the immutable criterion itself.

While my response to immutability is informed by the ideas and arguments of the aforementioned people, my problem with the criterion is much different. In my eyes, the most insidious concept underlying the idea of immutability is the idea that one can be faulted for socially significant aspects of their identity, even when they are faulted because of historical discrimination and oppression. When anti-discrimination does not take a stand against this fault-based notion of identity, marginalized peoples whose identities and cultural expression fall outside the dominant social norms are left especially vulnerable. Such is the case with grooming policy discrimination, where white conceptions of professionalism are weaponized against black women and their *faultable* hairstyling choices.

While ultimately my solution does, similarly to Yoshino and Greene, push for protection of culture, it does not favor a legal definition of black women's identity or an account of what it means and looks like to be a black woman. Rather, my solution focuses on how individuals are identified by others, which relates to the cultural interpretations of certain traits, appearances, and

enactments of identity, regardless of whether those interpretations hold true for every individual who falls into a similar identity category.

### ***Fault and Immutability throughout Legal History***

*Weber v. Aetna Cas. & Surety Co.* (1972) is an example of a 14th Amendment Supreme Court case that relied on heavily on the language of fault in the court's decision-making rationale. In *Weber*, the Court was evaluating a Louisiana labor law involving compensation for the families of recently deceased employed men. The law made it harder for "illegitimate"<sup>76</sup> children, i.e. children born out of wedlock, to access benefits from their father's employment than children born within a marriage. In deciding that this compensation law was discriminatory and unconstitutional, Justice Powell stated:

...imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth....<sup>77</sup>

In other words, one should only be punished for those things that they can be faulted for. The idea of punishment is implied in the concept of legal burdens, while the idea of fault is implied in the reference to individual responsibility. In this statement, Powell is suggesting that if an individual cannot be attributed fault for an action, such as in the case of being born an "illegitimate" child, then they cannot be justly penalized for their status. A year later, in another Supreme Court case, *Frontiero v. Richardson* (1973), the concept of non-faultable identity traits

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<sup>76</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)

<sup>77</sup>*Ibid.*

was defined as the “immutable” in response to sex discrimination: “...sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth...”<sup>78</sup>.

Fault, in both these cases, plays a key role for the Court’s evaluation of discrimination against a particular identity. The Court’s rejection of the discriminatory policies in *Weber* and *Frontiero* relies on their understanding of “illegitimacy” or sex-identity as being un-faultable designations, things that individuals cannot have control over or be considered responsible for. In *Weber*, the Court even goes as far to say that this is the “basic concept of our [legal] system”<sup>79</sup>. Implicating fault in relation to identity, though, implies that in cases where individuals can be demonstrated to have responsibility for a given aspect of their identity, courts are less likely to consider this unlawful discrimination. Such is true in the grooming policy cases, where because black women make the *choice* to style their hair a certain way, the regulation of this choice by corporations is not often considered discriminatory, even when it occurs in clearly racialized and gendered ways. The immutability criterion has become the legal vehicle to justify this rationale of fault-based identity, where faultable decisions are considered mutable and are therefore left vulnerable to outside control.

In defining immutable characteristics, fault has also proved especially useful in avoiding complicated questions of whether a trait really can be changed or not. For example, there are certain traits we can be faultless in having, but that we can still change. Katherine Baird Darmer

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<sup>78</sup> *Frontiero v. Richardson* 411 U.S. 677 (1973). *Frontiero* was a case concerning the reception of benefits by dependents of military officers. In this case, a woman named Sharron Frontiero, a military officer, was attempting to claim benefits for her husband, who was her dependent. The process for proving that the husband of a female military officer was a dependent was much harder and required more proof than for proving a wife of a male military officer. Ultimately, the court ruled in favor of Frontiero, and determined the policies to be gender discrimination within the military policy.

<sup>79</sup> *Ibid* note 76.

draws attention to an example of this in her discussion of the status of an undocumented immigrant child:

[A] young child brought into the country illegally, before she has the autonomy to make such decisions, might be deemed an "undocumented alien" or "illegal alien" though the child is faultless, but that trait, like "illegitimacy," is not beyond the capacity for change, as a child whose parents brought the child into the country without proper documentation may eventually obtain citizenship.<sup>80</sup>

In a further challenge to this distinction between faultless and unchangeable traits, the creation of new technologies that allow individuals to alter traits previously thought to be "fixed" continues to obscure the distinction. For example, skin color has often been thought of as a fixed, biologically determined characteristic that one both does not have control over and ought not be faulted for. However, skin color is not entirely out of the realm of voluntary cosmetic change. The plethora of tanning salons, skin bleaching products, and chemicals aimed at skin lightening challenge skin color's designation as entirely unchangeable. Furthermore, there are aspects of identity that are well within the individual's power to alter but that courts rarely want deem faultable, such as religion.

Thus, to avoid these dilemmas created by a strict definition of immutability, the concept of fault allows the court to shift the question from whether an agent can change a trait to whether an agent should be faulted for a trait. The immutability distinction is then only given to those traits the court deems we ought not be faulted for and anti-discrimination law becomes protection of the

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<sup>80</sup> Baird Darmer, M. Katherine. 2010. "SYMPOSIUM: LATCRIT XIV OUTSIDERS INSIDE: CRITICAL OUTSIDERS THEORY AND PRAXIS IN THE POLICYMAKING OF THE NEW AMERICAN REGIME, OCTOBER 1-4, 2009: STRUCTURAL BARRIERS: KEEPING OUTSIDERS OUT: 'IMMUTABILITY' AND STIGMA: TOWARDS A MORE PROGRESSIVE EQUAL PROTECTION RIGHTS DISCOURSE, 18 Am. U.J. Gender Soc. Pol'y & L. 439." *American University Journal of Gender, Social Policy and the Law* 18 (439).

immutable. As for discrimination that relates to one's identity, courts must establish what it means to be responsible for an aspect of an identity and to what extent one is responsible for particular characteristics.

When it comes to external appearance, courts tend to call those parts of appearance that individuals actively choose mutable, while calling those that we do not actively choose immutable. By drawing the line at decisions that can be credited to the active choice of an individual, immutability formulates the universal identity subject which defines all members who fall into that class. This allows courts to easily categorize both the identification ascribed to the victim (i.e. the identity class) as well as the list of attributes that sort individuals either within the class or outside of it. In doing so, the court does not have to really consider the individual at all, as any individual choices made are excluded from the definition, but instead can solely consider the universal category.

The problem with this as it relates to black women is that the category ascribed to them is never a comprehensive one. Courts have outright denied black women the right to try their cases *as* black women, and instead force them to contend with either an immutable understanding of their race or their gender<sup>81</sup>. While undoubtedly these decisions are characteristic of the historical devaluation and erasure of women of color, they are also symptomatic of the "immutable" understanding of identity by which courts have abided. By positing immutable characteristics, like race or sex, and then establishing the existence of a universal subject (or collection of traits that constitutes said subject) falling within these categories, courts have created distinctions that

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<sup>81</sup>See Angela Onwuachi-Willig, "Another Hair Piece: Exploring New Strands of Analysis under Title VII," at 1090 on *Rogers*: "The district court evaluated Roger's claims of discrimination "as a woman, and more specifically, a black woman" through two separate analyses: one for sex and the other for race, but not for both race and sex as her complaint indicated."

offer little flexibility in their interpretation<sup>82</sup> and ultimately exclude any experience that cannot be sorted into these classes. Women of color are thus misrepresented in anti-discrimination law because of the law's separation of the two intersecting aspects of their identity: race and gender.

In the context of grooming policy cases, the question of whether an agent can be attributed fault for an external aspect of appearance directly impacts their right to be protected from discrimination in the workplace on said aspect. In this inquiry, the conceptualization of identity used in anti-discrimination law often does not accommodate individual agency or choice, as this reflects individual responsibility and therefore fault. Thus, as it relates to external characteristics, immutability protects solely the passive manifestations of identity on our bodies, i.e. the ones we cannot be attributed responsibility for, like skin color or hair texture. Active manifestations, like hairstyle or dress, fall under the domain of individual responsibility and therefore are outside the protection of anti-discrimination.

### ***Fault and Legal Accountability***

Fault can also be framed in terms of accountability. To say that one can be faulted for an aspect of their identity is also to say that one can be held accountable for that aspect, that they can be treated as responsible for whatever enactment they are faulted for. The relationship between fault and accountability reflects the possibility of punishment or sanction<sup>83</sup> in response to the

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<sup>82</sup> Crenshaw, *supra* note 71 at 151-152, explains the disconnection between these universal standards and black women's treatment well: "Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics...As this analogy translates for Black women, the problem is that they can receive protection only to the extent that their experiences are recognizably similar to those whose experiences tend to be reflected in antidiscrimination doctrine."

<sup>83</sup> Allen, Anita L. 2003. *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability*. Feminist Constructions. Lanham, Md: Rowman & Littlefield. 4.

faultable action. In her discussion of the relation between privacy and accountability, Anita Allen highlights the important function of power in discussions of accountability: “Accountability can be used to disable power and, conversely, to enable it. Anyone owed accountability, like anyone able to extract it, has social power over others”<sup>84</sup>. In the cases of study of this thesis, black women are being faulted for their hairstyling decisions. This begs a number of questions: Who is faulting these women? Who has the power to sanction them for their hairstyling decisions? Who are these black women accountable to?

In workplace grooming policies, the employee is held accountable for any external grooming decisions by the company they work for. This means that the company has the ability to fault the employee for any grooming decisions made and to punish the employee ‘responsible,’ whether through chastising them, withholding promotions, or even firing them, as they see fit. Legally, the ability to determine one’s business image, which includes the presentation of individual employees, is considered a legitimate business right: “An employer’s desire to project a conservative and business-like image is a consideration recognized as a bona fide business purpose”<sup>85</sup>. Thus, businesses are able to punish employees, such as black women whose hairstyling decisions fall outside the dominant conception of “professional,” or whose grooming choices transgress the business’ ideals.

Businesses are able to control the actions and lives of their employees in a number of other respects, such as work hours, work benefits, workplace conditions, etc.. However, it is solely through grooming policies that the business exert direct authority over their employees’

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<sup>84</sup> *Ibid* at 26.

<sup>85</sup> *Ibid* note 14.

external appearances. This makes grooming policies unique in their relationship to the body and normative business conceptions of what bodies in the workplace ought look like.

Cases such as *E.E.O.C.*, *Rogers*, and others demonstrate many businesses current approach to using their social power, as Allen puts it, to enforce their policies: limiting the presence of socioculturally black hairstyles in their workplaces. When black women challenge these discriminatory policies in court, courts focus on immutability and the fact that hairstyling is a *choice*, therefore rendering it mutable and faultable. Immutability thus precludes the court from actually investigating what kinds of oppressive norms are inscribed into company's understanding of "professional" hair. It is clear then that the immutability standard does not actually allow for anti-discrimination to comprehensively challenge deeply rooted racist and sexist social hierarchies. In the next chapter, I present a two-part understanding of identity that I believe more accurately captures how discrimination occurs: passive and active identification. In moving towards the active understanding of identity, courts would be able to understand how individual's choices play important roles in how they are treated by others in the world.

### Chapter 3: Identity

“I seldom think of my girlfriend, Kathy, as black.... A lot of the times I look at her and it’s as if she is white; there’s no real difference. But every now and then, it depends on what she is wearing and what we’re doing, she looks very ethnic and very Black.”

White Detroit Politician<sup>86</sup>

“I move slowly through the world, accustomed now to seek no longer for upheaval. I progress by crawling. And already I am being dissected under white eyes, the only real eyes. I am *fixed*. Having adjusted their microtomes, they objectively cut away slices of my reality. I am laid bare. I feel, I see in those white faces that it is not a new man who has come in, but a new kind of man, a new genus. Why, it’s a Negro!”

Franz Fanon, *Black Skin, White Masks*

Personal identity and identity can be conceptualized in a number of ways. For example, identity can be understood as sameness across situations, times, and places. Another possible interpretation of identity is essence, or those properties that make the thing in question what it is, as opposed to something else. In anti-discrimination law, identity is often thought of in the social sense. Different from the first definitions of identity offered, social identity references the social categories through which an individual understands themselves and other people. Individuals can occupy a number of social identities, such as black, woman, student, American, etc., all of which frame how they interact with the rest of the world in different contexts. In choosing which of these social identities to protect, anti-discrimination laws such as Title VII center around those identities seen as majorly important to one’s perspective of the world, such as race, sex, religion, and natural origin.

In the previous chapter, I demonstrated how the immutability criterion currently relates to the manifestations of these social identities on the body, where only those aspects of identity for

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<sup>86</sup> Haney-López, Ian F. 1994. “Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, The.” *Harvard Civil Rights* 29: 63.

which an individual cannot be considered responsible are given the protection of anti-discrimination law. In this chapter, I argue that this fault-based conception of identity misconstrues how individuals are actually identified by others, which is often informed by their agential (and therefore, faultable) enactments of identity. To do so, I first explain how social identity is constructed. I then relate this to my first type of identification-- passive identification--which describes how individuals are identified by others absent any decisions. This is the construction of identity I see immutability relying upon. Following this, I move on to explain the conception of identity that immutability does not account for: active identification. In explaining the concept of active identification, or identification that occurs on the basis of individual choices, I describe how agency and agential enactments of identity play a major role in determining how individuals are understood by others. Throughout the chapter, I develop this analysis through the historical example of black women's identification and its relationship to their hairstyling decisions.

### ***The Construction of Identity***

To fully understand social identity as it relates to passive and active identification, it is first important to examine how the origins of identification and relationship to social identity. Through its reference to essential qualities and biological features, the immutability criterion often formulates identities such as race and gender as being universal facts about an individual rather than socially created phenomena. This understanding fails to deal with the complex ways in which social distinctions, which then turn into identifications, are created within a social context.

This section considers how the social origins of identifications are obscured through the language of immutability.

Judith Butler discusses how the problematic language of “being” obscures the social origins of identification, where biological and physical distinctions are treated as ahistorical, objective truths. Examples of this language of “being” include statements that take the form “she *is* a woman” or “they *are* black.” When making statements of this nature, the subject being referenced is not solely marked with a social identification, e.g. “woman” or “black”. Additionally, the implication of a fixed relationship between the social identity and the body, where identity is “something one has, or a static description of what one is,”<sup>87</sup> ties the signification itself to the body. In doing so, the identification being related to the body is treated pre-existing the body itself, a category that makes the body socially intelligible from the beginning.

Thus, the language of “being,” which marks identity as static or fixed, disguises the social origin of identity categories<sup>88</sup>. To demonstrate her points, Butler relies on the example of gender. While many more people are now inclined to view gender as a product of patriarchal systems, social norms, and social values, gender was once thought of something biologically and socially fixed. This view of gender as immutable, or objectively true and fixed to the body it marks, is most often tied to the relationship between sex and biological identity. Because sex categorization relies on biological facts about bodies, such as having XX or XY chromosomes, sex is seen as inherent to a person’s body, tied to the material being of the body itself.

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<sup>87</sup> Butler, Judith. *Bodies That Matter: On the Discursive Limits of “Sex.”* New York: Routledge, 1993: 2.

<sup>88</sup> *Supra* note 87, at 2, Butler highlights how this language is often used within political and legal systems: “... the law produces and then conceals the notion of “subject before the law” in order to invoke that discursive formation as a naturalized foundational premise that subsequently legitimates that law’s own regulatory hegemony.”

Here, Butler argues, we can see how the language of “being” an identity obscures that even biological distinctions, like determining sex by certain chromosome sets or determining race by ancestry, are products of social differentiations. It is not that these characteristics would not exist separate the society to name them. Presumably, there would be individuals with XX and XY chromosomes, regardless of if society even discovered their existence or organized different identities around them. What Butler is highlighting, rather, is that the ways these characteristics are named in relation to different social identities, such as “male” and “female” for chromosomal differences, are of social origin. These categories of male and female have not always existed, nor do they exist in the same ways across different times and cultures. There was, at some point, an intentional decision made to create social identities relating to these biological differentiations. However, when stating that one *is* female, for example, this disguises how these categories have been socially created by suggesting the identity objectively relates to some biological distinction.

These distinctions, though socially originated, and the identities formed around them, are not without significance; even identities that are socially produced can distinctly impact how we understand ourselves and our relationship to the world. Rather, in this discussion of “being,” Butler is highlighting that it is not a necessary fact that these identities be tied to the attributes they pick out. For example, we could imagine a world where sex was not established by chromosomal pairings, but rather hair color. Perhaps in this world, our understanding of sex distinctions would be less related to biological sex functions and more dependent on the different shades of hair color that one could have. Being male could simply mean having brown hair, and then sex distinctions could be attributed as hair characteristics are today. In this world, we could name chromosomal distinctions as secondary attributes with no identity tied to them, while hair

color could be used to mark one's social position. Differences in reproductive roles could be recognized without relating to any social identity, which has become increasingly true of different biological hair colors. The purpose of this example is simply to demonstrate how our understanding of biological identities, like male or female, are not necessary distinctions. As Butler states well,

[T]his "body" often appears to be a passive medium that is signified by an inscription from a cultural source figured as "external" to that body. Any theory of the culturally constructed body, however, ought to question "the body" as a construct of suspect generality when it is figured as passive and prior to discourse.

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Social identities, such as male and female, are made, and reiterated, throughout our social history. Any discussion of said identities therefore must engage with these social origins.

The identification with a social identity frames one's relationship to society, shaping the not only roles one can and does occupy, but also the norms are expected of them. This establishes people as what Charlotte Witt calls "social individuals"<sup>90</sup>; given how one is identified, they are then socially positioned in particular ways which influence their every interaction with the world. Depending on the identification, their awareness of or acceptance of this role is unnecessary. Witt calls this the distinction between a "voluntarist" view, where one must accept and identify with the role in order for it to have relevance to their life and social position, like a priest, and an "ascriptivist" view, where one does not need to accept nor identify with the role in order for it to have relevance, such as being a mother<sup>91</sup>. In the case of the priest, one must identify themselves with "priest" and accept that role in order for them to occupy that social position and for others to identify them with it. In the case of the mother, one does not

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<sup>89</sup>Butler, Judith. 2015. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge. 129.

<sup>90</sup>Witt, Charlotte. 2011. *The Metaphysics of Gender*. Studies in Feminist Philosophy. New York: Oxford University Press.

<sup>91</sup>*Ibid* at 43.

need to identify or affirm their role as a mother in order for them to occupy that social position and to be identified with it.

### ***Passive Identification***

Passive identifications are based on the body, where biological and physical traits signify an association with a particular identity. Passive identifications require no action on the part of the individual, and often individuals have little control over the ways they are passively identified by others in their society. Such tends to be especially true of race where a person's skin color or facial features are used as passive identifiers of their belonging to a certain racial group. Sex, on the other hand, is more complicated, though the presence of physical characteristics associated with the sexes, e.g. breasts with female, deeper voices with male, can serve as passive identifiers.

As it relates to identities such as sex and race, one's awareness or acceptance of their identification is irrelevant to their social positioning on its basis, especially when they are assigned it based on biological and physical traits. Referring back to the examples of Witt<sup>92</sup>, while both the priest and the mother can more easily shed or hide their labels respectively, identities that are attached to the body are uniquely tied to everything one does. In the words of Linda Alcoff, the visibility of the body and body markers mean that these sorts of identities are constantly "guiding if not determining the way we perceive and judge others and are perceived and judged

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<sup>92</sup> It is important to note that Witt ultimately argues that gender, *supra* note 90 at 79, "has normative priority in relation other social roles in an individual's social agency." This means that Witt sees as gender as the most essential social identity in the shaping which social roles an individual can occupy. This is a point on which we disagree. As I argue later in this chapter, the ethical implications of a racial identification completely transform how one is perceived by others and the social position they are associated with. Further, I would say that race actually shapes one's access to different social roles, such as Witt's example of "mother". Women of color in the U.S. have been historically denied this label because of their race, from the days of slavery where black mothers were denied the right to their own children (and their bodily autonomy) to the non consensual sterilization of Latina women covered in the legal case *Madrigal v. Quilligan* (1978).

by them”<sup>93</sup>. In this sense, passive forms of identification are judgments that one cannot escape without major inconvenience, insofar as one incurs them on the basis of the body. Skin color, for example, is an unavoidable marker on the body. While the color is not entirely unchangeable, as one can engage in dangerous processes like chemical bleaching or tanning in order to alter it, skin itself cannot always be meaningfully hidden when interacting with the world. Thus, when I walk outside with any part of my body exposed, whether it is my face, or hands, etc., I can be passively identified by others with a certain racial group, even if the identification is simply that I am racially ambiguous.

To say that one is passively identified based on biological and physical characteristics does not entail that these identifications are clear-cut, exact, or correct. For example, I am a mixed race individual. Often, when people see me, they are not quite sure what racial group I fall into based simply on my skin color. This can often lead people to passively identify me with groups I do not associate with and, given more information, that they would also be unlikely to associate me with. Passive identification is not that it is a precise and perfect action. However, this is irrelevant to the impact of passive identifications on our social position and treatment. The privileges afforded to people of color who are white-passing, meaning they present many physical characteristics that lead people to identify them as white, reflect how even incorrect passive identifications still shape how an individual moves through the world.

Passive forms of identification confine the ways individuals are understood, limiting their perception in society to the cultural intelligibility of their body. Cultural intelligibility here references how all enactments of identity are understood in relation to how said identity has been

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<sup>93</sup>Alcoff, Linda. 2006. *Visible Identities: Race, Gender, and the Self*. Studies in Feminist Philosophy. New York: Oxford University Press: 5.

understood and identified in the past. The ways one acts and moves through the world in the present are always related back to this cultural context. For example, to be black means to continuously move through the world *as black*, to be intelligible through the historical significance and meaning of blackness. The perception of this identity by others is fundamentally tied to the social value that has been placed on the label given. Thus, passive identification orients both the individual to the world as well as the world towards individual in a particular way. Bodies must be culturally intelligible in order to gain social meaning within their society, as intelligibility is the grounds for any meaning. In the words of Butler,

...to be material means to materialize, where the principle of that materialization is precisely what ‘matters’ about that body, its very intelligibility. In this sense, to know the significance of something is to know how and why it matters, where ‘to matter’ means at once ‘to materialize’ and ‘to mean.’<sup>94</sup>

The social meaning and value of the identification are determined by the historical and social context in which the identification is created and reiterated. This can be demonstrated through an analysis of race and how the passive identification of blackness has been given significance within the context of the United States. White supremacy is rampant in U.S. dominant culture, both in its inception and in its proliferation throughout history. By dominant culture, I am referring to the cultural norms that guide the formation of social structures such as law, politics, and education, as well as the norms that impact social interactions and underlie moral evaluations. The “racial contract,” a concept created by Charles W. Mills<sup>95</sup>, provides a good depiction of how white supremacy impacts dominant culture. Mills points out that the absence of white supremacy as a concept within our national discourse reflects its position as the foundation,

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<sup>94</sup> *Supra* note 87, at 34.

<sup>95</sup> Mills, Charles W. 1997. *The Racial Contract*. Ithaca, NY: Cornell University Press.

both historically and currently, for our understanding of the social contract. The social contract is a political theory that details the tacit agreement of members of a society to give up certain rights and privileges in order for the society to function as a whole.

Within Mills' *racial* contract, whiteness is treated as the origin for all society, even when this whiteness is imposed onto other, pre-existing non-white communities<sup>96</sup>. Whiteness is construed as being reflective of civil society, while nonwhiteness is construed as representing savageness. Once forced into (white) society, nonwhite people are given a status of *nonbeing*, in that they are not invited to buy into the social contract, but rather are forcefully subjected to its classifications. This occurs in all aspects of U.S. society, and Mills even argues globally, where the association of *nonbeing* means that by nature, non-white individuals are "born *unfree* and *unequal*,"<sup>97</sup> a designation that subjugates any trait, action, or concept associated with this *nonbeing* as less valuable or less moral than the white culture.

This value-laden judgment is not simply *based on* the identification, but is *fundamental* to the identification itself<sup>98</sup>. J. Reid Miller expands on this metaethical analysis of race through his dismantling of the pre-evaluated subject<sup>99</sup>. The pre-evaluated subject is the subject who exist without any ethical judgments being placed upon them, the person who has not yet been given their social value. In arguing that this subject does not exist, Miller states, "value, on the contrary, will disclose itself not as this or that *kind* of difference but as that by which anything could show

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<sup>96</sup> *Ibid*, at 13: "The role played by the "state of nature" then becomes radically different. In the white settler state, its role is not primarily to demarcate the (temporarily) prepolitical state or, perhaps better, *nonpolitical* state (insofar as "pre-" suggests eventual internal movement toward) of *nonwhite* men. The *establishment* of society thus implies the denial that a society already existed; the creation of society *requires* the intervention of white men, who are thereby positions as *already* sociopolitical beings."

<sup>97</sup> *Ibid*, at 16.

<sup>98</sup> This point is furthered by the articulation of Butler earlier in this paper on how the distinctions we make in terms of biological identity, while seemingly objective, are products of social differentiation, and therefore must be evaluated for their social significance.

<sup>99</sup> Miller, J. Reid. 2017. *Stain Removal: Ethics and Race*. New York, NY: Oxford University Press.

up *as such*-- that is, by which any entity exists as “itself”.<sup>100</sup> What Miller is highlighting here is the ethical extension of Butler’s analysis of socially created distinctions. Insofar as identities, even those based on biology, are constructed, and specifically constructed within a context where distinctions operate as statements of social position, the passive identification of the individual is necessarily also an identification of the social meaning of the identity.

Thinking about the conceptualization of black women’s bodies in the white Western mindset illuminates how the passive identification of *black woman* is value-laden. In her piece, “Racing Sex- Sexing Race: The Invention of the Black Feminine Body”<sup>101</sup> Kaila Ada Story lays out the historical construction of black women’s bodies in the European imaginary, where the combination of sexist constructions female bodies as different and the racist construction of black bodies as non-human and inherently sexual operated to shape perceptions of the black female body. In reference to this, Story states:

“African and European female bodies were compared to apes and other mammals to determine their moral worth and degree of humanity. “Experiment” and “discovery” by European naturalists and anatomists deemed European’s women’s bodies *dangerous* and *suspicious* due to the fact that they had anatomy unlike males; African bodies were *hypersexual* and ultimately *nonhuman* because of their polarization to whiteness.”<sup>102</sup>

Thus, the passive identification of the black female body as *black female* held a certain social significance, which translated to a certain social standing, of black females in the Western world. Examples of this impacted actual black women include the story of Sarah (Saartjie) Baartman, a South African black woman who was put on display throughout Europe as ‘Hottentot

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<sup>100</sup> *Ibid*, at 6.

<sup>101</sup> Story, Kaila Ada. 2010. “Racing Sex- Sexing Race: The Invention of the Black Feminine Body.” In *Imagining the Black Female Body: Reconciling Image in Print and Visual Culture*, edited by Carol E. Henderson, 1st ed. New York: Palgrave Macmillan.

<sup>102</sup> *Ibid*, at 28.

Venus'. The treatment of her body during her life as "freakish" became emblematic of the European fascination and otherization of black women's bodies. After her death, the display of her body in museums "as evidence that African women were the missing link between animals and humans..."<sup>103</sup> demonstrated the ultimate dehumanization and lack of respect that black women and their bodies were afforded in the white consciousness.

### *Active Identification*

Though one is confined by their passive identification in its connection to the visible, this does not imply that one has no agency in how they interpret and further give meaning to their own identity. Rather, passive identification shapes the perspective<sup>104</sup> from which one operates, which one can act through in a variety of individualized ways. Thus, for example, those who identify as women enact their womanhood in a variety of individual ways, like what they wear, how they act, how they understand themselves, etc., even while operating from a similar social role and perspective. This reflects a realist<sup>105</sup> conception of identity, which understands identity as not only a marker of social status, but also an individually interpreted phenomena, where people can enact and make sense of their identity in distinct and unique ways. It is in this sense that agential decisions play an essential role for identity. While passive forms of identification can occur

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<sup>103</sup> Henderson, Carol E., ed. 2010. *Imagining the Black Female Body: Reconciling Image in Print and Visual Culture*. 1st ed. New York: Palgrave Macmillan, at 4.

<sup>104</sup>This language of "perspective" comes from Witt, *supra* note 90, at 60, where Witt argues: "...most social individuals are agents; they do not simply occupy a social position, but they act in and through it. Agents are individuals who are capable of intentional behavior, are capable of entertaining goals (singly and in groups) and figuring out how to achieve them, and are capable of acting from a standpoint or perspective."

<sup>105</sup>This conceptualization of the realist concept of identity comes from Linda Alcoff and Satya Mohanty in the anthology, "Identity Politics Reconsidered" (2006).

regardless of one's acceptance of them, the individual still makes active choices of how to talk, act, dress, etc., which also contribute to how they are perceived by others.

However, individual interpretations of identity are not limitless, and still must be culturally intelligible. As Tobin Siebers states well, "identities are not infinitely interpretable, then, because they obey the rules of their formation and have strong connections to cultural representations"<sup>106</sup>. So, for example, one can interpret their womanhood in individual ways until the point at which it is no longer culturally intelligible as womanhood. Once one transgresses that boundary, they are either seen as subverting the identity, or abandoning it altogether. Butchness is primary example of this process, which, as a more masculine lesbian identity, is construed by some as being a deviant form of womanhood and by others as an abandonment of womanhood altogether, regardless of whether the individual in question actually views their own relationship to womanhood in that way. This displays how, regardless of if one understands a certain enactment as being an extension of their identity, others' perceptions of their choices are still filtered through their identification. Kai M. Green's response to critiques of a black lesbian magazine with phallic imagery that bemoaned its adherence to stereotypes that lesbians want to be "like men" highlights the restrictive nature of cultural intelligibility: "Do lesbians have to be women? What kind of women?"<sup>107</sup>

Ian Haney-López's concept of racial choices<sup>108</sup> reflects how these agential decisions, and the cultural context through which they are understood, occur with regard to race. In describing

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<sup>106</sup> Siebers, Tobin. 2006. "Disability Studies and the Future of Identity Politics." In *Identity Politics Reconsidered*. New York: Palgrave Macmillan. 18.

<sup>107</sup> Green, Kai M. 2016. "Troubling the Waters: Mobilizing a Trans\* Analytic." In *No Tea, No Shade: New Writings in Black Queer Studies*. Durham: Duke University Press. 69.

<sup>108</sup> *Ibid* note 86.

how the everyday decisions people make are racialized, Haney-López uses the example of hip-hop and rap:

“For example, seemingly inconsequential acts like listening to rap and wearing hip hop fashions constitute a means of race affiliation and identification. Many Whites have taken to listening to, and some to performing, rap and hip hop. Nevertheless, the music of the inner city remains Black music. Rapping, whether as an artist or audience member, is in some sense a racial act”<sup>109</sup>.

In López’s example, the passive identification of black gives broader social meaning to choices associated with it, such as racialized act of listening to rap. It is passive identification *in addition* to the personalized enactments that give true significance to the individual identity. For example, what it means to experience the world while constantly being passively identified as “woman” does not hold for all women. First, there are a variety of other passive identifications that are equally relevant to one’s experience of the world, e.g. race, ability. Additionally, though, all women experience their identity differently due to the choices they make on a person-to-person basis every day. Being passively identified as *woman* introduces the normative social conceptions of what womanhood ought look like, dependent on the cultural context she is in. Compounded with the individual women’s active enactments of her own identity, these two elements give meaning to the woman’s social identity. That is, if I, as a woman, choose to enact my identity, in binary terms, in very feminine ways or very masculine ways, it is the combination of my identification as woman and my individual choice to present myself in a certain way that shape how others perceive me.

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<sup>109</sup> *Ibid* note 86 at 49-50.

If I am identified as a woman and present in a very feminine way, others might perceive me as dainty, while if I present as very masculine, others might perceive me as butch or a tomboy. While either way I am identified as woman, how I am treated by others vastly changes depending on my individual interpretations of my identity. If I act feminine, I might experience more patronizing treatment by others who perceive me as less competent because of what it means to be both a woman and feminine. If I act masculine, I might be treated with more contempt for seemingly transgressing gender norms, or perhaps be deemed aggressive or manish. Perhaps my enactment of my womanhood in either of these two manners produces entirely different responses by others.

Importantly, in these examples, it is the combination of the ways one is passively identified and actively identified that ultimately contribute to what their identity means in the world. The passive identification marks the individual based on their physical traits with a social identity, which is connected to some cultural context and role within that context. With any social role follows a number of social norms, i.e. what is expected from an individual filling this role, what standards are they subjected to. Black women in the U.S., for example, are constantly being subjected to white beauty standards, e.g. straightening their hair, which they are pushed to emulate to be considered beautiful in dominant social views. However, how one experiences their social identity does not end there, as individuals who are passively identified still move through the world and make decisions. Though individuals can enact their identity in any number of personalized ways, the social significance of each decision is dependent on the social identity one is passively identified with. The choices we make can then further actively identify us with

different interpretations of our passive identification, informed by the historical context in which the identity is understood.

When investigating discrimination occurring against an individual, both forms of identification are involved. The ethical component of active identification directly connects to ethical evaluation of the passive. Thus, in terms of race, the evaluation of blackness as lesser or bad in U.S. society directly correlates to the perception of individual actions that further identify an individual with it. This is what makes race what Evelyn Brooks Higginbotham calls a “metalanguage”<sup>110</sup>. In defining this concept, Higginbotham states that, as a metalanguage, “[race] speaks about and lends meaning to a host of terms and expressions, to myriad of aspects of life that would otherwise fall outside the referential domain of race”<sup>111</sup>. In this sense, race codes all other decisions and positions that the raced individual holds in society.

### ***Hairstyling and Identification***

“An activist with straight hair was a contradiction. A lie. A joke really.”  
-Gloria Wade-Gayles

Historically, hair has operated as an embodied signifier of blackness. In the context of racial identification, defining hair as an embodied signifier references the historical use of hair to identify an individual’s race. During the race trials of the 1800s, where individuals would try to prove they were not black and therefore not a slave, hair became an important marker for one’s social (and racial) status. An example of this is the case *Hudgins v. Wright* (1806). In this case, Jackey Wright, a female slave, tried to prove her grandmother was a free woman by showing she

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<sup>110</sup> Higginbotham, Evelyn Brooks. 1992. “African-American Women’s History and the Metalanguage of Race.” *Signs* 17 (2): 251–74.

<sup>111</sup> *Ibid* at 255.

was Native American, which would, by extension, free Wright. She argued for her Native American heritage based on the fact that her grandmother's, mother's, and her own hair was straight rather than curly, which the court subsequently agreed with. In making this distinction legally, the judge established a racial test in which curly hair, because of its relation to blackness, became synonymous with being subordinate: "*Nature has stamp'd upon the African and his descendants two characteristic marks, besides the different of complexion, which often remains visible after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair...*"<sup>112</sup>.

Additionally, hair can be viewed as an embodied signifier in the ethical sense. J. Reid Miller, for example, uses the term embodied signifier to describe how the race can signify the ethical or moral worth of a given subject<sup>113</sup>. In the sense that hair is coded with the ethical value on the basis of race, it can also be viewed through this lens. This fits in with Higginbotham's concept of race as a metalanguage, which "makes hair "good" or "bad," speech patterns "correct" or "incorrect"."<sup>114</sup>

Normative ideas about what "good"<sup>115</sup> hair ought look to like have impacted black women's transition to the voluntary labor market since the late 19th/early 20th century. Beauty advertisements aimed at black communities at this time marketed their products as a way for

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<sup>112</sup> *Hudgins v. Wright*, 11 Va. 134 (VA 1806).

<sup>113</sup> *Ibid* note 99 at 30, Miller describes his investigation of the ethical value of race as a question of how corporal bodies could ever "signify disparate worth."

<sup>114</sup> *Ibid* note 110, at 255.

<sup>115</sup> "Good hair" is often used to reference hair that most closely resembles white supremacist beauty standards. Ingrid Banks explains this well in her book, *supra* note 69 at 2: "For black women in this society, what is considered desirable and undesirable hair is based on one's hair texture. What is deemed desirable is measured against white standards of beauty, which include long and straight hair (usually blonde), that is, hair that is not kinky or nappy. Consequently, black women's hair, in general, fits outside what is considered desirable in mainstream society." Angela Onwuachi-Willig expands on this in her work, *supra* note 81, at 1107: "In a society where straight, long, fine hair (compared to black hair) is viewed not only as the norm but as the ideal for women, tightly coiled black hair easily becomes categorized as unacceptable, unprofessional, deviant, and too political."

black people to distance themselves from their African heritage, which was portrayed as the external mark of their subordinate social position. Hair products like “Curl-I-Cure: A Cure for Curls” and “Ozonized Ox Marrow”<sup>116</sup> (a hair pomade) promised to remove the kinky hair that had, less than 100 years prior, been an indication of slave status. Hair straighteners, in addition to skin lightening creams, were praised as the black American’s key to becoming more beautiful<sup>117</sup>, more socially accepted, and, as a result of these things, obtaining more economic opportunity<sup>118</sup> and prosperity. By using these products, African American women could choose to make themselves more appealing in the larger American society.

Appealing to the idea of beauty and traditional beauty standards was particularly harmful for black women, who, because of their position at the intersection of race and gender, had been historically impacted by racialized notions of beauty. Advertisements of this type continued well into the mid-20th century with the invention of more permanent, chemical straightening processes, with the 1955 company Hair Strate marketing their product as “beauty for keeps,”<sup>119</sup> and 1994 company Rio marketing their product as freedom from “bondage”<sup>120</sup>. Invoking the idea of curly hair as ugly and as a reference to the times of slavery, these mainstream beauty campaigns reinforced that the only way for black women to be seen as beautiful and free was by

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<sup>116</sup> Rooks, Noliwe M. *Hair Raising: Beauty, Culture, and African American Women*. New Brunswick, N.J: Rutgers University Press, 1996 at 27.

<sup>117</sup> Ibid, at 35, Rooks speaks to how the language used in hair straightening product ads was meant to classify external evidence of African ancestry as inherently bad to reinforce that black women ought try to ascribe to white beauty norms: “Before treatment, African American hair is referred to as kinky, snarly, ugly, and curly. The language shapes or constructs that community as forever trapped by its circumstances and imprisoned by its features.”

<sup>118</sup> Ibid, from 52-64, Rooks speaks about the legacy of the first black female millionaire, Madam C.J. Walker, whose marketed her vastly popular beauty products through an appeal to economic independence: “...she assumed that African American women would want to straighten their hair and focused on the results of such practices in terms of economic security. In the process, she attempted to shift the significance of hair away from concerns of disavowing African ancestry. Instead, she focused on the realities of many African American women’s lives and the way that her new business could offer skills that would make it possible for them to gain a degree of economic independence.”

<sup>119</sup> Ibid, at 129.

<sup>120</sup> Ibid, at121.

ridding themselves of their natural hair. The impact of these racialized beauty standards on black women's own journey to self-love is captured within the personal narrative of Michele Wallace:

On rainy days my sister and I used to tie the short end of a scarf around our scrawny braids and let the rest of this silken mass trail to our waists. We'd pretend it was hair and that we were some lovely heroine we'd seen in the movies. There was a time when I would have called that wanting to be white, yet the real point of the game was being feminine. Being feminine *meant* being white to us.<sup>121</sup>

Additionally, beauty standards have had far-reaching social implications for the perception of black women and their choice of hairstyle by companies. When Civil Rights activism surged during the 1960s and the "Black is Beautiful" slogan became popularized in black communities, black women's choices to wear their natural hair, often styled in afros, as a form of pride became equated with being "radical" or "militant." A prime example of this was the notorious FBI poster calling for the arrest of activist and Black Panther Angela Davis, who famously wore her hair in an afro. Over 30 years later, this history of portraying black women in afros as militant was called upon in the 2008 New Yorker issue which featured Michelle Obama as a "gun-toting, Afro-wearing militant"<sup>122</sup>.

From the Civil Rights era and beyond, the negative perception of identifiably "black" hairstyles by mainstream white society manifested itself through corporate opposition to black hair in the workplace<sup>123</sup>. Black women who chose to straighten their hair were seen as more moderate and safe by white society, and were therefore able to attain more economic opportunity

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<sup>121</sup> Wallace, Michele. 1982. "A Black Feminist's Search for Sisterhood." In *All the Women Are White, All the Blacks Are Men, but Some of Us Are Brave: Black Women's Studies*, edited by Akasha Gloria Hull, Patricia Bell-Scott, and Barbara Smith. Old Westbury, N.Y: Feminist Press. 5.

<sup>122</sup> *Ibid* note 103, at 2.

<sup>123</sup> *Ibid* note 1, Caldwell states at, at 384-385: "Those who chose Afro hairstyles faced stiff opposition, similar to the opposition that today confronts those who choose braids, including the loss or refusal of employment...the rationalizations that accompanied opposition to Afro hairstyles in the 1960s-- extreme, too unusual, not businesslike, inconsistent with a conservative image, unprofessional, inappropriate with business attire, too "black" (i.e. too militant), unclean-- are used today to justify the categorical exclusion of braided hairstyles..."

because of it. These women, however, also faced ostracization and criticism by black activists who saw this as anti-blackness. This sentiment leaked into black intellectual circles, with psychiatrists William H. Grier and Prince M. Cobbs arguing that black women's hair alteration was an act of self-hatred<sup>124</sup>. Importantly here, it was individual black woman's choices to present themselves in one way or another that had consequences for how they were treated and viewed by others in their society. If they embraced their blackness, as some saw it, by adopting culturally black hairstyles, it meant being further ostracized from white society, and particularly, from economic opportunity. If they instead conformed to mainstream ideas about what proper hair looked like, they could acquire more social capital while damaging their tie to black social movements.

Here, the passive identification of blackness in addition to the individual agency exerted in performing one's identity shaped the significance of black women's individualized enactments of their identity. Depending on how individual black women enacted their identity and were perceived on the basis of it, their treatment by others and lived experience were vastly different. In the cases where black women styled their hair in socioculturally black styles, this choice was perceived as embracing an understanding of American blackness and black beauty as it was connected to African ancestry and black culture. Because this enactment was deemed unacceptable and subversive in the dominant white society, this led to direct consequences for individuals who performed their identities in these ways. In other cases, where black women styled their hair in socially accepted styles, often straightened, the enactment of blackness was perceived as in line with dominant, white society. This allowed for these black women to more

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<sup>124</sup> *Ibid* note 69.

easily navigate economic structures, but within activist contexts, often separated them from parts of the black community.

In both cases, the decisions made by the black women could not be separated from their identification as black. Instead, it was the distinct combination of their identification of blackness and the ways they exerted agency in forming their own understandings and enactments of blackness that gives their identity its significance within the social world.

While afros were eventually decided<sup>125</sup> to not be a choice of hairstyle but rather a natural and biological characteristic of black hair, grooming policies are still welcome to, as in the case of Chastity Jones, ban socio-cultural black hairstyles from the workplace. This is premised on the idea that these hairstyles are mutable characteristics over which an agent can exert control. While these decisions are subject to the same types of value-laden judgments as the passive manifestations of identity, their significance is lost through courts' over-emphasis on immutable characteristics and agent fault.

When anti-discrimination law focuses on identity as immutable and protects only to the point of fault, it ignores the very real consequences that follow from these individual choices, such as increased discrimination, because of how certain enactments of identity are perceived. This limits the kinds of arguments that can be made by victims of discrimination, who are forced to operate within limiting framework of immutability in order to receive any recognition from the courts. Anti-discrimination law is thus prevented from challenging the historical and social systems of oppression which have demonized marginalized groups cultured and bodies that fall outside of the white, cis, hetero, abled bodied, male norm. In the following chapter, I explain how

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<sup>125</sup>*Ibid* note 13.

my framework for identity could be applied in these grooming policy cases to better accomplish the goals of anti-discrimination law.

## Chapter 4: Legal Application of My Analysis

Throughout the last chapter, I described my conceptions of passive and active identification and explained how they related to social hierarchies and acts of discrimination. In this chapter, I will explicitly compare my understanding of identity to the immutability criterion, illustrating both how the definitions differ and the comparative advantages of my interpretation. To demonstrate how my characterizations of identity could be mobilized in practice within a legal context, I re-approach my original case study, *E.E.O.C. v. CMS* (2016). In returning to this case, I clarify how my arguments about identity translate into an judicial evaluative framework. Further, though, throughout this analysis, I demonstrate how my framework differs from how courts have previously evaluated claims under the immutability criterion. Following this, I will discuss how my approach fits within an anti-subordination reading of anti-discrimination law's purpose and why this ultimately leads to better social outcomes.

### *Immutability versus Passive and Active Identification*

Under the immutability criterion, the relevant question for the courts is whether individuals can be considered responsible for the aspect of identity in question, whether it is hairstyle, dress, speech, or something else. As it is then applied to grooming policies and black women's hair, courts tend to rule that these women can be considered responsible for their hairstyling decisions and that therefore they are unprotected from discrimination on its basis. This is present in the language of *Rogers* (1981), where the court ruled in favor of the American Airlines policy that banned cornrows for employees. In the language of the decision, the court decided that hair was an "easily changed characteristic," implying that it was both an agential

decision, and one of decision of low importance. Further, the court argued that Rogers could cover her hair with a hairpiece, regardless of if that hairpiece caused her discomfort<sup>126</sup>. From these points, the court then determined hairstyle to be a mutable characteristic, i.e. an agential decision one could be considered responsible, and therefore faultable for, and thus left the American Airlines policy in place.

The solution in these cases cannot be simply to say that people ought not be responsible, or faultable, for their choices in grooming. To do so would ignore the agency that individuals have in enacting their identity in ways they find to be most culturally significant. It is not that individuals cannot be considered responsible for their hairstyling decisions. To say something of this nature would ignore the very deliberate ways that hairstyling has operated as a site of positive identity creation for black women as well as a site of resistance against the dominant norms. As Maxine Baca Zinn and Bonnie Thornton Dill describe in their conception of multiracial feminism,

Women of color have resisted and often undermined the forces of power that control them...it is the nature and organization of women's opposition which mediates and differentiates the impact of structures of domination<sup>127</sup>.

It is therefore necessary that courts shift away from the language of fault altogether. Doing so in favor of a focus on identification prevents courts from stripping the subjects of anti-discrimination law of their individual agency and socially significant choices. Identification, or how individuals are socially categorized and understood by others, allows courts critically question how it is discrimination is occurring and how it relates to larger ethical evaluations of

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<sup>126</sup> Ibid note 14.

<sup>127</sup> Zinn, Maxine Baca, and Bonnie Thornton Dill. 1996. "Theorizing Difference from Multiracial Feminism." *Feminist Studies* 22 (2): 321–31. 328.

different identities. So, for example, discrimination in these grooming policy cases relates to both the individual being identified and discriminated against because of their grooming choices as well as the larger social groups that the individual is associated with. Thus, the American Airlines case both involved a targeted discrimination against Renee Rogers, as a black woman who had made the choice to style her hair in a certain way, and the black community more largely, through the cultural connection of braided hairstyles to black culture in the United States.

My approach allows for a comprehensive assessment of the multiple axes on which prejudice shapes both grooming policy creation and application. First, it allows for courts to recognize how individuals are being passively identified, that is, what social identities they are being tied to absent any individual decisions. In recognizing this, courts can contend with the relationship between social identities and social hierarchies. These hierarchies are relevant insofar as they shape which identities seen as more acceptable and ideal, and which are not. Following this, the consideration of active identification allows courts to recognize how individual grooming decisions are then interpreted in relation to these social identities and hierarchies. Agential enactments of identity significantly change how the individual is perceived in relation to both the identity with which they are passively identified and other social norms. Thus, black women's decisions to style their hair in different ways have different cultural significances, specifically in how they are further associated, or unassociated, with blackness and white standards of beauty.

If the courts were to investigate both of these forms of identification together, it would allow them to acknowledge how systems of racism and sexism implicitly and explicitly manifest themselves in grooming policy creation and application. The question before the court would no longer be if a black woman's hairstyle is immutable or if she can be considered responsible for a

particular hairstyling decision, but rather how does the identification of *black woman* and the further identification that occurs on the basis of hairstyle reflect discriminatory social hierarchies in workplace conceptions of “professionalism” or “conservative business image”.

Importantly, my argument does not imply that every decision that individuals make can be considered socially significant and that businesses’ lose all rights in regulating their workplaces (objections I deal with at greater length in the following chapter). Rather, by abandoning the immutability criterion in favor of my focus on identification, this opens up the types of arguments that can be made by individuals who have faced discrimination because of workplace grooming policies. For example, individuals could argue about the historical and individual significance of their enactment of identity and the relevance of these factors to the discrimination they experienced. It is only under my framework that these arguments are not discarded immediately by the court because of a trait’s mutability, as is currently done.

### ***Re-approaching E.E.O.C. v. CMS (2016)***

To demonstrate how my standard could be employed, I will re-approach the *E.E.O.C. (2016)* case and discuss how the arguments of the E.E.O.C., which actually line up well with my definition of identity, would be differently evaluated from the court’s perspective. As a reminder, the case of *E.E.O.C. v. CMS* involved a black woman named Chastity Jones who was told that if she wanted to work at the company Catastrophe Management Solutions (CMS), she would need to cut off her dreadlocks. The grooming policy in question did not specifically call out dreadlocks, but rather employed “race-neutral” language: “All personnel are expected to be dressed and

groomed in a manner that projects a professional and businesslike image...No excessive hairstyles or unusual colors are acceptable”<sup>128</sup>.

In arguing the application of this policy to be discriminatory, the E.E.O.C. made a number of compelling arguments. First, they demonstrated how dreadlocks had been historically connected to black identity within the United States, with the term originating in reference to African people’s hairs during American slavery. Further, they demonstrated a dreadlock hairstyle was both more suitable for black hair textures and are also culturally significant for black communities. They described hair and hair texture as an embodied signifier that had historically “been used as a substantial determiner of race”<sup>129</sup>. Lastly, they argued that black people’s decisions to wear their hair in styles that worked for their hair texture in the workplace often lead to them incurring harmful stereotypes such as “‘radical,’ or ‘troublemaker,’ or the perception that the black person displaying the style was not sufficiently assimilated into the corporate and professional world of employment”<sup>130</sup>.

In the actual *E.E.O.C.* case, the court dismissed all these claims because the EEOC hadn’t proved that dreadlocks were an immutable characteristic. Additionally, the original case involved only a race-discrimination claim, as courts frequently force black women to separate their identities when alleging discrimination, as discussed in Chapter 2. The district court’s decision, under the immutability criterion, can be summarized by the following statement:

“Critically, the EEOC’s proposed amended complaint did not allege that dreadlocks themselves are an immutable characteristic of black persons, and in fact stated that black persons choose to wear dreadlocks because that hairstyle is historically, physiologically, and culturally associated with their race”<sup>131</sup>.

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<sup>128</sup> *Ibid* note 2.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid*.

Thus, under the immutability criterion, Jones' case was dismissed. Had the court adopted my approach to identity, this case would likely have been ruled in favor of Jones. The arguments contextualizing the historical relevance of black hair and black hairstyling decisions made by the EEOC reflect the passive and active identification analysis I am a proponent of.

First, consider the EEOC's claim that dreadlocks are historically connected to black identity. This establishes, in my terms, the passive identification of a social identity, namely black identity. In doing so, this would prompt the court to consider how the passive identification of black identity has been given historical significance in the United States. A consideration of this might detail the histories of white supremacy in the United States, from slavery and Jim Crow laws to segregation and political narratives of "war on drugs" and "war on crime", that have criminalized black identity and determined it as lesser. This contextualizes the EEOC's further arguments about hair as an embodied signifier of blackness, which can then be filtered through the lens of the historical significance of blackness and its treatment both in the workplace context as well as society more generally. On the passive identification front, then, the court would recognize how hair that is identified with blackness is subjected to the same discriminatory and white supremacist values that underlie the treatment of blackness itself.

Further, though, under my framework of evaluation, the court would also have to recognize the passive identification of black womanhood, which, at the intersection of two marginalized identities, has distinct implications. In doing so, the court would consider how the social position of black women has been historically viewed. As Patricia Hill Collins describes,

Within U.S. culture, racist and sexist ideologies permeate the social structure to such a degree that they become hegemonic, namely, seen as natural, normal, and

inevitable. In this context, certain assumed qualities that are attached to Black women are used to justify oppression.<sup>132</sup>

To attend to the unique ways black women's identity has been conceived of in the United States, the court could consider the devaluing and otherization of black women's bodies through the historical imagination of "femininity." During the times of slavery, black women and their bodies were continuously abused and objectified through the economic and physical exploitation inherent to slavery, as well as sexual abuse by slave owners and the denial of their rights to their own children and families. The social distinction between black women and white women continued into the Civil Rights era, where, as Higginbotham points out, "little black girls learned at an early age to place themselves in the bathroom for "black women," not in that for "white ladies"<sup>133</sup>. This distinction also plays out within beauty standards, where the same beauty standards idealizing femininity and feminine grooming that white women considered oppressive in cases such as *Price Waterhouse v. Hopkins* (1989)<sup>134</sup>, play out in gendered *and* racialized ways for black women. Historical examples of this include the racialized beauty ads for black women through the 20th century described in Chapter 3, where black women were bombarded with social messages that the only way for them to be beautiful would be to distance themselves from markers of African heritage such as darker skin and curly hair.

With the context of this passive identification in mind, the court could then move to evaluate why the decision of Chastity Jones, a black woman, to wear her hair in dreadlocks, a

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<sup>132</sup> Hill Collins, Patricia. 2009. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. Routledge Classics. New York: Routledge. 5.

<sup>133</sup> *Ibid* note 110, at 254.

<sup>134</sup> In *Price Waterhouse v. Hopkins* 490 U.S. 288 (1989), a white woman named Ann Hopkins sued her employer, Price Waterhouse, for not considering her for a partnership, which she considered sex discrimination because of comments from her employers stating she ought wear more make-up and present herself in a more feminine way. The district court decided that these comments did constitute sex discrimination because of their reliance on gendered stereotypes.

socioculturally black trait, was considered “unprofessional” by Catastrophe Management Solutions. The EEOC’s arguments about how black people in the workplace who wear their hair in natural or socioculturally black styles incur negative stereotypes become especially relevant here. As discussed in Chapter 3, black women who have historically decided to wear their hair in socioculturally black hairstyles have faced both exclusion from traditional, white supremacist ideas of beauty, and faced immediate association with stereotypes of militancy and radicalism. During the 1960s, black women’s individual hairstyling decisions shaped their perception by others in relation to Black Power movement membership. When black women were identified as being somehow related to said movements, this directly led to them being locked out of traditional corporate jobs.

Even though this social correlation between hairstyle and party membership has become less prominent, this history has still shaped what modes of presentation are viewed as acceptable within the workplace, as the EEOC highlights. The significance of the identification of a hairstyle with blackness is still steeped in the racism that has marked many culturally black features, such as the use of ebonics, as being improper within institutional settings. Thus, in choosing to style her hair in dreadlocks, a hairstyle typically associated with blackness, as a black woman, an identity positioned at the intersecting oppressions of blackness and womanhood, Chastity Jones was left vulnerable to discriminatory evaluations of her perceived “professionality.” As such, the court, under my framework, would undoubtedly understand this case as one of discrimination, regardless of Jones’ responsibility in choosing her hairstyle, a so called mutable characteristic.

### ***My Identity Framework in an Anti-Subordination Lens***

An anti-subordination reading of anti-discrimination law understands its purpose as working to combat social hierarchies on based on identity and emphasizes the historical context of discrimination. My approach to understanding identity similarly is based in the recognition of existing social hierarchies as it relates to both group and individual identity and seeks to contextualize cases of discrimination within this social history. It is through my focus on *identification*, passive *and* active that my conception of identity is able to acknowledge and critically examine social hierarchies.

Passive identification focuses on the visible markers of identity that are thought of as uncontrollable or non-faultable, such as skin color, that are interpreted as marking one's social identity membership. When considering how it is that an individual is passively identified, courts need to take into account the historical significance of the passive identification, that is, how the social position of the connected identity has been constructed. Further, active identification builds off this social context to understand how different individual enactments of identity are given significance in the context of the individual's passive identification. Thus, once the court can determine the passive identification of black women, they can then consider how the actions of the individual are interpreted by others through a historical analysis of how similar choices by black women have been culturally understood.

A comprehensive understanding of identity recognizes how subordination shapes the entirety of people's experiences, regardless of whether they are being explicitly classified by identity or not. The preference for whiteness, which is codes the application seemingly neutral language, creates the pressure to "cover" one's identity for black women, in the terms of Yoshino,

to make it more in line with the dominant ideas of what is respectable. In grooming policy cases, this occurs with terms that appear neutral such as “professional” or “business-like” which are then imposed using white standards of beauty.

Basing anti-discrimination law’s protection on immutable characteristics and the protection to a fault standard allows for these culturally coded forms of subordination to go unchallenged by denying marginalized people any agency in enacting their identity. By focusing on fault, courts do not contend with the racialized and gendered pressures of assimilation which impact black women within the workplace. Shifting towards discrimination protection which extends to agential decisions opens up room to challenge subordination to a fuller extent, insofar as historically, marginalized groups have had their culture deemed lesser and pushed out of mainstream norms of respectability without any protection by the law.

This can, I believe, occur without anti-discrimination law itself becoming oppressive, as scholars such as Ford and Gonzalez worry. Under my conception of identity, the law does not need to make any statement about what it means to be a black woman to police claims of authenticity, where the court claims that one enactment of identity is more authentically black than another. Rather, the court can focus on the historical context of how these women are identified by others based on their visible features, both passive and active, where the question is not “is this what it means to be black” but rather “how does the association with blackness shape how this enactment is interpreted by others”.

## Chapter 5: Objections

In this chapter, I consider possible objections to my critiques of immutability and my larger argument about passive and active identity. In responding to these objections, I will further clarify the implications of my argument in terms of what parts of the current legal framework I am challenging and those I am not. Additionally, I consider the competing interests courts must evaluate: the rights of the employee versus the rights of the business. I explain how I see my argument relating to the rights of businesses, which I ultimately believe are preserved under my framework. Lastly, I consider arguments about the possible misuses of my concept of active identification, which would attempt to use it to determine all individual decision as pertaining to one's identity. In response to this objection, and to all the objections more generally, I demonstrate how my argument provides a new means of evaluation for courts and argumentation for individuals rather than a definition of all possible iterations of enactments that are significant to identity.

### **Objection 1: Is the Immutability Criterion Inherently Problematic?**

The first possible objection to my argument questions whether the immutability criterion is problematic in itself or whether it is problematic by virtue of the oppressive context in which we live. Someone who holds this view might argue that the immutability criterion itself could be a valid measure for identity claims under anti-discrimination law, as it seems normatively good to protect individuals against discrimination on the basis of things they cannot control. Only protecting these non-faultable features also seems in line with general societal practices that allow for institutions, employers, individuals, etc. to take into consideration those aspects of an

individual for which they are considered responsible. So, for example, universities are able to pick their applicants based on how good of a student they are perceived to be, often using test scores, written samples, and extracurriculars to make this determination. All of these parts of the student's identity, so to speak, are understood as well within their control to either develop and improve or to not. Thus, a proponent of this objection might question whether the problem in the current evaluation of grooming policy cases is inherent to the immutability criterion or just indicative of the larger oppressive social context of the U.S.. Possibly, in a society where subordination was not entrenched into all cultural decisions, anti-discrimination law could be used solely to ensure that distinctions were not made on the basis of uncontrollable features. In this world, where cultural subordination did not exist, the exclusion of personal decisions presumably would not leave marginalized groups vulnerable to assimilationist pressures.

Another possible formulation of this objection is that cultural rights ought to be included in the category of immutable. This would mean that culture would be seen as something beyond fault, allowing for individuals to be protected from discrimination on the basis of cultural traits. So, for example, if cultural rights were to be included in immutability, black women's decisions to style their hair in socioculturally black styles would be considered immutable and therefore protected. Here, the immutability distinction might actually be viewed as beneficial for anti-discrimination, as it could be used as a legal tool for marginalized groups to assert their right to their own cultural identity.

In light of this objection, I still hold that the immutability criterion itself is inherently problematic. The concept of fault-based identity that immutability perpetuates continues to obscure both the social construction of identity, as well as the individuality of it. In constructing a

definition of identity that emphasizes its objectivity and universality, immutability erases the intentional social origins of identity distinctions. The original conception of immutability, or even one that incorporates cultural rights, still does not allow for the courts to critically investigate how social distinctions have occurred and how this origin places the social identity within larger hierarchies. This is demonstrated in my discussion of Butler and the “language of being” within Chapter 3. Insofar as an anti-subordination reading of anti-discrimination necessitates a consideration of these social hierarchies, immutability remains an inadequate standard.

Furthermore, by excluding individual agency, immutability ignores that while social identities are used as categories for classes of people, the real significance of the one’s social identity can only be understood individually. No universal definition of “black woman” or “white woman,” “Latino man” or “Arab man”, could ever fully encapsulate the experiences of the individual people who are identified by those categories. People experience their identity within their own contexts, related not only to other parts of their identity (e.g. class, sexuality, ability, nationality, etc.), but also, importantly for my argument, the ways their decisions, as agents who make distinct choices, are interpreted by others. Immutability simply cannot account for these decisions by any means insofar as it draws the line of protection at individual responsibility.

Additionally, I am wary of any thought experiment that attempts to abstract legal definitions from the oppressive context in which they are created. While, in an equitable world, the law might be able to employ definitions like immutability without reinforcing the social burdens faced by marginalized peoples and cultures, this is simply not the world we live in. Within the actual historical context of U.S. society, access to agency and culturally intelligible decisions differs based on the social identities one holds. Those who have faced structural

oppression, such as black women, have incurred a significant amount of social punishment and isolation by virtue of both their passive identity as well as their agential decisions. Thus, any concept of discrimination protection that centralizes fault offers little justice for these women, and other groups, whose relationship to fault vastly differs from other, dominantly positioned, groups.

### **Objection 2: Rights to Business Image**

As mentioned briefly in Chapter 2, grooming policies are considered to fall within the legal rights of a business to define their own image. The right to one's business image is defined as a "bona fide business purpose"<sup>135</sup> which means that it is a valid business concern that can be used to justify policies. Insofar as we do accept certain business regulations on employee appearance, such as uniforms for example, a possible objection to my argument is that my critiques leaves unclear what employee grooming practices are within the rights of the business to regulate and those that are not. If businesses cannot regulate their employees' hairstyling decisions, why can they regulate their clothing? Where does this leave regulations on employee behavior?

Furthermore, a proponent of this objection might believe that there are clear aspects of employee life in which businesses do, and should, have an interest. For example, a business where an employee's position involves a lot of customer interaction ought be able to regulate how their employees are allowed to act on shift, i.e. not allowing rude or offensive behavior. The question for my argument thus becomes how courts can delineate acceptable and unacceptable limitations

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<sup>135</sup>*Ibid* note 14.

on employees by businesses, and whether I am suggesting that businesses have no right to control their company standards.

My response to this objection offers an important clarification as to what the problem being implicated in my thesis actually is. The question of my thesis is not whether or not it is problematic for business to have power over their employees. This is an entirely different line of questioning that would engage more with theories about the purpose of businesses and the rights of employees, which are not conversations I am currently seeking to enter. Rather, the purpose of my thesis is to highlight how the current conception of identity within anti-discrimination law is inadequate to deal with discriminatory business actions, particularly against black women and hair. Business rights are definitely implicated in this line of inquiry, but only to the extent that they must respect the identities of their workers even as they impose regulations on them. In other words, business rights under my framework do not cease to exist, but rather are evaluated against the competing individual rights of employees, as is currently done. The only shift that my analysis calls for is how the individual rights that are being comparatively evaluated are understood.

Additionally though, on the normative level, courts must critically investigate what kinds of business images are being idealized. What it means to appear “conservative” or “business-like” is not a neutral statement, and the historical ramifications of centuries of interlocking systems of racism and sexism mean that black women are facing entirely different standards of beauty and appearance than non-black female employees or non-female employees. Additionally, as argued by TL Banks, the relationship between the business and consumer is itself racially coded, where mainstream businesses often market themselves to white consumers<sup>136</sup>. This racialized dynamic

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<sup>136</sup>*Ibid* note 48.

shapes how businesses conceptualize what an employee ought to look and act like in order to reach their intended consumer audience. Thus, even if businesses' have some claim to constructing their public image, the standards they use to do so as it pertains to employee appearance warrant further scrutiny.

### **Objection 3: Misuses of Active Identity/ Where Do We Draw Line**

While my arguments about active identity emphasize the historical significance of individual choices, one could object that my framework could easily be misused to justify any individual decision as an enactment of identity. If individual choices are just as significant in defining identity as biological characteristics, how can courts justify protecting persons from discrimination on the basis of braids but not for bedhead, for example. While this example might seem facetious, one could also formulate this objection as relating to more complicated examples. Beards are one such case, as they can hold religious and cultural significance for some, while simply being a grooming choice for others. Furthermore, a proponent of this objection might wonder if this framework for identity could be used justify more contentious grooming decisions such as white persons wearing dreadlocks, or protection of those who wish to change their racial identification, such as Rachel Dolezal.

I have a few different responses to this objection, some of which are more satisfactory than others. First, one important aspect of my argument is the relationship between passive and active identity, where active identity is understood through the social position of the identity one is passively ascribed. Within this framework, grooming decisions are relevant to identity claims when they relate to embodied signifiers of identity, that is, when they are tied to larger social

identities. Decisions such as going to work with bedhead or wearing sweatpants do not relate to embodied signifiers beyond the fact that one might identify a person displaying these characteristics (in this example, having bedhead or wearing sweatpants) as lazy. While the attribution of such a trait to an individual can have implications for how they are treated, it does not specifically reference any social identity that the individual holds. With hair texture and styling, however, there exists a wealth of historical examples of how hair has been an embodied signifier social identities such as race. Thus, I would argue that decisions that cannot be demonstrated to have any connection to a social identity are largely irrelevant, even within my framework. This limits the number of frivolous discrimination claims that could be made through the use of active identification.

My second, and possibly less satisfying, response, is that my thesis does not claim to draw the clear lines of what constitutes an agential enactment of identity versus a general agential decision. Making this distinction would require further an extended discussion of what it means to be an agent within a social context. Rather, the purpose of my thesis is to open up the evaluative framework used by courts and the arguments that can be made by individuals to include faultable decisions. My argument ultimately only pushes for embodied signifiers and other enactments of identity that can be established as historically significant to be protected. The job of applying this standard to individual decisions and contexts falls upon the courts, whose framework is currently limited by the immutability criterion.

## Conclusion

“In Western societies, the *natural places* that measure and regulate our bodies within the body politic then have all been dependent on the body’s corporeal and translated ideological value. In this sense our perception of our own bodies and other bodies becomes our reality.”

Kaila Ada Story, *Racing Sex- Sexing Race: The Invention of the Black Feminine Body*<sup>137</sup>

“[H]air also exists within a metaphysical and existential state that speaks to who we are as human or social beings. Because hair is attached to physical *and* social bodies, it is given meaning or “energy” because of its very relationship to the self. Hair matters because it is a part of our being, of our very existence that has meaning on the level of ideas and materiality.”

Ingrid Banks, *Hair Matters*<sup>138</sup>

As members of social societies, we are constantly being identified by others as we move through the world. These identifications place us within the context of larger social identities, roles, and positions. Frameworks for identity that center around fault, such as immutability, focus on how we are passively identified, absent any individual responsibility. These passive identifications often are based on the visible (usually physical), e.g. to have darker skin leads to the identification *black*, to have breasts leads to the identification *woman*, etc.. Identity in this sense is treated as universal, where what it means to be a part of a social identity is the same for all those passively identified with it.

However, social identity goes far beyond the passive markers on our bodies. What it means to be a social agent and to perform actions within a culture is to be constantly reinterpreted through the context of one’s choices. This is what makes my identity, and my experience of it, *mine*, as opposed to anyone else’s. Though I may share the same skin color or physical body

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<sup>137</sup>*Ibid* note 101, at 24.

<sup>138</sup> *Ibid* note 69, at 25.

characteristics as others which lead us to be similarly identified, the different decisions we make to enact our identities (e.g. dress, grooming, speech, behavior) further shape how we are socially understood.

Our individual enactments are constrained in their cultural intelligibility by our passive identifications. Further, depending on our passive identification, certain characteristics and decisions can be more socially significant than others. Such is true of hair which, for black communities, has acted as an embodied signifier of black identity. As such, hair can shape the passive identification one is given by others. Additionally, though, because of the dominance of white beauty standards and the devaluation of black identity, black individuals' choices to style their hair lead to active identifications as well, which importantly impact how they are treated by others. Thus, black women who choose to wear their hair in socioculturally black styles are deemed less beautiful, less professional in the workplace, and more politically radical.

The purpose of anti-discrimination law, as I see it, is to combat the social hierarchies that these identifications ultimately relate to. Every identification, passive and active, occurs in relation to the dominant normative ideals that underlie the culture, like white supremacy in American beauty culture, and the social hierarchies that determine an individual's social position, like the systems of racism, classism, sexism, etc. on which the U.S. is structured. To fully comprehend what the significance of a given identification is, it must be analyzed in relation to the historical meaning and position of the social identity (e.g. black woman) *and* of the choice being made by the individual (e.g. how to style one's hair). Taking into account both forms of identification would allow courts to combat the value-laden social hierarchies that subordinate those modes of being that challenge the dominant, white norms.

Under the current judicial framework, however, the immutability standard is used to focus solely on passive identifiers while excluding agential decisions. This fundamentally misses all the ways we are actively identified based on our individual choices. When anti-discrimination law focuses on identity as immutable and protects only to the point of fault, it ignores the very real consequences that follow from individual choices, such as increased discrimination, because of how certain enactments of identity are perceived. The immutability standard also limits the kinds of arguments that can be made by victims of discrimination, who are forced to operate within its limiting framework in order to receive any recognition from the courts.

If courts were to move past the reductionist understanding of identity immutability creates and incorporate both passive *and* active identification into their analysis, discrimination could be more deeply and fully combated, such as the discrimination against black women's hairstyling practices. Opening up room for argumentation about the historical and individual significance of identity and embodied signifiers recognizes and protects the agency of individuals from marginalized groups in forming and enacting identity on their own terms. Types of harm that would be prevented by this reframing of identity within anti-discrimination law include the more deep-seated biases against different enactments of identity and culture, leading courts to more nuanced questions like what it means for a hairstyle to be "professional." Furthermore, adopting this more dynamic framework of identity would actually allow for anti-discrimination law to better understand intersectional identities such as black women's, and others (e.g. queer people of color, disabled people of color, etc.), by looking to the social and historical significance of the identities in question rather than relying on the separate understanding of the intersecting categories. Without this reframing of the definition of identity, statutes such as Title VII will

never be effective in protecting the people, such as Chastity Jones and other black women who have been mistreated in the workplace, that need their protection the most.

Given more time, there are a few areas of this thesis I would want to expand upon. For example, I would have liked to do more research and analysis on the ethical implications of being faulted for one's identity. This would likely include more discussion of social value in the context of identity. I also believe there is much more to be said about the phenomenology of identification and how the act of identifying a person shapes how they are understood as a social being and subject that can be interacted with. Lastly, I would have liked to include more historical detail and narratives surrounding the interpretations of black women's hair throughout U.S. history to incorporate more information on the personal and political significance of black women's hairstyling decisions.

There are important steps currently being taken to combat discrimination on the basis of hair. Most notably, the New York City Commission on Human Rights passed legislation banning discrimination on the basis of black hairstyles. Speaking to the rationale behind the ban, Chirlane McCray, the First Lady of NYC, said,

There are too many places, from schools to workplaces and beyond, where the idea that the hair grows on the heads of people of African descent is, in its natural state, not acceptable. That prejudice extends to traditional hairstyles, designed as much for practicality as for beauty, as are seen as undesirable by European standards.<sup>139</sup>

Businesses, if they violate this ban, face "penalties and civil damages should they harass, threaten, fire or deny admission or affiliation to anyone based on a particular set of grooming

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<sup>139</sup> McCauley, Alicia. 2019. "NYC Commission on Human Rights Announces New Protections and Enforcement Actions Against Discrimination Based Upon Natural Hairstyles in Employment, Education, and Public Accommodations."

choices”<sup>140</sup>. This policy offers a hopeful recognition of black hair as an important part of black identity *and* experience of the world. In protecting hairstyling choices, the New York City ban provides an example of a law that could better combat discrimination on the basis of active identification and individual choice. However, this ban only protects against one of many ways individuals are actively identified. To deal with the multitude of identifications we incur daily, courts need to re-investigate the fundamental problems inherent to their current, immutable understanding of identity. So long as anti-discrimination protections are allotted under a fault-based system, discrimination informed by how one is actively identified, such as through hairstyle, dress, speech, etc., will continue to go unaddressed by the very legal bodies tasked to fight against it.

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<sup>140</sup> Bellafante, Ginia. 2019. “The Decriminalization of Black Hair.” *The New York Times*, February 21, 2019, sec. New York. <https://www.nytimes.com/2019/02/21/nyregion/black-hair-decriminalization-ny.html>.

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