

# The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers

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## INTRODUCTION

In September 2006, Taalib-Din Uqdah, the man whom at least one observer called “the Johnny Cochran of natural hair,”<sup>1</sup> and the plaintiff in the 1993 braiding case *Uqdah v. District of Columbia*,<sup>2</sup> went to Illinois to lead braiders’ efforts to eliminate braider licensing regulations. He calls himself a “modern-day abolitionist” on a crusade against “the last legal bastion of chattel slavery in the United States”—the cosmetology industry.<sup>3</sup> Uqdah claims that the purpose of his endeavor is to “get[] the white man’s foot off the black woman’s neck.”<sup>4</sup> Uqdah’s fighting spirit has heartened braiders, dreadlock stylists (“lockticians”), and state legislators, who are optimistic that a bill will pass to amend the Illinois Barber, Cosmetology, Esthetics and Nail Technology Act of 1985 to exclude braiders from state regulation.<sup>5</sup>

In July 2006, Essence Farmer celebrated the opening of her natural hair salon, Rare Essence Braiding Studio, in Glendale, Arizona. Just three years earlier, the Arizona Board of Cosmetology had barred Farmer from opening her salon until she completed 1600 hours of training—which would have cost approximately \$10,000 but would have included no instruction on natural styling. In December 2003, Farmer filed suit against the board. Before the case was resolved, the State amended its statute, thereby eliminating the application of cosmetology licensing to braiders.<sup>6</sup>

The Illinois and Arizona episodes are only two of the most recent examples of a growing line of court challenges that have led to the elimination or substantial curtailment of licensing requirements for braiders and natural hair care providers<sup>7</sup> catering to black women.<sup>8</sup> This Comment analyzes a little-

1. Tasheem Paghdwala, *The Politics of Braids*, CHI. READER, Sept. 1, 2006, at 1, available at <http://chicagoreader.com/features/stories/braids>.

2. 785 F. Supp. 1015 (D.D.C. 1992) (holding that braiding regulations do not violate the Equal Protection or Due Process Clause), *vacated*, 995 F.2d 306 (D.C. Cir. 1993) (unpublished disposition). See *infra* Subsection II.B.1.

3. Paghdwala, *supra* note 1.

4. *Id.*

5. See *id.*

6. Sherry Ann Rubiano, *Braiding Studio is a Result of Perseverance*, ARIZ. REPUBLIC, Aug. 2, 2006, <http://www.azcentral.com/community/westvalley/articles/0802gl-braid02Z1.html> (last visited Apr. 15, 2007). See ARIZ. REV. STAT. ANN. § 32-506 (2006).

7. For the purposes of this Comment, I use the designation of “braider” and “natural hair stylist” interchangeably though, in reality, there are distinctions between what braiders and natural hairstylists do. Natural hairstylists might perform a range of services that some braiders would not, such as maintaining dreadlocks or styling loose black hair. Some natural stylists object to the use of hair extensions, while hair extensions are an integral part of most professional braiders’ work. This distinction is of little relevance to this Comment’s argument and thus, I use the terms interchangeably.

8. There is a fourteen-year span of relevant cases. *E.g.*, *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); *Uqdah v. Dist. of Columbia*, 785 F. Supp. 1015 (D.D.C. 1992), *vacated*, 995 F.2d 306 (D.C. Cir. 1993) (unpublished disposition). At least seven lawsuits have been filed in these matters by the Institute for Justice (IJ), a conservative-libertarian public interest legal organization, alone. See [http://www.ij.org/economic\\_liberty/index.html](http://www.ij.org/economic_liberty/index.html) (last visited Apr. 13, 2007).

studied shift in the legal regulation of and for black women: the increasing number of instances in which states have exempted hair braiders from regulations that apply to other hairstyling professionals. Initially, braiders' cases were fully litigated. In recent years, however, simply filing a lawsuit has rushed braiding regulation to the top of the legislative or administrative agenda, bringing a swift pre-trial remedy and making the case moot. The decision-makers in the early braiding cases were judges, but increasingly, the political branches are resolving these disputes.<sup>9</sup>

Advocates for deregulation have made three arguments. First, they argue that these licensing requirements are unnecessary because natural hairstylists do not use harsh chemicals, meaning that there is little danger to their customers. Second, they challenge requirements that natural hairstylists attend cosmetology schools, which include minimal, if any, instruction on African natural hair care. Many braiders and commentators have heralded the policy changes, maintaining that certification requirements represent too much governmental interference with a treasured cultural practice.<sup>10</sup> Third, deregulation proponents have also observed that braiding is an important source of income for poor black women. The greater the cost of entry, the fewer women who will be able to pursue this homegrown profession as a means of achieving economic independence.<sup>11</sup> However, few have asked whether the deregulation of this industry is, on the whole, in the best interests of black women, who are both providers and consumers of braiding services. What is at

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9. This trend illustrates how impact litigation has goals other than merely winning cases. One reason that deregulation advocates might choose to bring suits instead of engaging in pure legislative advocacy is so they can force legislators to take up the issue. IJ Litigation Director Clint Bolick, discussing *Uqdah*, confirms its use of lawsuits to create the publicity necessary to effect legislative change:

This case . . . demonstrates the efficacy of arguing in the court of public opinion. Favorable coverage in the *Wall Street Journal* and other media followed the case throughout . . . . The result was that while the case was pending on appeal, the District of Columbia became the first jurisdiction in the United States to deregulate entry into the cosmetology profession.

Clint Bolick, IJ Litig. Dir., *The Slaughter-House Cases: Dismantling Liberty's Slaughter-House*, Dec. 1, 2005, <http://www.instituteforjustice.net/publications/other/slaughterhouse/dismantle.html>.

10. See, e.g., *Braider Licensing Raises Issue of State Regulation vs. Culture*, ST. PETERSBURG TIMES: BUS. ONLINE SEC., Sept. 22, 2006, [http://www.sptimes.com/2006/09/22/Business/Braider\\_licensing\\_rai.shtml](http://www.sptimes.com/2006/09/22/Business/Braider_licensing_rai.shtml) (“[C]an a school effectively teach part of a culture that is passed down through generations, learned on front stoops and sidewalks?”); *Braiding Without a License?*, FREE LANCE-STAR, Aug. 21, 2006, <http://fredericksburg.com/News/FLS/2006/082006/08212006/215520>; Paghdiwala, *supra* note 1; Rashard Zanders, *Hairbraiders Put “Cosmetology Cartel” on Notice*, MINN. SPOKESMAN-RECORDER, Apr. 27, 2005, [http://www.nappystories.com/main/nonfiction/cosmetology\\_cartel.htm](http://www.nappystories.com/main/nonfiction/cosmetology_cartel.htm). For more on the cultural value of braiding, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 (“Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie.”).

11. See, e.g., *Braider Licensing Raises Issue of State Regulation vs. Culture*, *supra* note 10; Gloria Lau, *A Hair-Brained Scheme*, FORBES, Oct. 20, 1997, at 220 (“[S]tupid laws . . . stifle the entrepreneurial aspirations of a few thousand poor Americans.”).

stake for black women consumers in this debate? And why have officials neglected to engage in this inquiry?

This Comment takes up both of these questions. After an overview of the cultural, political, legal, and economic salience and evolution of black hair in Part I and an explanation of the current regulatory scheme in Part II, Part III argues that abolishing and modifying certification standards for natural hairstylists warrants hesitation and policy innovation by courts and policymakers. Though braiders raise good arguments challenging the arbitrariness of many regulatory regimes, the health and safety risks of braiding and other forms of natural hairstyling are non-negligible and deserve some acknowledgement.<sup>12</sup> Part IV contends that the failure of well-intentioned judges and policymakers to consider seriously the interests of black women reveals a culturally relativist heuristic that manifests itself in cultural deference. The operation of this heuristic in the context of the braiding cases indicates subtle race-sex bias.<sup>13</sup> Finally, Part V suggests an alternative to the culturally deferential approach to regulations. Following the path of several other states,<sup>14</sup> state legislators should exempt braiders from cosmetology licensing requirements and authorize state administrators to promulgate substantive regulations that are reasonably related to braiding and natural styling. Developing a specialized policy for braiding and natural hairstyling will increase the likelihood that policymakers will seriously engage with braiders' claims about black culture and consider the possibly divergent interests of black women consumers.

## I. THE SIGNIFICANCE OF BLACK WOMEN'S HAIR

As a cultural, political, legal, and economic matter, hair occupies a significant space in black women's lives. This Part focuses on the complex role that hair has played in the social positioning of African-American women—as a cultural marker, a political statement, a means for economic empowerment, but also as a political and economic liability. Section A explores the unique space hair occupies in black women's culture. Section B turns to the political significance of hair both historically and currently. Section C discusses black

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12. It is important to note that, although I call for a more thorough inquiry into plaintiffs' claims that natural hairstyling is a harmless cultural practice, consideration of these risks should not *necessarily* lead courts or policymakers to uphold or strengthen the regulation of braiders. A court or legislature might review data on the dangers associated with natural hair styling and still decide to exempt or curtail braider licensing requirements.

13. I use "race-sex bias" as opposed to "race and sex bias" or any other wording throughout the Comment to emphasize both the *unity* of sex and race bias and the *primacy* of race bias in these cases. Black women consumers are disregarded not because of their race, and not because of their sex, but because of their sex as it functions within their racial group.

14. See, e.g., S.C. CODE ANN. §§ 40-7-20, -255 (2007); 16 TEX. ADMIN. CODE § 83.110 (Vernon 2007); 18 VA. ADMIN. CODE § 41-30-10 to -250 (2007) (establishing licensure for braiding and braiding schools); see also *Braider Licensing Raises Issue of State Regulation v. Culture*, *supra* note 10.

hair's interaction with legal constraints. Finally, Section D focuses on the role black hair plays in the economic positioning of black women, particularly for black women entrepreneurs who rely predominantly on black women consumers. These spheres are interrelated: For example, the legal constraints on black women's hair in the workplace impact their economic position. This framework grounds my argument that hairbraiding—far from being a quaint cultural artifact—is in fact part of a complex social structure that decision-makers should consider when creating or interpreting policy.

### A. Cultural Significance

The rituals of black hair grooming provide shared stories and a sense of community among many black women.<sup>15</sup> Though “[h]air seems to be such a little thing,”<sup>16</sup> it has permeated nearly every aspect of many black women's lives. Lanita Jacobs-Huey, a professor of anthropology at the University of Southern California, dedicated six years of research to observing black women's discussions about hair in everyday settings.<sup>17</sup> bell hooks describes the custom of having one's hair “pressed” (that is, straightened):

Hair pressing was a ritual of black women's culture—of intimacy. It was an exclusive moment when black women (even those who did not know one another well) might meet at home or in the beauty parlor to talk with one another, to listen to the talk . . . . It was a world where the images constructed as barriers between one's self and the world were briefly let go, before they were made again.<sup>18</sup>

There is even a shared lexicon of black hair care that many black children learn early on, a vocabulary that “indoctrinate[s] [them] into the intricate culture of hair.”<sup>19</sup> The cultural and social implications of hair for black women have also

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15. Marcia Gillespie, former editor-in-chief of *Ms.* and *Essence* magazines, explains: “I think part of the stories that bind us together as Black [people] are our hair stories.” AYANA D. BYRD & LORI L. THARPS, *HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA* 139 (2001) (alteration in original). Michelle Burford elaborates the various connections between hair and culture:

My humiliation that night was just another episode in that series of shames, blisters and life stories so many of us begin gathering in girlhood. For sisters, hair is much more than insulation from cold weather . . . . For us, hair represents everything from politics to the possibility of nabbing the finest brother; it remains a lightning rod of division that we inherited from plantation owners, a caste system separating the lights from the darks, the loosely curled from the tightly coiled. Yet no matter where we find ourselves on the color-and-texture spectrum, hair will always be the Black girl's consummate rite of passage . . . .

*Hair: A Love Story*, *ESSENCE*, Feb. 2006, at 146.

16. Caldwell, *supra* note 10, at 370.

17. LANITA JACOBS-HUEY, *FROM THE KITCHEN TO THE PARLOR: LANGUAGE AND BECOMING IN AFRICAN AMERICAN WOMEN'S HAIR CARE* (2006).

18. bell hooks, *Straightening Our Hair, in TENDERHEADED: A COMB-BENDING COLLECTION OF HAIR STORIES* 111 (Juliette Harris & Pamela Johnson eds., 2001) [hereinafter *TENDERHEADED*]; *see also* BELL HOOKS, *BONE BLACK* 91-93 (1996) (discussing the ritual of hair pressing during hooks's childhood).

19. BYRD & THARPS, *supra* note 15, at 134. Byrd and Tharps continue, “Vocabulary words like *grease*, *kitchen* (the hair at the nape of the neck, not the room in the house), and *touch-up* are ones a

found an important place within black American art and literature. The novels of Pulitzer Prize-winners Toni Morrison<sup>20</sup> and Alice Walker,<sup>21</sup> and the works of Maya Angelou<sup>22</sup> and Zora Neale Hurston,<sup>23</sup> are examples of this phenomenon. Additionally, black women's hair has been the subject of children's books,<sup>24</sup> nonfiction works,<sup>25</sup> movies,<sup>26</sup> and music.<sup>27</sup>

### B. Political Significance

The political implications of black hair are as salient as its cultural elements.<sup>28</sup> *Negro World*, the magazine of Marcus Garvey's Universal Negro Improvement Association (UNIA), was filled with polemics against hair straightening.<sup>29</sup> Garvey urged African Americans, "Don't remove the kinks

Black child hears at a very early age and needs to learn in order to fully participate in the Black hair lifestyle." *Id.* However, they note that "[f]amiliarity with the tools and fluidity in the language of Black hair culture do not automatically qualify a person as a member of the club . . . . Certain rituals and rites of passage must also be experienced." *Id.* at 136. Byrd and Tharps go on to provide readers with a black hair glossary. *Id.* at 137-38.

20. See, e.g., TONI MORRISON, *SONG OF SOLOMON* 140, 340-41 (1977); TONI MORRISON, *SULA* 148-49 (1973); TONI MORRISON, *THE BLUEST EYE* 62, 82 (1970); cf. MORRISON, *THE BLUEST EYE*, *supra*, at 44-50 (illustrating Pecola's belief that beauty, defined as having blue eyes and blond hair, would bring love from her teachers, schoolmates, and family).

21. See, e.g., ALICE WALKER, *THE COLOR PURPLE* 220 (1982) (articulating the protagonist's concern that her friend would not love her because, among other things, her hair was "short and kinky").

22. See, e.g., MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* 2-3 (1969) (describing the author's "black ugly dream" in which her hair was a "kinky mass").

23. See generally ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (1937).

24. See, e.g., CAROLIVIA HERRON, *NAPPY HAIR* (1997); BELL HOOKS & CHRIS RASCHKA, *HAPPY TO BE NAPPY* (2001); NATASHA ANASTASIA TARPLEY, *I LOVE MY HAIR!* (1998).

25. See, e.g., INGRID BANKS, *HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN'S CONSCIOUSNESS* (2000); LONNICE BRITTENUM BONNER, *GOOD HAIR* (1990); SHARON D. CHAPPELLE, *NAPPY JOURNEY: THE TWISTED ROAD TO NATURAL HAIR* (2002); JACOBS-HUEY, *supra* note 17; LINDA MOSETTA JONES, *NAPPYISMS: AFFIRMATIONS FOR NAPPY-HEADED PEOPLE AND WANNABES!* (2003); NOLIWE M. ROOKS, *HAIR RAISING: BEAUTY, CULTURE, AND AFRICAN AMERICAN WOMEN* (1996). Novelist Alice Walker has addressed the culture of black hair in some of her nonfiction writings. Alice Walker, *Dreads*, in FRANCESCO MASTALIA & ALFONSE PAGANO, *DREADS* 8 (1999); ALICE WALKER, *Oppressed Hair Puts a Ceiling on the Brain*, in *LIVING BY THE WORD: SELECTED WRITINGS 1973-1987*, at 69 (1988).

26. See, e.g., B.A.P.S. (New Line Cinema 1997); *BEAUTY SHOP* (MGM Pictures 2005); *HAIR SHOW* (UrbanWorks Entertainment 2004); *NORA'S HAIR SALON* (Warning Films/Nu-Lite Entertainment 2004).

27. Black musician India.Arie's 2006 single, *I Am Not My Hair*, earned a spot on The Billboard Hot 100. Billboard, <http://www.billboard.com/bbcom/index.jsp> (follow "Charts" hyperlink, then search "India.Arie" under "Music Search"; select "Artist" from "Music Search" menu; then follow "Artist Chart History" hyperlink); see also INDIA.ARIE, *I Am Not My Hair*, on *TESTIMONY: VOL. 1, LIFE & RELATIONSHIP* (Universal Motown Records 2006).

28. See Mark Higbee, *The Hairdresser and the Scholar*, in *TENDERHEADED*, *supra* note 18, at 11, 11-12.

29. See BYRD & THARPS, *supra* note 15, at 38-39. It is important to note that, while Garvey and *Negro World* condemned hair straightening, two-thirds of the magazine's advertising space contained advertisements for hair straighteners. Instead of an indication of hypocrisy or contradiction, these advertisements might be a result of Garvey's primary message, which was supportive of black-owned business. Companies that sold hair straighteners were some of the most successful black-owned businesses at the time.

from your hair! . . . Remove them from your brain!”<sup>30</sup> Perhaps most famously, the Black Power Movement of the 1960s and 1970s encouraged African-American men and women to forsake straightened locks for large afros. The negative perceptions of straightened hair were so strong during this era that some who could not achieve a good afro style used chemical processes to achieve the look.<sup>31</sup> Political dissident Angela Davis, a prominent figure in the Black Panther Party, became just as famous for her large afro as for her activism.<sup>32</sup> The politics of hair has declined since the popularity of afros was at its zenith in the 1960s and 1970s.<sup>33</sup> But still, as recently as the spring of 2006, a black woman’s hair was a focal point in the halls of predominantly white and male Congress. Former Congresswoman Cynthia McKinney’s hair attracted a great deal of attention in the spring of 2006 after her altercation with a Capitol Hill police officer who did not recognize her and barred her from entering the Capitol building. Some claimed that part of the reason officers did not recognize her was her new “twistout” hairstyle.<sup>34</sup> Talk radio host Neal Boortz had this to say about Congresswoman McKinney: “I don’t blame that cop for stopping her. It looked like a welfare drag queen was trying to sneak into the Longworth House Office Building. That hairdo is ghetto trash.”<sup>35</sup> Though McKinney may not have intended for her hair to make a political statement, and though her response to being turned away was unhelpful (to say the least), public reaction sent a message that black women in political office are essentially one hairstyle away from being told they do not belong there.<sup>36</sup>

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30. *Id.* at 38. See also Tracey Owens Patton, *Hey Girl, Am I More than My Hair?: African American Women and Their Struggles with Beauty, Body Image, and Hair*, NWSA J., Summer 2006, at 29, available at [http://muse.jhu.edu/journals/nwsa\\_journal/v018/18.2patton.pdf](http://muse.jhu.edu/journals/nwsa_journal/v018/18.2patton.pdf).

31. See, e.g., BYRD & THARPS, *supra* note 15, at 59.

32. Angela Y. Davis, *Afro Images: Politics, Fashion and Nostalgia*, in TENDERHEADED, *supra* note 18, at 200.

33. BYRD & THARPS, *supra* note 15, at 63-64.

34. See, e.g., Robin Givhan, *Why a Hairstyle Made Headlines*, WASH. POST, Apr. 7, 2006, at C01; Jabari Asim, Posting of 12:30 EST, Washington Post Blog, Apr. 10, 2006, to [http://www.washingtonpost.com/wp-dyn/content/blog/2006/04/10/BL2006041000578\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/blog/2006/04/10/BL2006041000578_pf.html). *Creative Loafing Atlanta*, a recreation-focused newspaper in the capital of McKinney’s state, also discussed the Congresswoman’s hair. Two out of the three people interviewed for the paper’s “Streetwork” section suggested that she straighten her hair and highlight it or add extensions to it—recommendations that bring to light deeply-rooted political issues about black hair, “good hair,” and professionalism. Jeff Slate, *Should Congresswoman Cynthia McKinney Consider a New Hair Stylist?*, CREATIVE LOAFING, Apr. 5, 2006, <http://atlanta.creative loafing.com/gyrobase/Content?oid=oid%3A57600>.

35. Boortz Claimed McKinney “Looked Like a Welfare Drag Queen”; Predicted “Media Matters Will Pick Up on That,” Media Matters (Mar. 31, 2006), <http://mediamatters.org/items/200604010003> (transcribing portion of *The Neal Boortz Show* that aired on Mar. 31, 2006).

36. It is important to note that hair was not the only factor in this incident: McKinney was not wearing the lapel pin that should have identified her as a member of Congress. Asim, *supra* note 34. Still, McKinney’s hair garnered an inordinate amount of attention.

### C. Legal Significance

Hair has had a substantial impact on the legal status of black women and children. For example, in 1972 the National Association of Black Social Workers (NABSW) cited white parents' need to be taught hairstyling techniques that come "naturally" to black parents as one of many reasons to prohibit transracial adoption.<sup>37</sup> While it is highly unlikely that the NABSW's stance entirely explains the commonness of race-matching through the early 1990s, many adoption agencies used the policy until Congress passed the Howard Metzenbaum Multiethnic Placement Act (MEPA) in 1994, which barred adoption agencies and similar organizations receiving federal funds from using race as the sole placement factor.<sup>38</sup> As recently as 1999, NABSW continued to use hair as one rationale for its stance against transracial adoption,<sup>39</sup> taking the odd position that it is better for black children to spend a longer time in foster care or institutions than to live permanently with white families that do not "naturally" understand their hair, and by analogy, their culture. Because boys' hair is often closely cropped, most of the hair difficulties associated with transracial adoption are more salient when families seek to adopt black girls.<sup>40</sup>

Most notably, however, black hair has had considerable effects on the legal status of black women's economic position. The oft-studied case *Rogers v. American Airlines*<sup>41</sup> illustrates the legal limitations on black women's hair (or rather, the *blackness* of women's hair). In that case, Renee Rogers, a black

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37. National Association of Black Social Workers, *Position Statement on Trans-Racial Adoption* (Sept. 1972), available at <http://uoregon.edu/~adoption/archive/NabswTRA.htm>. See also Ezra E.H. Griffith & Rachel L. Bergeron, *Cultural Stereotypes Die Hard: The Case of Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY & L. 303, 305 (2006).

38. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. 1996b (2000)). For more information on race-matching in adoption, see R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Elizabeth Bartholet, *Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY & L. 315 (2006). See also Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1183-85 (1991) (discussing the pervasive but hidden nature of race-matching policies in both public and private adoption agencies prior to the passage of MEPA).

39. Rudolph C. Smith, president of NABSW, told a Denver reporter:

In a nutshell, African-Americans are in the best position to teach African-American children how to survive in this country as African Americans . . . . White females can't teach young black girls how to comb their hair; white men can't teach young black boys what to do on the street when the cops stop you, so you don't get yourself shot or killed . . . . Those things are not experienced in Caucasian communities.

Janet Simons, *Love is Color Blind: Dad Shares Secrets to Raising Biracial Children*, ROCKY MTN. NEWS, Feb. 7, 1999, at 13F. See BYRD & THARPS, *supra* note 15, at 163.

40. See Adoption: A Family Choice, African American Childrens' [sic] Hair & Skin Care: Pat's Suggestions, <http://www.adoptn.org/hair.html#Pat> ("Hair care (unless it's a boy with a close-cropped head) is going to be a big issue . . ."); see also Adoption: A Family Choice, Hair and Self-Esteem, <http://www.adoptn.org/hair.html#hair5> (last visited Apr. 13, 2007); Adoption: A Family Choice, Short Hair or Long Hair?, <http://www.adoptn.org/hair.html#hair9> (last visited Apr. 13, 2007).

41. 527 F. Supp. 229 (S.D.N.Y. 1981).



female employee of American Airlines, was fired because she refused to remove or cover her cornrow braids. Rogers claimed that American Airlines' policy was discriminatory on the basis of race and sex insofar as it barred wearing a traditional hairstyle of black women. The court insisted on treating Rogers's claims as separate race discrimination and sex discrimination claims, ultimately denying both.<sup>42</sup>

Real or perceived hostility to black hair in a variety of workplaces persists. The Baltimore City Police Department, which polices a city that is over sixty-five percent black,<sup>43</sup> recently barred its officers from wearing various natural hairstyles, effectively limiting black women officers to straightening or cutting off their hair.<sup>44</sup> The author of an online petition against the policy has reported that it was rescinded,<sup>45</sup> but there have been no news reports to that effect. *Vault Guide to Conquering Corporate America for Women and Minorities* advises that black women "[t]ry not to make [their] hair too memorable . . . . African-American women can wear neat braids or short natural styles; elaborate colored extensions and unruly dreads should be avoided."<sup>46</sup> Because restrictions on traditionally black hairstyles in the workplace disproportionately affect black women, the denial of protected legal status makes hair a liability for black women's employment.

#### D. Significance to Entrepreneurship

Though possessing black hair has often proved difficult in predominantly white workplaces, the hair care industry has long been one of the few sites of success for black women entrepreneurs. Not including the cosmetology industry, the creation and distribution of ethnic hair products purportedly generates eight billion dollars of revenue annually.<sup>47</sup> Madam C.J. Walker, one

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42. For a fuller treatment of the *Rogers* case, see, for example, KENJI YOSHINO, COVERING 131-38 (2006); Caldwell, *supra* note 10, at 376-80; John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 312-17 (1997); Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L.J. 115, 136-40 (2001); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 379 (2006).

43. U.S. Census Bureau, 2005 American Community Survey, Baltimore City, Maryland, <http://factfinder.census.gov> (enter "Baltimore" and select "Maryland" under "Fast Access to Information," press "Go," then click on "Baltimore city, Maryland" under "Cities and Towns") (last visited Apr. 13, 2007).

44. *Police Appearance Policy Raises Racial Sensitivity Issues*, WBAL TV 11 (Dec. 5, 2006), <http://www.wbal.com/11investigates/10470167/detail.html>.

45. Baltimore Police Dept. Racist Grooming Policy Petition, <http://www.petitiononline.com/baltpd/petition.html> (last visited Jan. 10, 2007).

46. PATRICIA KAO ET AL., VAULT GUIDE TO CONQUERING CORPORATE AMERICA FOR WOMEN AND MINORITIES 13 (2003).

47. Black Owned Beauty Supply Association (BOBSA), About BOBSA: Our Mission, [http://www.bobsa.org/index.php?option=com\\_content&task=category&sectionid=4&id=4&Itemid=51](http://www.bobsa.org/index.php?option=com_content&task=category&sectionid=4&id=4&Itemid=51) (last visited Apr. 13, 2007). The hair care market is split into "general" and "ethnic" categories.

of the first black female self-made millionaires, achieved her wealth through a hair straightening empire in the early twentieth century.<sup>48</sup> Her contemporary, Annie Turnbo Malone, also became a wealthy woman and noted philanthropist as a result of her “Poro” hair system.<sup>49</sup>

A cottage industry has also developed for hair products specially designed for natural hair. While men of all races ran the early, corporate-controlled market for “natural” products,<sup>50</sup> black women are gradually taking control of that market.<sup>51</sup> Natural hairstyling is a relative newcomer to the lucrative industry. The 1990s brought greater interest in “afrocentrism,” which was a boon for African immigrant hair braiders and importers of human hair (which is used to create many popular braided styles.)<sup>52</sup> With the growing popularity of dreadlocks and the resurgence of some afro styles, natural hairstyling has become a force to be reckoned with inside the larger black hair industry.<sup>53</sup>

## II. UNDERSTANDING THE MODERN BRAIDING INDUSTRY

The braiding practices of yesteryear, honed on stoops and in kitchens, sharply contrast with those of today’s professional natural hair salons. The evolution of braiding has led state administrators to apply cosmetology regulations to braiders and natural hair stylists, sparking their intense opposition. This Part fleshes out that development. Section A discusses the current braiding and natural hair industry, highlighting its evolution from a home craft to a commercial endeavor and describing the current regulatory environment. The goal of Section A is to show that braiders’ quaint, home-

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Chemene R. Quinn, Timothy M. Quinn & A. Paul Kelly, *Hair Care Practices in African American Women*, 72 HIGHLIGHTING SKIN OF COLOR 280, 280 (2003).

48. Derek T. Dingle, *Madame C.J. Walker: Breaking New Ground*, BLACK ENTERPRISE, Feb. 2005, at 20, available at [http://www.findarticles.com/p/articles/mi\\_m1365/is\\_7\\_35/ai\\_n9485614](http://www.findarticles.com/p/articles/mi_m1365/is_7_35/ai_n9485614).

49. BYRD & THARPS, *supra* note 15, at 31-32.

50. *Id.* at 93-94.

51. One of the most prominent black women in the natural hair product market today is Lisa Price, the President and CEO of Carol’s Daughter, a natural product line that boasts multimillion-dollar annual revenues and multiple celebrity investors. See Will Smith, *Jay-Z Back Beauty Line*, CNN.COM, May 18, 2005, <http://money.cnn.com/2005/05/18/news/newsmakers/cosmetics/>. Other black women have begun similar home-prepared product lines. See, e.g., Anita Grant, <https://anitagrants.com/> (last visited on Feb. 27, 2006); Karen’s Body Beautiful, <http://www.karensbodybeautiful.com/> (last visited Feb. 27, 2007); Oyin Handmade, <http://oyinhandmade.com/> (last visited Feb. 27, 2007); Qhemet Biologics, <http://www.qhemetbiologics.com/> (last visited Feb. 27, 2006). In addition to hair products, all of these companies sell products for the body, the home, and for other purposes.

52. BYRD & THARPS, *supra* note 15, at 93, 95. See also Pamela Reynolds, *Homespun Hair: Kitchen Salons Surge in Popularity as Black Women Seek Out Natural Look*, BOSTON GLOBE, Oct. 25, 1995, at 71.

53. In fact, some braiders claim that one reason for the crackdown on unlicensed braiders is because black cosmetologists who specialized in chemical treatments began to feel threatened by braiders’ encroachment upon their business. Gloria Lau, *supra* note 11, at 220 (“Licensed beauty salon staffers generate several billion dollars annually from straightening hair with chemicals. That’s a nice business. Who wants a bunch of hair braiders cutting in on a good thing like that?”); Paghdiwala, *supra* note 1.

based depiction of the industry is partially outdated. Section B will briefly summarize some of the challenges to braiding regulations, indicating a trend in the direction of deregulation.

#### A. *The Increasing Professionalism of Braiding and its Costs*

Relative to other black-led industries, braiding is big business. Dwana Makeba, an English professor and a licensed cosmetologist, acknowledged the shift from braiding-as-home-craft to braiding-as-industry: “Nowadays, the art is being passed on commercially (rather) than passed on from families.”<sup>54</sup> Many braider advocates continue to focus on braiding as a homegrown craft, although this narrative is partially mythical, or at least outdated. The evolution of the braiding industry has, understandably, changed the government’s relationship to the industry.

Industry leaders have facilitated a movement toward professionalization of the braiding industry by leading seminars and workshops,<sup>55</sup> producing videos,<sup>56</sup> and creating a trade literature<sup>57</sup> that introduces their techniques to a large audience. The costs of these videos and workshops are high enough that one surmises they are not intended for the casual braider who wants to learn to do her own hair: They have the purpose of “shor[ing] up the presumed boundaries between hair novices and hair experts.”<sup>58</sup> For example, Taliah Waajid, an Atlanta entrepreneur, charges \$500 per session for her workshops,<sup>59</sup> and JoAnne Cornwell, founder of Sisterlocks, charges \$1395 for a four-day training session.<sup>60</sup> Furthermore, while many braiders operate from their homes, many others have moved to salons.<sup>61</sup> Modern natural hair salons like Khamit Kinks in New York City, Natural Hair Center in Atlanta, and Amazon Natural Look

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54. Elizabeth Ashby, *Black Hair in America—“HairStories” Explores a Long Tradition*, LOUISIANA WKLY., Apr. 4, 2005, <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20050404h>.

55. See *infra* notes 59-60 and accompanying text.

56. Stylists sometimes sell instructional videos on their websites. See, e.g., Royalty Braiding Videos, <http://www.royaltybraids.com/> (last visited Apr. 15, 2007); Taliah Waajid Natural Hair Center, Educational Videos, <http://www.naturalhair.org/index.asp?PageAction=VIEWCATS&Category=5> (last visited Apr. 15, 2007). At least one entrepreneur sells an electronic instruction book for starting a braiding business. See Braids by Breslin, *New Book Teaches You How To Make Money Braiding and Weaving Hair*, <http://www.braidsbybreslin.com/book.html> (last visited Apr. 15, 2007).

57. Trade magazines include *Braids & Beauty*, *Black Beauty Braids Magazine*, *Elite Hair Braids Magazine*, and *Braids World*.

58. JACOBS-HUEY, *supra* note 17, at 29.

59. Taliah Waajid Natural Hair Center, Seminars & Events, <http://www.naturalhair.org/index.asp?PageAction=Custom&ID=4> (last visited Feb. 27, 2007).

60. Sisterlocks, Consultant Training Program, [http://www.sisterlocks.com/Training\\_Classes/Training\\_Info.html](http://www.sisterlocks.com/Training_Classes/Training_Info.html) (last visited Feb. 27, 2007).

61. *Should Hairbraiders Be Licensed?*, JET, Oct. 27, 1997, at 54 (“The hairbraiding business has grown into such a lucrative enterprise that many hairbraiders have stopped braiding hair in their homes and have opened salons.”).

Salon in Chicago provide a wide range of services and claim high levels of expertise.<sup>62</sup>

The states have responded differently to these developments. Eleven states overtly and completely exempt braiders from licensing requirements.<sup>63</sup> At the opposite end of the spectrum, seven states expressly identify braiders as cosmetologists.<sup>64</sup> Ten states have taken the approach this Comment supports by creating specialized licenses for braiders.<sup>65</sup> In twenty-two states, including states with relatively large black populations like Alabama, Massachusetts, and New Jersey, the law is silent on the issue.<sup>66</sup> There is not a discernable regional pattern of braiding regulation. Until recent years, the legal status of braiders and natural hair stylists was ambiguous: They were not overtly exempted from cosmetology laws, but they were not compelled to abide by them either.<sup>67</sup> As braiding and natural styling became more popular and as natural salons began offering more services, it is not surprising that they eventually began to attract unwanted attention from state regulators.

The indiscriminate application of cosmetology licensing requirements to braiders is likely a product of cosmetologists' desire to eliminate competition from braiders rather than a benevolent consumer protection effort.<sup>68</sup> As braids and natural styles increase in popularity, cosmetologists' business is compromised. Cosmetologists believe that it is unfair that they must go through a long and expensive licensing process while braiders, whose work is certainly not risk-free, can avoid licensing altogether.<sup>69</sup> Since cosmetology boards are composed mostly of salon owners,<sup>70</sup> it is not surprising that boards would try to limit unlicensed competitors.

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62. The Khamit Kinks website refers to the salon as a "pioneer in natural hair care" and touts its "award winning work and national exposure." Khamit Kinks Website, <http://www.khamitkinks.com/Home.html>. Waajid's Natural Hair Center's website proclaims, "Welcome to the Home of Natural Hair Care." Braids, Weaves, & Things Webpage, <http://www.naturalhair.org/index.asp> (last visited Apr. 15, 2007).

63. VALERIE BAYHAM, *A DREAM DEFERRED: LEGAL BARRIERS TO AFRICAN HAIRBRAIDING NATIONWIDE* (2006), available at <http://ij.org/publications/other/national-hairbraiding.html>. For a graphical depiction of national braiding regulations, see Institute for Justice, *Hairbraiding Laws*, [http://www.ij.org/pdf\\_folder/economic\\_liberty/national-hairbraiding/hairbraidinglaws05mapnew.pdf](http://www.ij.org/pdf_folder/economic_liberty/national-hairbraiding/hairbraidinglaws05mapnew.pdf). These states include Arizona, California, Connecticut, Georgia, Kansas, Maryland, Michigan, Minnesota, Mississippi, North Carolina, and Washington. *Id.*

64. BAYHAM, *supra* note 63.

65. Those states are Florida, Louisiana, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.* See *infra* Part V.

66. BAYHAM, *supra* note 63.

67. See Paghdiwala, *supra* note 1.

68. *Id.*

69. South Carolina Board of Cosmetology, Minutes of Sept. 9, 2002 Meeting, available at <http://www.llr.state.sc.us/POL/COSMETOLOGY/forms/Minutes/cosmin15.pdf>. See also *infra* note 68 and accompanying text.

70. John Stossel, *Trimming the Bureaucrats*, N.Y. SUN, Apr. 6, 2005, at 9.

*B. Modern-Day Abolitionists?: Braiders' Responses to State Crackdowns*

When state officials began to enforce cosmetology laws by sending undercover police to operate “hair stings”<sup>71</sup> of braid shops, some braiders reacted by seeking judicial intervention. This Section relates just a few of the instances when braiders have challenged regulations to lay a foundation for this Comment’s critique of the outcomes’ rationales and ramifications.

*1. Washington, D.C.: Uqdah v. District of Columbia*<sup>72</sup>

In 1980, Taalib-Din Uqdah and his wife, Pamela Ferrell, started Cornrows & Co., a noted natural hair salon in Washington, D.C.<sup>73</sup> In 1989, government officials went to Uqdah’s place of business to notify him that he was operating in violation of D.C. law, which required all cosmetologists to be licensed. Uqdah had not been aware of the law, but promised to obey it. Upon learning that D.C. law, as amended in 1938, required cosmetologists to receive 1500 hours of expensive training, Uqdah and Ferrell decided to continue braiding without licenses despite the law. After D.C. officials returned to Cornrows & Co., this time imposing a one thousand dollar fine, Uqdah decided to bring suit against the District to seek exemption from the licensing requirement.<sup>74</sup>

Uqdah claimed that the licensing requirement violated his rights to due process and equal protection. He argued that his loss of “economic liberty” and subjection to arbitrary licensing requirements violated his right to substantive due process. He also claimed that the regulations did not provide an equal opportunity for braiders to serve the public.<sup>75</sup> The D.C. District Court granted summary judgment to the defendant District and dismissed Uqdah’s case with prejudice. The court quickly dispatched both legal claims on the grounds that braiding fit the definition of cosmetology as laid out in the law and, relying on *Ferguson v. Skrupa*,<sup>76</sup> contended that the state does not have to show that each licensing requirement is relevant for each person it regulates. But the court had great sympathy for Uqdah’s policy arguments, strongly urging the D.C. City

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71. See South Carolina Board of Cosmetology Minutes, *supra* note 69; Lee Hubbard, *Hair-Brained Politics*, SALON, Sept. 13, 1999; Stephen Humphries, *The State vs. Hair Braiders*, CHRISTIAN SCI.-MONITOR, Mar. 15, 2000, at 17.

72. 785 F. Supp. 1015 (D.D.C. 1992), *vacated*, 995 F.2d 306 (D.C. Cir. 1993) (unpublished disposition).

73. Cornrows & Co., Company, <http://www.cornrowsandco.com/company.cfm?companyID=1> (last visited Feb. 27, 2007).

74. Hoover Institute, *City Hall’s License to Kill Civil Society*, POL’Y REV. (July-Aug. 1996), available at <http://www.hoover.org/publications/policyreview/3574767.html>; Institute for Justice, Litigation Backgrounder: *Uqdah v. Board of Cosmetology*, [http://www.ij.org/economic\\_liberty/dc\\_hairbraiding/backgrounder.html](http://www.ij.org/economic_liberty/dc_hairbraiding/backgrounder.html) (last visited Apr. 15, 2007).

75. *Uqdah*, 785 F. Supp. at 1018.

76. 372 U.S. 726 (1963) (upholding a Kansas law requiring that debt adjusters be licensed attorneys).

Council to reconsider the issue: "Certainly the D.C. Council can exercise sound judgment and common sense to accommodate Plaintiffs' needs . . . the Court would certainly urge the District to consider the plight of Plaintiffs and the good citizens they have faithfully served for over twelve years."<sup>77</sup> The D.C. City Council eventually did so, amending the cosmetology law.<sup>78</sup> Uqdah then founded the American Hairbraiders & Natural Haircare Association (AHNHA) as an advocacy organization for African hair braiders and natural stylists.<sup>79</sup>

## 2. *California: Cornwell v. Hamilton*<sup>80</sup>

JoAnne Cornwell is an associate professor of French and Africana Studies at San Diego State University, but starting in 1993, she also became a natural hair entrepreneur. Cornwell started the company Sisterlocks, which markets a system of black natural hair care that creates miniscule dreadlocks. Cornwell's company has three divisions: hair services, training, and products and accessories.<sup>81</sup> Sisterlocks has highly regimented training, certification, and administration requirements, even specifying the number and content of salon visits included in "the Sisterlocks Package."<sup>82</sup> The website lists all official trainees.<sup>83</sup>

In 1997, Cornwell decided to challenge California's cosmetology licensing system as applied to braiders. Unlike Uqdah's case, Cornwell's suit was not sparked by run-ins with state officials, although other unlicensed stylists in California had been reprimanded.<sup>84</sup> Cornwell, like Uqdah, brought constitutional due process and equal protection claims.<sup>85</sup> The court, applying rational basis review, held that although California's professed interest in the health and safety of its citizens was legitimate, its regulations were irrational as applied to braiders. However, the court did not strike down cosmetology

77. *Uqdah*, 785 F. Supp. at 1020 n.4.

78. See D.C. CODE § 47-2853.06(c) (2005); D.C. MUN. REGS. tit. 17, § 3702.1(c)(1) (2005); D.C. MUN. REGS. tit. 17, § 3703.9 (2005); 50 D.C. Reg. 7699 (Sept. 12, 2003).

79. Cornrows & Co., About AHNHA, <http://www.cornrowsandco.com/politicsSub.cfm?politicsID=1> (last visited Apr. 13, 2007).

80. 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

81. Sisterlocks, About Sisterlocks, [http://www.sisterlocks.com/About\\_Sisterlocks.html](http://www.sisterlocks.com/About_Sisterlocks.html) (last visited Apr. 13, 2007).

82. Sisterlocks, Official Trainee Registry, [http://www.sisterlocks.com/Web\\_Registries/OfficialTraineeRegistry.html](http://www.sisterlocks.com/Web_Registries/OfficialTraineeRegistry.html) (last visited Apr. 13, 2007).

83. *Id.* There are certified Sisterlocks consultants in thirty-three states, the District of Columbia, and in several European and Caribbean nations.

84. See Hubbard, *supra* note 71.

85. Cornwell's equal protection argument was based on the premise that "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). It is unclear whether Uqdah made the same claim.

requirements as applied to all braiders, just Cornwell.<sup>86</sup> In 1999, the California Legislature amended the law to exclude natural hair braiders from the definition of barbers and cosmetologists.<sup>87</sup>

### 3. *Mississippi: Armstrong v. Lunsford*

Melony Armstrong has been a licensed “wigologist” in Mississippi for over ten years. When Armstrong learned that she would need a license to braid, she decided to seek a wigology license that would allow her to braid with hair extensions and weave after only 300 hours of instruction, instead of a more comprehensive cosmetology license. Now Armstrong is a successful braider and has begun offering classes for prospective braiders. Eventually, two students wanted to use her wigology classes to fulfill Mississippi’s licensing requirements, but, in order to do so, Armstrong would have needed to become certified as a cosmetology instructor. That certification would require between 2000 and 2750 hours of training in addition to the 1200 hours required to receive a cosmetology license.<sup>88</sup> In 2004, Armstrong and her prospective wigology students filed a federal suit challenging not only the cosmetology instructor licensing requirements, but also the cosmetology and wigology requirements as applied to braiders.<sup>89</sup> In 2005, the Mississippi Legislature passed and Governor Haley Barbour signed an amendment to state law defining hair braiding and exempting braiders from the cosmetology, wigology, and cosmetology instruction laws, thereby mooting Armstrong’s case.<sup>90</sup> Currently, the state only requires braiders to pay a twenty-five dollar registration fee and to take a self-test from a brochure on sanitation.<sup>91</sup>

In addition to states that have amended their laws as a result of legal challenges, some states, such as South Carolina, Georgia, Texas, and Virginia changed their laws without a suit. A few states, like Missouri, continue to insist on putting braiding in the same category as chemical processing, but these states are bucking the trend. The braiding cases have created a unique niche for braiders and natural hair stylists in the regulatory regime. Though they perform many tasks associated with the highly-regulated cosmetology industry, they are exempt from occupational licensing requirements. This trend reflects a policy

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86. The court did not draw the same conclusion about the other named plaintiff, Uqdah’s American Hairbraiders & Natural Haircare Association, because it was unsure of what services member braiders performed. *Id.* at 1108.

87. CAL. BUS. & PROF. CODE § 7316(d)(2) (West 2007).

88. Institute for Justice, *Challenging Barriers to Economic Justice: Untangling African Hairbraiders from Mississippi’s Cosmetology Regime*, [http://www.ij.org/economic\\_liberty/ms\\_hairbraiding/backgrounder.html](http://www.ij.org/economic_liberty/ms_hairbraiding/backgrounder.html) (last visited Feb. 27, 2007).

89. *Id.*

90. MISS. CODE ANN. §§ 73-7-31(d), -71 (2006); H.B. 454, 2005 Leg., Reg. Sess. (Miss. 2005), available at <http://billstatus.ls.state.ms.us/2005/html/history/hb/hb0454.htm> (last visited Feb. 27, 2007).

91. MISS. CODE ANN. § 73-7-71(2)-(3) (2006).

strategy that has not fully considered the costs and benefits of regulation for both braiders and braid-wearers.

### III. WHAT'S AT STAKE: HARM AND ARBITRARINESS IN THE REGULATION OF BLACK HAIR

This Part addresses the first question posed in the Introduction: What is at stake for black women in the braiding debate? Section A critiques the assertion by deregulation advocates that braiding and natural hairstyling are “harmless.” I argue that this is a mischaracterization because of the notable connection between hair loss and braiding. Section B addresses braiders’ claim that current regulations are arbitrary. Though I disagree with their portrayal of braiding risks, I concur with their arbitrariness point. These determinations lay the foundation for this Comment’s suggestion of a middle-of-the-road, specialized regulatory regime.

#### A. Black Women Consumers: Braiding as a “Harmless” Practice

Advocates of natural hairstyling deregulation, in addition to noting the cultural significance of the practice, frequently assert that braiding and natural hairstyling are essentially harmless because they do not employ heat or harsh chemicals.<sup>92</sup> This Section calls into question the claim that natural hairstyling is “harmless.” While hairbraiding and natural hairstyling are undoubtedly safer than pressing<sup>93</sup> or relaxing,<sup>94</sup> they still present non-negligible risks to black women. These risks are significant enough to warrant the consideration of policymakers and courts as they consider braiding regulations.

Courts and legislatures have seriously acknowledged only one risk for braid-wearers: infectious scalp disease.<sup>95</sup> Some states that have largely deregulated the braiding industry have retained requirements that braiders receive a brochure or take a very short course on sanitation and recognizing

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92. See, e.g., Zanders, *supra* note 10 (“There are no health and safety justifications because there are no health concerns—they braid, weave and lock hair using their hands.”) (quoting Lee McGrath, executive director of JJ’s Minnesota chapter); *id.* (““They say it’s a health and safety issue, but we use natural products—a comb and hair grease.”) (quoting Salahud-Din Shabazz, a Minnesota “hair artist”).

93. “Pressing” is a process in which a metal comb is heated to an extremely high temperature and combed through curly hair to temporarily straighten it. Keratin, Curling Irons and Heated Rollers, <http://www.keratin.com/ai/ai028.shtml> (last visited Feb. 27, 2007).

94. “Relaxing” is a chemical process in which an alkaline mixture is applied to the hair to permanently straighten it. The alkaline base may contain calcium, lithium, or sodium hydroxide. D.A. Rauch, *Hair Relaxer Misuse: Don’t Relax*, 105 PEDIATRICS 1154, 1154 (2000).

95. One example of a scalp disease highly associated with braiding is tinea capitis, or scalp ringworm. Tinea capitis is a contagious disease frequently observed in black schoolchildren. Aditya K. Gupta et al., *Tinea Capitis: An Overview with Emphasis on Management*, 16 PEDIATRIC DERMATOLOGY 171 (1999); Amit G. Pandya, *Seborrheic Dermatitis or Tinea Capitis: Don’t Be Fooled*, 37 INT’L J. DERMATOLOGY 827 (1998); Judith V. Williams et al., *Semiquantitative Study on Tinea Capitis and the Asymptomatic Carrier State in Inner-City School Children*, 96 PEDIATRICS 265 (1995).



scalp infections.<sup>96</sup> Other risks, however, have received no judicial or legislative attention. One of those risks is alopecia, another term for abnormal hair loss or baldness. Because tight braids and chemical straightening processes are major causes of alopecia, black women are especially subject to it.<sup>97</sup> Alopecia comes in many forms, but the most prevalent one for braid-wearers and people with long dreadlocks is traction alopecia, a disorder that can result in permanent hair loss.<sup>98</sup> Central centrifugal cicatricial alopecia is another form of the disease caused by poor styling techniques.<sup>99</sup> Cosmetology regulations sometimes acknowledge alopecia risks briefly, but court documents and newspaper articles on the controversy over braider licensing often leave them out altogether, even though literature directed toward black women has warned of the disease.<sup>100</sup> In addition to scalp diseases and hair loss, there are other more acute risks of braiding. Braiders usually use matches, lighters, candles, boiling hot water, and other devices to seal and smoothly finish their creations. An untrained, unlicensed braider could misuse these dangerous items, thereby presenting a serious risk to clients.<sup>101</sup>

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96. Mississippi, for example, passed a bill in 2005 that requires braiders to pay a twenty-five dollar fee, take a self-test, and receive a brochure about sanitation. *Mississippi Eases Hair Braiding Rules*, ASSOC. PRESS, Mar. 29, 2005, available at <http://www.blackamericaweb.com/site.aspx/headlines/braiding330>.

97. Valerie D. Callender et al., *Medical and Surgical Therapies for Alopecias in Black Women*, 17 *DERMATOLOGIC THERAPY* 164 (2004); R.M. Earles, *Surgical Correction of Traumatic Alopecia Marginalis or Traction Alopecia in Black Women*, 12 *J. DERMATOLOGIC SURGERY & ONCOLOGY* 78 (1986); Suzanne O. Niang et al., *Alopecia in Senegalese Women*, 44 *INT'L J. DERMATOLOGY* 22 (2005). The propensity of black women to suffer from alopecia is ironic considering the energy and expense associated with black women's hair care. Even if hair loss seems to be an unimportant factor to decision-makers in the braiding cases, the salience of hair to black women might actually be one reason to err toward over-valuing the risks of braiding.

98. Callender, *supra* note 97; see Susan Taylor, Society Hill Dermatology, *The Uniqueness of Black Hair: Dr. Susan Taylor's Prescription for Healthy Hair*, [http://www.societyhilldermatology.com/feat\\_unique.htm](http://www.societyhilldermatology.com/feat_unique.htm) (last visited Apr. 13, 2007) (recognizing alopecia as one of the most frequent causes of black women's hair problems). Surgery is sometimes an option for blacks suffering from alopecia, but, because black skin is at high risk for abnormal scarring (e.g., keloid scars), many dermatologists are hesitant to resort to it. Callendar, *supra* note 97; Earles, *supra* note 97; Cheryl Guttman, *Alopecia Option for Black Women: Hair Transplantation Plays Emerging Role*, *DERMATOLOGY TIMES*, May 1, 2003, <http://www.dermatologytimes.com/dermatologytimes/article/articleDetail.jsp?id=56489>.

99. Holly Carter, *Saving Our Strands*, *ESSENCE*, July 2006, at 31.

100. See, e.g., *id.* at 6 ("Hair loss among Black women has reached near epidemic proportions . . . . Many Black women suffer from what doctors call traction alopecia. Tight hairstyles—braids, weaves, ponytails and cornrows—worn over long periods of time pull on the hair, causing the natural hairline to recede."); Zondra Hughes, *The Explosion of Braids, Locks & Twists*, *EBONY*, Sept. 2002, at 108; NIA, *Hair Braiders: To License or Not to License?*, [http://www.niaonline.com/NiaLD/NewDesign/homepage\\_channel/homepage\\_article\\_fullstory/1,2015,2972,00.html](http://www.niaonline.com/NiaLD/NewDesign/homepage_channel/homepage_article_fullstory/1,2015,2972,00.html) (quoting Diane Bailey, owner of Tendrils Hair Spa). Some newspaper articles on the braiding controversy make note of alopecia risks. See, e.g., *Braider Licensing Raises Issue of State Regulation vs. Culture*, *supra* note 10 (noting one braider's opinion that licensing "will help ensure that braiders know more about sanitation and the various related medical conditions such as alopecia, a scalp problem caused by braiding too tight" and acknowledging that supporters of regulation believe "there can be serious problems if people are not properly trained how to braid . . . . Braiding too tight can cause [hair] to fall out").

101. Of course, a trained and licensed braider could also make these mistakes, but training requirements ensure that the state has fulfilled its obligation insofar as it has used its power to protect black women clients as much as possible. The *Cornwell* court took note of the dangers in the use of

There is widespread acknowledgement among black women that wearing braids poses some risk, and the literature seems to presume that customers have the burden of foreseeing the hazards and taking measures to protect themselves. But should they bear that burden? Perhaps many black women are willing to bear these health risks to keep prices as low as possible.<sup>102</sup> However, placing the burden on black customers to protect themselves is problematic for a number of reasons. First, some professional braiders are prone to braiding tightly, despite the association of tight braiding with hair loss, because it pleases customers in the short-run and makes them more likely to return.<sup>103</sup> Second, braids are a considerable investment, thereby making women less likely to take them out if they are too tight or if the extensions are too heavy. Small braids can cost anywhere from \$100 to over \$600.<sup>104</sup> Third, black women might be accustomed to associating pain with nice-looking hair because of burns from chemical relaxers and pressing combs. Women who are used to dealing with those problems might be more likely to underrate the consequences of a tension headache or scalp tightness from braids. Fourth, despite the availability of literature warning about the risks of tight braids, many black women alopecia sufferers still tend to associate scalp disease with genetics or “bad hair” instead of styling trauma.<sup>105</sup> Fifth, an ex post tort remedy

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cigarette lighters for sealing braids, but apparently accepted the view that since braiders singe the tips of synthetic fibers and not the actual hair, the practice was not of concern. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1108 n.21 (S.D. Cal. 1999). This distinction is untenable given that the synthetic fibers are woven in with the client’s hair.

102. Curtrise Garner, *Knotty Problems: Tangled Questions Surround the Licensing of Hair Braiders*, DETROIT METRO TIMES, May 10, 2000, <http://www.metrotimes.com/20/32/Features/newKnotty.htm>. Alternately, prices and thus profit margins, for braiders could go down even in a system of regulation due to the development of a black market for braids. One of the complaints about licensing requirements in Illinois is that unlicensed braiders are practicing illegally in their homes and driving down the market price for braids, thus lowering profit margins for storefront braiders. Paghdwala, *supra* note 1.

103. One Illinois braider who emigrated from Senegal explained customers’ preference for African braiders over African-American braiders this way: “We take eight, ten hours, to do it neat and tight.” Paghdwala, *supra* note 1. One wonders if the tightness these customers prefer is in the best interests of their long-term hair health. Instead of arranging the hair more loosely, some braiders advise clients to take aspirin for tension headaches, steam their hair in order to slightly loosen it without ruining the style (a bad move, because the steam actually makes the hair more subject to breakage), or pat it until it feels better. Noting the commonness of this problem, Marquette Breslin, a licensed hair braider and founder of braiding instructional company Braids by Breslin, warns, “[Some braiders] may get caught up in making the braids look neat rather than protecting the client[’]s hair.” Marquette A. Breslin, Braids by Breslin Blog, Posting of 16:51 EST, July 27, 2006, <http://www.braidsbybreslin.com/blogger/braids-and-tension>.

104. A website called “Low-Cost African Hair Braiding” lists the starting price for micro braids (the smallest braids) as \$125. Low-Cost African Hair Braiding, <http://coolbraids.blogspot.com/> (last visited Apr. 13, 2007). Higher-end establishments charge much more: For example, Khamit Kinks in New York City lists the cost for micro braids as \$650 and up. Prices, Khamit Kinks, <http://www.khamitkinks.com/Prices.html> (last visited Jan. 10, 2007).

105. Dermatologist Chemene R. Quinn discovered in her study of twenty-three black women with undiagnosed scalp diseases that many of her research subjects believed their problems were genetic. Betsy Bates, *Hidden Hair Disorders Common in Black Women: Uncover Cultural Burden*, SKIN & ALLERGY NEWS, Nov. 1, 2003, available at [http://www.accessmylibrary.com/coms2/summary\\_0286-2852615\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-2852615_ITM).

for the effects of too-tight braiding over a course of years is infeasible. If an unknowing braider does major damage to even *several* clients' hair over the course of decades and provokes a lawsuit, plaintiffs would be unlikely to sufficiently recover after attorneys' fees.<sup>106</sup> Even if courts could somehow assign a monetary value to hair loss of this kind, the high transaction costs of litigation would deter consumers from pursuing legal action.<sup>107</sup> In any event, a working-class or even middle-class braider would be unlikely to have enough money to cover the expense of a sufficient damages award. In other words, braiders are judgment-proof. Consequently, an *ex ante* requirement that braiders know the risks associated with their craft is more likely to protect customers. For all of these reasons, braiders, not clients, are in the best position to avoid costly and emotionally-traumatic accidents.<sup>108</sup>

*B. Black Women Entrepreneurs: Braiding Regulations as Arbitrary Barriers to Economic Independence*

In addition to the culture-based arguments that challenge braiding regulations as a concept, braiders have also argued that the regulations as established in various states are arbitrary. They have complained that state regulations require natural hairstylists to pay thousands of dollars for instruction in chemical hair processes that they will never use in practice, while offering little or no instruction in natural styling. Their arguments are compelling: Prior to the consent decree in *Anderson v. Minnesota Board of Barber and Cosmetologist Examiners*,<sup>109</sup> braiders in Minnesota were required to fulfill 1550 hours of training in shampooing, conditioning, hair design and

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106. Even in cases where a corporation, not just an individual hairstylist, has done major damage to black women's hair, plaintiffs may not sufficiently recover. See Laura Sullivan, *A Rio Crime*, in TENDERHEADED, *supra* note 18, at 116, 124 (noting that black women awarded \$4.5 million in a settlement with hair product manufacturer World Rio Corporation received very little money after legal fees were paid). For more information about the Rio scandal, see *In re Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 U.S. Dist. LEXIS 20440 (D. Mich. 1996) (approving the settlement agreement); *Black Women Awarded \$4.5 Million in Hair Care Suit*, JET, Jan. 20, 1997, at 12 (providing more information on the procedural background of the Rio settlement); cf. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573 (1997) (showing the discriminatory elements in the application of punitive damages in cases involving women and minorities).

107. This is especially true when we consider that minorities and women have traditionally been less likely to file lawsuits. Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 498-500 (1996).

108. The idea of identifying which entity is best positioned to avoid the costs of tortious actions is most famously expressed by Guido Calabresi, although his analysis is much more complex than my application suggests. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

109. *Anderson v. Minn. Bd. of Barber & Cosmetologist Exam'rs*, No. 05-5467 (Min. Dist. Ct., June 10, 2005) (consent decree granting permanent injunction), available at [http://www.ij.org/pdf\\_folder/economic\\_liberty/mn\\_hairbraiding/MN-HairBraiding-judgement-6-10-05.pdf](http://www.ij.org/pdf_folder/economic_liberty/mn_hairbraiding/MN-HairBraiding-judgement-6-10-05.pdf).

shaping, chemical hair control, facials and makeup, manicuring, etc.<sup>110</sup> In Ohio, 1500 hours.<sup>111</sup> In the states of Washington and California, 1600 hours.<sup>112</sup> As noted in Section II.B, many states still have the same regulations for braiders as cosmetologists.

Courts have generally applied rational basis review in the braiding cases. In *Cornwell*,<sup>113</sup> the court found that plaintiff Cornwell did not meet the definition of a cosmetologist because her services were quite limited and the long list of cosmetology requirements, such as finger waving and pin curling, were completely irrelevant to her work. The court held that the fit between California's interest in health and safety and its insistence that Cornwell receive cosmetology training (less than ten percent of which was relevant to her business)<sup>114</sup> was too loose, making the licensing requirement arbitrary. Likewise, the *Anderson*<sup>115</sup> court found, for each of Minnesota's cosmetology licensing requirements, that the training "does not include and is not required by the Board to include any course, education or training in Hair Braiding."<sup>116</sup> Because interpreting the Minnesota licensing law to include braiders would bar knowledgeable unlicensed braiders from operating but permit licensed cosmetologists untrained in braiding to perform those services, that interpretation did not survive rational basis review.<sup>117</sup>

Not only are the requirements usually arbitrary as applied to braiders, they may also erect additional barriers to the economic independence of poor black women who have few marketable skills other than braiding.<sup>118</sup> Free market advocates have aggressively taken up this facet of the braiding regulation debate,<sup>119</sup> and some have argued in favor of deregulation on feminist grounds.<sup>120</sup>

110. *Id.* at 4 (quoting MINN. R. 2644.0510 (2003)).

111. Press Release, Institute for Justice, African Hairbraiders Seek To Untangle Regulations (Nov. 16, 1998), available at [http://www.ij.org/economic\\_liberty/oh\\_hairbraiding/11\\_16\\_98pr.html](http://www.ij.org/economic_liberty/oh_hairbraiding/11_16_98pr.html).

112. See Hubbard, *supra* note 71; Dan Richman, *Hair Braider's Suit Reveals Tangle Between Ancient Trade, Modern Laws*, SEATTLE POST-INTELLIGENCER, Aug. 6, 2004, at E1.

113. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

114. *Id.* at 1110.

115. *Anderson v. Minn. Bd. of Barber & Cosmetologist Exam'rs*, No. 05-5467 (June 10, 2005), available at [http://www.ij.org/pdf\\_folder/economic\\_liberty/mn\\_hairbraiding/MN-HairBraiding\\_judgement-6-10-05.pdf](http://www.ij.org/pdf_folder/economic_liberty/mn_hairbraiding/MN-HairBraiding_judgement-6-10-05.pdf).

116. *Id.* at 5.

117. *Id.* at 9.

118. See *Braider Licensing Raises Issue of State Regulation vs. Culture*, *supra* note 10.

119. TIMOTHY CARNEY, *Regulatory Robber Barons*, in THE BIG RIPOFF: HOW BIG BUSINESS AND BIG GOVERNMENT STEAL YOUR MONEY (2006), excerpt available at <http://www.cei.org/gencon/019,05426.cfm>; Ron Kozar, *Upbraiding the Hair Police*, The Buckeye Institute for Public Policy Solutions, <http://www.buckeyeinstitute.org/article/269> (last visited Apr. 17, 2006); Nat'l Ctr. for Policy Analysis, *Regulatory Policy: Hair Braiding Regulations Slam Minority Enterprises*, <http://www.ncpa.org/pd/regulat/oct97a.html> (last visited Apr. 17, 2006); Stossel, *supra* note 70.

120. Donna G. Matias, Association of Libertarian Feminists, *Decriminalizing Work*, <http://www.alf.org/alfnews/alf64.shtml> ("Feminists should note that many of these barriers, like the licensing of natural haircare practitioners, disproportionately affect women."). One can only speculate

The training requirements for cosmetologists bear little relevance to the work braiders do, and the price of cosmetology school may make it more difficult for poor black women to gain economic independence. But the unreasonableness of current regulations does not mean that all forms of regulation would be misguided. A more fitting regulatory scheme would provide alternative licensing requirements for braiders, mandating only enough hours to learn proper sanitation, braiding, weaving, and natural hairstyling techniques. Part V discusses alternative regulatory systems, which are already in place in several states, in greater detail.

#### IV. THE BRAIDING CASES, CULTURAL DEFERENCE, AND RACE-SEX BIAS

First, this Part turns to the second question I posed at the outset of this inquiry: Why have courts and policymakers been so reluctant to scratch the surface of braiders' arguments? In other words, why have officials yielded to braiders' demands for deregulation without seriously engaging their claims about black hair culture? We can better understand this hands-off approach by examining it through the lens of a ubiquitous issue in the international law context: the debate between "western human rights" and "non-western culture." Policymakers have made two notable moves in these cases. First, they have exercised "cultural deference."<sup>121</sup> Second, they have perceived the loudest black voices, in these cases braiders, as representing the community of black women, even though the divergent interests of black entrepreneurs and consumers should be obvious. The adoption of this culturally deferential heuristic in these cases reveals subtle but notable race-sex bias.

##### A. *The Braiding Cases and Cultural Deference*

By "cultural deference," I refer to a heuristic whereby decision-makers permit actions that would otherwise be impermissible because they are customary for a recognized group. Cultural deference and the resulting nonintervention have been noted widely, especially with regard to domestic

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about why libertarian groups have so aggressively taken up the cause of black braiders, but one could imagine that, given the expected political disagreement between free market advocates and black civil rights advocates, it is effective in "the court of public opinion" for libertarian groups to take up minority causes. See *supra* note 9 and accompanying text.

121. See also discussion *infra* Subsection IV.A. Note that the main exercisers of cultural deference in these cases have been legislators. When judges strike down licensing requirements because of arbitrariness, they do not have the power to replace them with another system. But legislators do, and they often mention the cultural aspects of braiding as they support eliminating or substantially curtailing regulations. See *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1104 (S.D. Cal. 1999) ("[T]he Court does not write laws for the State of California, nor does it mandate new regulatory programs. That is the role of the Legislature, and state agencies should the Legislature properly delegate such authority.").

violence against immigrant women.<sup>122</sup> Officials in host countries, asserting that wife-beating is “an inherent part of [immigrants’] cultural repertoire,”<sup>123</sup> neglect their duty to protect citizens from unnecessary violence. Female genital cutting is another poignant example of cultural deference. Initially, when African women asked the World Health Organization (WHO) to intervene in the practice, WHO refused because it claimed female genital cutting was a cultural issue, not a medical one.<sup>124</sup> Though the tide has completely changed—international organizations now uniformly condemn female genital cutting<sup>125</sup>—its proponents continue to view it as an important cultural ritual, and activists have had relatively little success in eradicating it.<sup>126</sup> Particularly in the context of international women’s rights, culture has been an excuse for the continuation of practices that many women, including those who are part of those cultures, denounce.<sup>127</sup>

Certainly, having one’s hair braided too tightly cannot compare to domestic violence or involuntary female genital cutting, but the rationale condoning it is the same. States inadequately protect women members of minority ethnic groups because some members of the groups allege that a practice’s cultural aspects should make it immune from critique. It is precisely because the braiding act seems innocuous that officials who would probably object to cultural deference in the international women’s rights context defer here.

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122. See, e.g., ELEANORE KOFMAN ET AL., GENDER AND INTERNATIONAL MIGRATION IN EUROPE 101 (2001) (“The case of domestic violence exemplifies the tolerance of practices in the private sphere on grounds of non-intervention in the customs of others.”); Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC’Y 898, 901 (2002); see also Salome Mbugua, founder of AkiDwa (African women’s sisterhood), Presentation in Dublin, Ireland (Oct. 28, 2004) (notes on file with author). Ms. Mbugua, an immigrant to Ireland from Kenya, created a training program for the Gardí (Irish police) after numerous reports of officers’ non-intervention in domestic disputes between African immigrant couples. The program teaches officers “culturally-sensitive” approaches to domestic intervention.

123. Menjivar & Salcido, *supra* note 122, at 901.

124. ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY 41 (2005).

125. *Id.* at 61.

126. IRIN, RAZOR’S EDGE: THE CONTROVERSY OF FEMALE GENITAL MUTILATION (2005), available at <http://www.irinnews.org/webspecials/FGM/FGM-webspecial.pdf>. An encouraging exception is Senegal, where some rural communities have employed the principles of “the convention theory” to reduce female genital cutting. See Gerry Mackie, *Female Genital Cutting: The Beginning of the End*, in FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 253 (Bettina Shell-Duncan & Ylva Hermalund eds., 2000); Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 AM. SOC. REV. 999 (1996).

127. See, e.g., WARIS DIRIE & CATHLEEN MILLER, DESERT FLOWER: THE EXTRAORDINARY JOURNEY OF A DESERT NOMAD (1998); see also UMA NARAYAN, DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM 32-33 (1997) (arguing that distinctions between “Western” and “non-Western” conceptions of femininity pit women against each other and cripple legitimate critiques of misogyny); Madhu Kishwar, *A Horror of ‘Isms’: Why I Do Not Call Myself a Feminist*, in OFF THE BEATEN TRACK: RETHINKING GENDER JUSTICE FOR INDIAN WOMEN 268 (1999).

Cultural deference can be a decision-making approach in any branch of government. *Cornwell*<sup>128</sup> contains a blatant example of a judge's use of the heuristic. After the court explains that strict scrutiny is not applicable because there is no evidence of racial animus, the opinion notes that "[r]ace . . . is not irrelevant to this case."<sup>129</sup> The court then, in dicta, indicts the State of California for its denigration of tightly-coiled black hair, claiming that the state "often refers to coily hair in a pejorative manner" in media such as state-approved textbooks and final exams<sup>130</sup> and maintaining that the state "has embraced this ideology to such an extent that a large percentage of African Americans have themselves adopted a construction of beauty which equates straight hair with attractiveness."<sup>131</sup> To support the controversial assertion that black women straighten their hair because of the "negativity associated with African-American physical characteristics,"<sup>132</sup> the court cites the plaintiffs' own documents and one book about black hair.<sup>133</sup> It is doubtful that the roughly seventy-five percent of black women who straighten their hair<sup>134</sup> would say that they do it for these reasons. There are several other reasons one might straighten her hair, including convenience, versatility, tradition, and economic mobility,<sup>135</sup> but the court did not second-guess the plaintiffs' assertions on this point. The defendant State argued that the plaintiffs' conclusions were "mere personal belief,"<sup>136</sup> but, instead of exercising the usual skepticism, the (white male) judge deferred to the plaintiffs' assertions about black social pathology. Administrators have also blatantly exercised cultural deference: To explain why North Carolina does not regulate braiders, Dee Williams, an enforcement officer with that state's Board of Cosmetic Arts Examiners, said, "The board feels it's a black culture thing."<sup>137</sup>

It is important to note that, although culture-based deference has discouraged white officials from considering the best interests of black women in this instance, I do not contend that all culture-based deference is undesirable. In some cases I would argue that judges and policymakers should exercise more culture-based deference. For example, if the *Rogers* employment discrimination case were heard in a court that deferred to the cultural expertise

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128. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

129. *Id.* at 1104.

130. *Id.* at 1105 n.10.

131. *Id.* at 1105.

132. *Id.* at 1105 n.11.

133. *Id.* (citing *ROOKS*, *supra* note 25).

134. Mariame Kaba, *When Black Hair Tangles with White Power*, in *TENDERHEADED*, *supra* note 18, at 102, 103.

135. See, e.g., *BYRD & THARPS*, *supra* note 15, at 162; Kaba, *supra* note 134, at 103-104; Jenyne M. Raines, *Relax Your Mind!*, in *TENDERHEADED*, *supra* note 18, at 95, 95-101. See also *supra* note 18 and accompanying text (presenting bell hooks's childhood association of the hair straightening ritual with black female intimacy).

136. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105 n.11 (S.D. Cal. 1999).

137. Katrice Franklin, *Hair Braider Fights To Keep Government Away from Salons*, *VIRGINIAN-PILOT*, Aug. 1, 2002, at A1.

of black women about their hair, it almost certainly would have turned out differently, and the social position of women of color might have been recognized by a protected legal status. But the *Rogers* Court did not defer, instead questioning the hairstyle's salience in black women's culture due to its increasing popularity among whites at the time.<sup>138</sup> Cultural deference is troubling in the braiding cases because its deployment avoids critical cultural engagement, and it does not protect consumers' best interests. When the only conceivable harm was to a mainstream company's conception of professionalism, the court demanded evidence of what constituted "culture." When black women's well-being is at stake, officials do not engage in such a searching inquiry.

### *B. Cultural Deference and Race-Sex Bias*

Understanding the decisions of state officials in these cases as culturally deferential, while also recognizing that legislatures and courts rarely resort to this heuristic begs the question: Why have they deferred in *these* cases? Among various potential alternatives, I argue that the most compelling response is race-sex bias.

As applied to these cases, race-sex bias describes prejudice related to women as a subset of black America: Well-meaning officials view black America as a culture they cannot know and, thus, defer to braiders' assertions about black cultural practices. Black women are overwhelmingly the participants in the relevant cultural practice, which means these instances of deference have a disparate impact on them. Put differently, black women braid-wearers are inadequately protected because of their womanhood within a "foreign" racial group, not because they are "foreign" voices among women. Admittedly, in many cases this distinction is tenuous, as it is often difficult to tell precisely how race and sex are working together to produce bias against women of color. Black feminist and intersectional scholars have been wary of breaking out which parts of discrimination against women of color are attributable to their race versus their sex: As Kimberlé Crenshaw notes, "Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another . . . [I]f a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race

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138. The *Rogers* Court contested Rogers' claim that cornrows have special significance within black culture, noting that "plaintiff first appeared at work in the all-braided hairstyle on or about September 25, 1980, soon after the style had been popularized by a white actress in the film '10.'" *Rogers v. American Airlines*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981). The white actress in question was Bo Derek. Kenji Yoshino has referred to the *Rogers* Court's argument as "the Bo Derek defense." Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, §6 (Magazine), at 32.



discrimination.”<sup>139</sup> Black women have faced widespread prejudice within female communities because of their race.<sup>140</sup> In this case, however, the mechanics are fairly clear. The distinction is important: decision-makers are deferring to claims about black culture, not women’s culture.<sup>141</sup>

Unlike first-generation racism and sexism, the race-sex bias at work in these cases is likely unconscious.<sup>142</sup> It is probably also well-meaning. Naomi Wolf describes the racism practiced by herself and that of her social class in her essay, *The Racism of Well-Meaning White People*:

[O]ne’s racism has to do with how one sees: one experiences one’s own racism more often as a sort of shameful scrim, a dirty curtain made of the elaborate tissues of fears and inequities that surround and envelop the fact of race merely because one lives in a racist culture.<sup>143</sup>

Wolf continues, “It means spending so much time trying to clear the scrim away—and hoping to convey that one is indeed trying to clear it away—that the Other in question is still dimmed and obscured.”<sup>144</sup> Scholars of criminal law have also pointed out this form of racial bias with regard to community policing. Dan Kahan and Tracey Meares note that, despite efforts by minority inner-city residents to secure curfews, anti-loitering laws, and random searches; civil liberties groups have challenged these laws, purportedly because of concerns about racial bias in law enforcement.<sup>145</sup> Knowledge of the racial impact of the criminal justice system is so widely available that advocates do not consider the possibility that minorities can, at least occasionally, use law

139. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149.

140. See, e.g., BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 37-38 (1989) (recounting white feminist academics’ devaluation and appropriation of feminist theory by women of color); Dorothy Gilliam, *Reaching Across the Feminist Racial Divide*, in SKIN DEEP: BLACK WOMEN AND WHITE WOMEN WRITE ABOUT RACE 256 (Marita Golden & Susan Richards Shreve eds., 1995) [hereinafter SKIN DEEP]; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in CRITICAL RACE FEMINISM 34, 35-39 (Adrien Katherine Wing ed., 2d ed. 2003) (critiquing Catharine MacKinnon’s approach to discussing black women); bell hooks, *Feminism in Black and White*, in SKIN DEEP, *supra*, at 265, 268; Pamela J. Smith, Comment, *We Are Not Sisters: Black Women and the Freedom to Associate and Disassociate*, 66 TUL. L. REV. 1467 (1992).

141. See *supra* Section I.A.

142. For a better understanding of unconscious bias theory, see Charles R. Lawrence III’s *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence’s article is the foundational piece on unconscious bias, also known as implicit or cognitive bias. See also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5-10 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005).

143. Naomi Wolf, *The Racism of Well-Meaning White People*, in SKIN DEEP, *supra* note 140, at 37, 43.

144. *Id.* at 46.

145. Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160 (1998) (“Although civil liberties groups purport to be representing inner-city residents generally when they challenge community policing strategies, their lawsuits are often opposed by inner-city residents themselves.”).

enforcement to improve their neighborhoods. A similar phenomenon is at work in the braiding cases. Attempting to be sensitive to the interests of black women—to clear the scrim away—but unfamiliar with black culture, judges and policymakers have accepted braiders' assessment of risks with few questions. Put differently, state officials have tokenized black women braiders, potentially to the detriment of black women consumers. A more responsible approach would be for officials to acknowledge that, although relationships between service providers and consumers may vary cross-culturally to some degree, the relationships probably have enough in common that providers of braiding services cannot be presumed to adequately represent the interests of their patrons.

#### V. A POTENTIAL SOLUTION: RELEVANT BRAID AND NATURAL HAIR REGULATIONS

How can policymakers both respect black American culture and protect consumers? This Comment urges policymakers to adopt a strategy that several states have already employed: developing new regulations tailored specifically to braiders and natural hair stylists. Instead of eliminating braiding regulation wholesale or applying irrelevant cosmetology regulations to natural hair stylists, policymakers should rigorously weigh the risks for black braid-wearers and the costs of regulation for black braiders to find a policy that serves the best interests of both groups. Creating new regulations will initially take more time than all-or-nothing approaches, but regulations provide important protections for consumers, while making those regulations as minimal as possible decreases the likelihood that braiders will operate on the black market. Further, weighing these risks will require critical engagement in this debate instead of passive acceptance of braiders' cultural claims.

While many states whose licensing regimes are challenged eliminate all regulation or require only a sanitation lesson, ten states have replaced traditional cosmetology licensing requirements with more relevant requirements created specifically for braiders: Florida,<sup>146</sup> Louisiana,<sup>147</sup> New York,<sup>148</sup> Ohio,<sup>149</sup> Oklahoma,<sup>150</sup> Pennsylvania,<sup>151</sup> South Carolina,<sup>152</sup>

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146. FLA. STAT. ANN. §§ 477.013(9), .0132 (West 2006); FLA. ADMIN. CODE ANN. r. 61G5-24.019(1), (2) (2007).

147. LA. ADMIN. CODE tit. 46, §§ XXXI.101(A), XXXI.1105(A), XXXI.1107 (2005).

148. N.Y. GEN. BUS. LAW §§ 400(5), 406(2)(b) (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 19, § 162.3(a) (2007).

149. OHIO REV. CODE ANN. §§ 4713.01, 4713.24, 4713.28(D) & (J) (West 2007).

150. OKLA. STAT. tit. 59, §§ 199.1(11), 199.8 (2000); OKLA. ADMIN. CODE §§ 175:10-3-43(b), 10-9-2(a)(5), 10-9-25 (2005).

151. 63 PA. STAT. ANN. § 507 (West 2007).

152. S.C. CODE ANN. §§ 40-7-20(2), 40-7-255, 40-13-230 (2006).

Tennessee,<sup>153</sup> Texas,<sup>154</sup> and Virginia.<sup>155</sup> Ironically, the District of Columbia, where the first braiding case originated, also adopted licensing requirements for “specialty cosmetologists” in 2003.<sup>156</sup> The most reasonable regulatory regimes are those requiring significant technical training, not merely sanitation training and a licensing fee. New York, Ohio, Oklahoma, Texas, and Virginia have achieved the best balance of substantive training requirements with accessibility for braiders. Oklahoma’s system is unique because it allows braiders to become licensed through apprenticeship, not just classroom time. Texas has taken a multi-tiered approach to its specialized licensing system, offering certification in braiding (thirty-five hours) and hair-weaving (three hundred hours). By contrast, Florida’s alternative licensing scheme is poorly thought out, with very minimal requirements of a sixteen-hour sanitation course and a twenty-five dollar biennial fee. Florida did not include those who add hair extensions in their definition of “braiders,” even though professional braiders add hair extensions routinely. While each state must make its own determinations regarding training requirements, every state should communicate both with braiders and braid-wearers in order to avoid ill-conceived policy.

The Institute for Justice (IJ) opposes specialty licensing, stating “[T]his is hairbraiding, not brain surgery. Training is utterly unnecessary to protect the public; safety concerns can easily be addressed by reading a simple pamphlet.”<sup>157</sup> Their arguments bring to mind those of civil libertarian groups opposed to community policing in the work of Kahan and Meares. Despite evidence that braiding is not, in fact, harmless to black women, IJ justifies its position through appeals on behalf of black women. Many braiders oppose specialized licensing as well. Taalib Uqdah has called on braiders to openly defy Pennsylvania’s new licensing law requiring 150-300 hours of training,<sup>158</sup> and other braiders cite culture and experience as the only important qualifications to be a hair braider.<sup>159</sup> However, some braiders support—or at least understand—the benefits of specialized licensing.<sup>160</sup> Many of the news reports on braiding regulations do not contain viewpoints from customers,

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153. TENN. CODE ANN. §§ 62-4-102(a)(14) & (15), 62-4-110(f) (West 2006).

154. TEX. OCC. CODE ANN. § 1602.002(a)(2) (Vernon 2007).

155. VA. CODE ANN. § 54.1-700 (West 2007).

156. D.C. CODE § 47-2853.06(c) (2007); D.C. MUN. REGS. tit. 17, §§ 3702.1(c)(1), 3703.9 (2005); 50 D.C. REG. 7699 (Sept. 12, 2003); *see also* Public Notice, <http://www.asisvcs.com/publications/pdf/680959.pdf>.

157. BAYHAM, *supra* note 63.

158. Kaya Casper, Posting of 01:13 EST, Naturally You! Magazine: Behind the Naps!, Dec. 23, 2006, [http://naturallyyoumagazine.blogspot.com/2006/10/call-to-openly-defy-braiding-laws\\_10.html](http://naturallyyoumagazine.blogspot.com/2006/10/call-to-openly-defy-braiding-laws_10.html) (reporting a press release from Taalib Din Uqdah calling on braiders to openly defy Pennsylvania’s new licensing law).

159. *See supra* note 10 and accompanying text.

160. *See Braider Licensing Raises the Issue of State Regulation vs. Culture, supra* note 10.

which reveals a bias in the determination of whose stories are important in the braiding cases.<sup>161</sup>

Despite opposition from libertarians (who oppose virtually all regulation) and industry insiders, a specialized training requirement is a positive step for several reasons. First and most obviously, it ensures that braiders have some knowledge of how best to foster black women's hair health. Second, it teaches braiders necessary information for perfecting their craft, while not burdening them with other information that is unnecessary and costly to acquire. Third, it ensures that licensed braiders can give knowledgeable advice to their clients, which empowers black women consumers. Fourth, it professionalizes the industry, which offers benefits for the entrepreneur as well as the customer. The advantages of professionalizing domestic industries have been noted, especially with regard to childcare. Community groups like All Our Kin, in New Haven, Connecticut, give women opportunities to earn child development certificates that help women see themselves not as babysitters, but as child care professionals.<sup>162</sup> A similar dynamic can occur within the braiding industry—there are benefits to training requirements for both braiders and braid-wearers. Finally, although detractors have noted that licensing requirements have the effect of creating a “black market” for braids,<sup>163</sup> the state should fulfill its responsibility to provide legal structures for protecting consumers by rationally regulating the industry. The fact that some will break the law is not a sufficient reason for legislative inactivity.

## CONCLUSION

Black women's hair might appear, at first, a trivial issue. But, given the cultural lineage, social salience, and economic implications of hair, the regulation of the braiding industry is an issue worthy of academic attention. The erroneous belief that braiding is essentially risk-free has animated a number of poorly thought-out policy decisions and has meant that braid-wearers have less legal protection than people who do not wear braids. To address this disparity, this Comment urges state legislatures to create specialized licensing policies for braiders in consultation with both braiders and braid-wearers.

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161. There are a couple of exceptions. One eighteen-year-old Virginia customer concluded that “[b]raiding without a license is not necessarily a bad thing” since she wasn't personally aware of “many people who have had bad reactions to braids.” *Braiding Without a License?*, *supra* note 10. A more complex answer came from a twenty-seven-year-old Philadelphia customer, who remarked that “[The braider] got licensed to braid my hair when I paid her.” *Braider Licensing Raises Issue of State Regulation vs. Culture*, *supra* note 10. This statement might suggest that the customer believes that consumers of braiding services should bear the risks of braiding, without regulatory involvement.

162. See All Our Kin, Inc., <http://www.allourkin.org/parents.php> (last visited Feb. 27, 2007).

163. E.g., *Anderson v. Minn. Bd. of Barber & Cosmetologist Exam'rs*, No. 05-5467 (Minn. Dist. Ct., June 10, 2005), at ¶ 23; Paghdiwala, *supra* note 1.

The fact that most braiders and braid-wearers are black women illuminates another, more complicated culprit: race-sex bias. Race-sex bias impedes well-intentioned decision-makers' ability to think critically about how legal rules affect minority women. When the challenged law deals in cultural currency, well-intentioned decision-makers are paralyzed and thereby defer to a small group's subjective assessment of cultural practice. This issue is much more difficult to remedy. On one hand, it is important for decision-makers to be culturally sensitive. Adapting the law to create space for cultural practice is, generally speaking, a societal good. On the other hand, cultural sensitivity has to mean something deeper than uncritical acceptance of potentially (un)representative minority women's claims. This Comment supports a richer conception of non-racist and non-sexist policymaking, one that takes into account the voices of all minority women, and by analogy, any potentially-affected group. In order for states to develop and interpret law that is as free of bias as possible, courts and policymakers must "look to the bottom"<sup>164</sup>—the *whole* bottom.

Of course, decision-makers who are not part of underrepresented cultures may encounter challenges when attempting to critically analyze cultural practices like braiding. This reality is part of the rationale for a more diverse bar, bench, and legislature. However, it is not enough for officials to merely rely on minorities, women, LGBT people, disabled people, or other members of underrepresented communities to be "the voice" for their respective groups. Fundamentally, the "critical engagement" approach I suggest here involves a paradigm shift: officials must see the *commonalities* between black women's businesses and mainstream businesses, without undue deference to cultural claims. While it may be difficult to tease out when cultural deference is appropriate and when it is not, justice demands that officials make the effort.

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164. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("[T]hose who have experienced discrimination speak with a special voice to which we should listen.").