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Can I Touch Your Hair?: Business Diversity, Slavery, Disparate Outcomes, and the Crown Act

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> *Inclusivity means not 'just we're allowed to be there,' but we are valued. I've always said: smart teams will do amazing things, but truly diverse teams will do impossible things.*
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> *~Claudia Brind-Woody*

INTRODUCTION

Despite the debate surrounding diversity in all areas of American life and politics, one thing has proven to be true in business time and time again: Diversity makes good business sense.[1] Most businesses can agree

[1] Vijay Eswaren, *The Business Case for Diversity in the Workplace Is Now Overwhelming*, WORLD ECON. FORUM (Apr. 29, 2019), https://www.weforum.org/agenda/2019/04/business-case-for-diversity-in-the-workplace/ (discussing how diversity, defined as a non-homogenous workplace,

that promoting diversity and inclusion in the workplace means not discriminating intentionally on characteristics that might be associated with a certain race or ethnicity. It means considering job and promotional candidates regardless of the color of their skin; however, when it comes to the texture of the hair growing from a worker's head or the hairstyles in which the hair is kept, some businesses struggle. Bare minimum federal requirements allow businesses to continue "subtle" discriminatory hair rules on their books. For businesses to fully realize economic boosts from diversity, businesses must do more than follow bare minimum federal anti-discrimination requirements. Businesses must let go of discriminatory hair rules. Intentional and overt discrimination by employers may have been banned by Title VII of the Civil Rights Act of 1964,[2] but it is past time to realize that more subtle forms of discrimination have the same result and effect as overt forms of discrimination.[3] In a growing number of unintentional, seemingly innocent, or subtle, discrimination cases, Title VII has had only some ability to protect our most vulnerable workers.[4] Unfortunately, this leaves many American workers unprotected, a recurring theme in cases that have come up over time, which have appeared in areas uncovered by Title VII due to its somewhat vague language.[5] These cases are concerning due to the disparate impact on Black Americans who cannot enjoy full protection under Title VII.

Malaysia and Singapore serve as two large case studies, as both countries have made conscious, nationwide efforts to promote the

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enhances, and fosters creativity and innovation while also boosting the economic performance of the business).

[2] *Title VII of the Civil Rights Act of 1964*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Apr. 18, 2021).

[3] Alexia Fernandez Campbell, *A Black Woman Lost a Job Offer Because She Wouldn't Cut Her Dreadlocks. Now She Wants to Go to the Supreme Court,* VOX (Apr. 18, 2018), https://www.vox.com/2018/4/18/17242788/chastity-jones-dreadlock-job-discrimination. Chastity Jones was denied a job in a call center in Alabama after arriving to her interview wearing her hair in short dreadlocks, herein after referred to as ("locs"). *Id.* The human resources manager told Jones that her hair violated company policy, as the manager asserted that locs "tend to get messy." *Id.* Jones was denied the job after she refused to cut off her locs as a condition of accepting employment. *Id.* The human resources manager in this case is certainly not alone in her thinking. Studies have shown that biases towards natural hair persist in business, and that White women tend to be the most biased against natural hair particular on Black women. *Id.* In fact, white women tend to rate natural hair "less beautiful and less professional than smooth hair." *Id.*

[4] *Id.*

[5] *Id.*

inclusion of diverse ethnic and religious populations in housing and the workplace.[6] Both countries have seen significant annual growth of their gross domestic product (GDP) since beginning to actively promote diversity and inclusion on a national scale.[7] Changing focus from the national scale to an individual business, we can see how diversifying leadership and other teams can boost revenue and drive innovation, making a case for a diverse workplace more than just optics.[8] Why then, do businesses across the United States have discriminatory rules on their books?

This comment will begin by looking at why hair in the United States is related to issues of race. This comment will then look at how businesses' rules for appearance and hair disproportionately affect Black employees. Next, this paper will look at Title VII of the Civil Rights Act of 1964 to point out how the vague language has created loopholes, which allow businesses to lawfully discriminate against people with natural hair. We will then move to explore what role some city and state governments have had in creating natural hair-safe workspaces for employees in their respective boundaries. Lastly, we will consider what businesses themselves can do to create diverse and inclusive environments that encourage all hair types and styles by looking at both Starbucks's diversity program and Dove's CROWN Act mission.

I. HAIR: CURLY, STRAIGHT, NATURAL, BRAIDS, LOCS, AFRO & WEAVE

Each day many people of color, particularly women, struggle with whether to sleep in or straighten their hair, whether to keep their hair short to avoid the appearance of an Afro, or whether to wear their favorite braids

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[6] *See* Eswaren, *supra* note 1.

[7] *Id.*

[8] Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BOS. CONSULTING GRP. (Jan. 23, 2018), https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation.aspx (exploring how even small changes in the racial, gender, thought, and career makeup of a leadership team can have large impacts on a company's revenue stream, particularly because increasing diversity of thought leads to innovative products that can end up accounting for more than half of a company's revenue-evidencing the diverse leadership team's ability to quickly adapt to changing customer demands).

to a job interview.[9] Why? Because women of color, in particular, are subject to hair-based discrimination in the workplace. Still, courts around the country have been hesitant to extend Title VII protections beyond traditional boundaries to insulate these women from hair-based racial discrimination.[10] Black boys and men have also faced discrimination surrounding their hairstyles. For example, some community institutions have written policies in such a way that Black men with protective styles or longer hair had to fundamentally change the way they wore their hair to be accepted by these institutions.[11]

You might be asking yourself, "Why should we care that seven states and two cities have enacted legislation to protect hair in the workplace?" You might also be wondering, "Why hair?" when there are issues in the workplace that affect people with varying minority statuses that fall under Title VII protection. Why focus on making the changes necessary to be more accommodating of Title VII protected class job applicants and coworkers, especially when it might feel that hiring them is akin to inviting litigation?[12] Changing the way that businesses in the

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[9] Phil Willon & Alexa Diaz, *California Becomes First State to Ban Discrimination Based on One's Hair*, L.A. TIMES (July 3, 2019), https://www.latimes.com/local/lanow/la-pol-ca-natural-hair-discrimination-bill-20190703-story.html.

[10] Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt Solutions, 852 F.3d 1018 (11th Cir. 2016). The court's interpretation of the Civil Rights Act of 1964 has allowed for some discrimination in the workplace by permitting employers to moderate things like employee's hairstyles so long as the employer asserts that their policies are race neutral; s*ee also* Visceccia v. Alrose Allegria, 117 F. Supp. 3d 243 (2d Cir. 2015) (finding that a male employee was terminated for having long hair).

[11] Johnny Diaz, *Student Suspended Over Dreadlocks Is Invited to the Oscars by "Hair Love" Team*, N.Y. TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/02/01/us/DeAndre-Arnold-dreadlocks.html (discussing the suspension and disallowance of a teenage boy, DeAndre Arnold of Texas, to walk in his high school graduation ceremony because his locs would extend lower than a shirt collar if he did not wear them up at school).

[12] Taylor Cotterell, *Understanding Title VII: What Organizations Need to Know About Employees in Protected Classes*, FORBES (Aug. 22, 2018), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/08/22/understanding-title-vii-what-organizations-need-to-know-about-employees-in-protected-classes/#669b34be3a32. Businesses often struggle with whether they can hire or fire employees who are protected under Title VII. Some businesses feel as if they are unable to hire more well qualified candidates if they happen to interview someone like a Black Woman, who is a part of two Title VII protected classes. Some businesses fear even firing an underperforming Title VII protected

United States look at hair, hairstyle, and race can change the overall makeup and satisfaction of the American workforce. Businesses could look at company policies and determine which might be discriminatory or of detriment to a particular group of employees. Companies can take proactive steps to change discriminatory hair-based policies to create a more inclusive workplace. Additionally, as workplace protections begin to modernize across the nation, business will likely be forced into accepting all hair types.

California became the first state to ban discrimination based on hair on July 3, 2019.[13] The CROWN Act, or Create a Respectful and Open Workplace for Natural Hair Act, recognizes that protective hairstyles, natural hair, and other hair texture and style-related characteristics are race-based.[14] The new protections began on January 1, 2020, and have banned discrimination based on various types of curly or natural hair in schools and workplaces, and are protective of other styles that people with natural hair, usually of African descent, typically wear.[15] But why does California, and as we will see later, other states—and, arguably, the nation—need the CROWN Act?

The CROWN Act and its sister statutes are necessary because many people in the business world consider curly, natural hair unprofessional. Many natural hairstyles are frowned upon when worn by Black employees of businesses across the country.[16] It should go without

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employees due to recent litigation by employees because the fear of being sued becomes overwhelming. The author argues that the background check process and careful documentation of employee performance is necessary to stave off or succeed in defending discrimination related litigation. *Id.*

[13] *See* Willon & Diaz, *supra note 9.*

[14] Corinn Jackson, *Dear Littler: Can We Still Maintain Hairstyle and Personal Grooming Policies?,* LITTLER (Dec. 9, 2019), https://www.littler.com/publication-press/publication/dear-littler-can-we-still-maintain-hairstyle-and-personal-grooming.

[15] *Id.* It is important to note that the CROWN Act does not just begin protecting individuals when they reach the workplace; this protection also extends to schools and public places as well. *Id.*

[16] Maya Allen, *22 Corporate Women Share What Wearing Their Natural Hair to Work Means*, BYRDIE (May 8, 2019) https://www.byrdie.com/natural-hair-in-corporate-america (sharing interviews from women with natural hair and hairstyles who explain the anxiety and fear surrounding daily hair decisions and how it will affect their perceptions in the workplace, and how workplaces that are supportive wearing natural hairstyles or letting down their natural hair on the job

saying that hair, its texture, and its styled appearance, have absolutely nothing to do with job performance or professionalism. In fact, there are many hairstyles that White women wear that, if worn by Black women, are considered unprofessional and are regulated.[17] When a White person wears these styles, they are not considered distracting or unprofessional, and rules governing these hairstyles in workplaces do not apply.[18] This unequal treatment and application of hair regulations among Black and White employees creates disparate impacts within individual workplaces and businesses across the country. This is evidence that it is not the hair or hairstyles that are unprofessional, but rather there are harmful and untrue stereotypes about Black people as employees that persist and create a harmful narrative surrounding hair as worn in any fashion by Black people at work.

II. HISTORY

A. How Did We Get Here?

To have an informed discussion about why natural hair, and particularly Black hair, is so controversial, we must explore American slavery as it informs the racism in the workplace today. We will begin with a discussion of Black hair during slavery before discussing the effects of Jim Crow laws on Black economic participation.

Slaves had little say in their appearance generally, as slave masters often would brand their flesh with hot irons or otherwise disfigure them as a means to assert control and to prove ownership.[19] But on Sundays, which

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helps women with natural hair feel more accepted as they work to break the stereotypes surrounding hair and job performance).

[17] Ria Tabacco Mar, *Why Are Black People Still Punished for Their Hair?*, N.Y. TIMES (Aug. 29, 2018) https://www.nytimes.com/2018/08/29/opinion/black-hair-girls-shaming.html. "When it comes to hair, only black people and multiracial people of African descent are punished when they choose to wear styles consistent with their natural hair texture. It's unthinkable that a court would uphold a policy that effectively required white workers to alter their hair texture through costly, time-consuming procedures involving harsh chemicals."

[18] *Id*.

[19] Shane White & Graham White, *Slave Hair and African American Culture in the Eighteenth and Nineteenth Centuries*, 61 THE J. OF S. HIST. 45, 48 (Feb. 1995), https://www.jstor.org/stable/2211360?seq=2#metadata_info_tab_content ("Throughout the centuries of their enslavement the bodies of African and African

was considered the Lord's day and a time when some slaves could have time off of their duties, slaves were allowed to care for their hair and each other.[20] "The way African American slaves styled their hair was important to them as individuals, and it also played a substantial role in their communal life."[21] For some slaves, their hair, which was often referred to as "wool" by slave owners wishing to equate slaves and farm animals,[22] was the only thing about their appearance which they were allowed to control.[23] If a slave was deemed to have misbehaved, the ownership of their hair was stripped from them as a means of removing that last bit of control slaves had over their lives.[24] When a slave owner cut a slave's hair, it was done knowing full well the significance that hair had to African and African American slave communities.[25] When slaves ran away in an attempt at finding freedom, written physical descriptions of the slaves would often include descriptions of how the slaves wore their hair.[26]

On January 1, 1863, President Abraham Lincoln issued the Emancipation Proclamation and freed slaves.[27] However, the Emancipation Proclamation had limited application to only some states that had seceded from the Union, and depended upon a Union military

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American slaves were surfaces on which were inscribed the signs of inferior status. . . . Sam, who ran away in South Carolina in 1767, bore the mark of a horse's hoof on his forehead.").

[20] *Id.* at 46.

[21] *Id.* (explaining the significance of hair and hair care for Black slaves in the Southern United States).

[22] *Id.* at 56. Some slave owners refused to refer to Black hair as hair at all and would correct slaves who referred to their hair as "hair" rather than as "wool." *Id.*

[23] "[B]y and large, slaveholders in the British mainland colonies seem to have allowed African Americans to style their hair as they pleased." *Id.* at 49.

[24] "Nevertheless, some eighteenth-century owners did resort to hair cropping, or shaving the head, as a form of punishment—for instance, the young slave Hannah had had 'her Hair . . . lately cut in a very irregular Manner, as a Punishment for Offences,' and Peter, a frequent runaway, had been branded 'S on the cheek, and R on the other,' and had had his hair cut entirely off." *Id.*

[25] *Id.* at 50.

[26] "Typically, eighteenth-century advertisements for runaway slaves supplied information about a miscreant's name, age, skin color, likely destination, and clothing. They also, very frequently, described the escaped slave's hair." *Id.*

[27] *The Emancipation Proclamation*, NAT'L ARCHIVES (April 17, 2019), https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation.

victory.[28] With the end of slavery came Jim Crow laws, which lasted from the period of Reconstruction through the Civil Rights era and created conditions under which newly freed slaves were unable to fully participate in American life.[29] One of the Jim Crow laws' main goals included hindering the full economic participation of new Black Americans.[30] The Jim Crow era lasted nearly a century, spanning from 1877 to 1954.[31] During Jim Crow, racial segregation was enforced in nearly all facets of life in the Southern states, and even the Supreme Court ruled that the existence and enforcement of these laws were Constitutional under the Fourteenth Amendment in order to maintain the separation of the races.[32]

Throughout the United States, Black people have had difficulty securing employment post-slavery, and in particular, employment with pay equal to that of White people.[33] During the heyday of the Jim Crow era, Black people faced harsh segregation and other forms of discrimination.[34] In the South, this discrimination was much more prevalent.[35] Black men and White men did not earn the same amount of

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[28] *Id.*

[29] Melvin I. Urofsky, *Jim Crow Law*, ENCYCLOPEDIA BRITANNICA (Aug. 21, 2019), https://www.britannica.com/event/Jim-Crow-law (explaining how the Jim Crow era began with the Supreme Court's ruling in *Plessy v. Ferguson* and how that ruling paved the way for legal segregation in all areas of American life).

[30] *Id.*

[31] *Jim Crow and Plessy v. Ferguson*, PUB. BROAD. SERV., https://www.pbs.org/tpt/slavery-by-another-name/themes/jim-crow/ (last visited Apr. 18, 2021). The Jim Crow era ended in 1954 with the reversal of the *Plessy v. Ferguson* decision in *Brown v. Board of Education*. *Id.* In *Brown* the Supreme Court ruled that racial segregation was unconstitutional in public spaces. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[32] *See* Urofsky, *supra* note 29; Plessy v. Ferguson, 163 U.S. 537 (1896). In 1892, Homer Plessy bought a first-class train ticket from New Orleans, Louisiana, to Covington, Louisiana. *Id.* Once Plessy was seated, the conductor asked Plessy if he was Colored, to which Plessy replied affirmatively. *Id.* Once Plessy confirmed that he was indeed Colored, the conductor asked him to move to the Colored car, and Plessy refused. *Id.* Plessy was arrested for not moving to the Colored car and was charged criminally under the Separate Car Act. *Id.* The United States Supreme Court then held that the Fourteenth Amendment allowed for laws such as the Separate Car Act, because, as was reasoned, segregation was not the same as unlawful discrimination. *Id.*

[33] Gillian B. White, *Searching for the Origins of the Racial Wage Disparity in Jim Crow America*, ATLANTIC (Feb. 9, 2016), https://www.theatlantic.com/business/archive/2016/02/the-origins-of-the-racial-wage-gap/461892/.

[34] *Id.*

[35] *Id.*

money for time worked, which was compounded by the fact that Black people were simply not allowed to hold the same types of jobs that White people held.[36] Black workers, due to both Jim Crow and a gap in skills due to unequal education opportunities compared to their White counterparts, simply could not get the same jobs that White people were able to secure.[37] The gap in skills which further compounded the wage and employment gap issue was due in large part to the racism and segregation of the Jim Crow era.[38] Enforcement of Jim Crow laws continued to churn out generations of Black people who were less educated, earned less, and participated in employment and economic life at staggeringly lower rates than White people.[39]

Due to Jim Crow, Black children were unable to attend White schools, and vice versa, which meant that Black children attended underfunded schools that lacked the educational resources and rigor of White-only schools.[40] Conversely, White children were going to schools that were richer in monetary and other resources, allowing White children to gain advantages in competitive job markets.[41] The skills of Black workers during the Jim Crow era were severely limited by the education that they were receiving, which was caused by the segregationist and racist laws regulating the educations that they received.[42] These skills gap severely limited potential future employment opportunities of Black people during this era.[43] During the Jim Crow era, Black Southern men, in

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[36] *Id.*

[37] *Id.*

[38] White, *supra* note 33. The study by Carruthers and Wanamaker which was cited by this article showed that if Jim Crow laws had not been used to create unequal educational outcomes between Black and White American men, there likely would not have been such a large disparity in the wage-earning potential of Black men in comparison to White men. *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Jim Crow laws provided an unfortunately legal underfunding model for segregated Black schools. This underfunding of schools created a continuous building up of "shortcomings that limited the skill sets and education levels of young, black men . . . which in turn limited their job opportunities." *Id.*

[43] "The discriminatory preferences of white southerners were powerful in limiting black public-school quality and reducing the wages of young black men through the human capital channel." *Id.*

areas where the skills gap was more prevalent, earned as little as fifty percent less than their White male counterparts.[44]

With the passing of the 1964 Civil Rights Act, more educational opportunities opened for Black youth through creating better funding streams for Black schools by integrating White and Black schools across the nation.[45] Along with the rise in educational funding came a rise in wages and increased economic opportunity.[46] But even with the ability to earn more, the gap in wages and educational attainment persists to this day.[47] Black men still earn, on average, significantly less than White men, and Black women only earn fifty-nine percent of what White men make.[48]

B. Title VII and Its Loopholes

The Civil Rights Act of 1964 was of much importance to Black Americans' fight for Civil Rights and for their ability to fully participate in American economic life and employment.[49] With the beginning of the Civil Rights movement and the Civil Rights Act's enforcement came the start of new opportunities for Black Americans in the workplace.[50] Title VII of the Civil Rights Act specifically addressed workplace discrimination and outlined what discrimination could no longer go unchecked in the workplace.[51] Title VII, Section 703, specifically covers unlawful employment practices.[52]

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[44] *Id.*

[45] Celeste K. Carruthers & Marianne H. Wanamaker, *Separate and Unequal in the Labor Market: Human Capital and the Jim Crow Wage Gap*, NAT'L BUREAU OF ECON. RSCH. (Jan. 2016), https://www.nber.org/papers/w21947.pdf.

[46] *Id.*

[47] *Id.*

[48] Sonam Sheth, et al., *7 Charts That Show the Glaring Gap Between Men and Women's Salaries in the US*, BUS. INSIDER (Aug. 26, 2019), https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3#cities-show-an-even-bigger-discrepancy-especially-for-people-of-color-2.

[49] *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/epilogue.html (taking readers through a short, chronological journey through the fight for civil rights beginning with the Civil Rights Act of 1964.).

[50] *Id.*

[51] 42 U.S.C. § 2000e (1964).

[52] Title VII makes unlawful discrimination in the workplace which is based on race, religion, national origin, and a variety of other group identifying traits. *Id.*

We now look to the text of Title VII to explore what discrimination is disallowed versus what protections are missing. Title VII prevents much of employment discrimination, and parts of Title VII that are relevant to our discussion are excerpted below:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[53]

Title VII explicitly bans discrimination in hiring, termination, and pay of individuals based on their race or color.[54] It also makes illegal the classification, segregation, or limiting of employees based on race or color.[55] Title VII, in forcing the commercial sector to make changes to the way it hires, treats, and terminates its workforce, changed the face of the American workforce.[56] Overt discrimination was no longer allowed or viewed as being part of the normal course of business.[57] Of course, overt discrimination is not the only thing that tends to produce discriminatory results.[58] Over time, with case by case proceeding through American courtrooms, there are disparate impacts resulting from not just overt racism, but unconscious bias and less overt forms of racism, which

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[53] *Id.*

[54] 42 U.S.C. § 2000e–2.

[55] *Id.*

[56] Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC'Y OF HUM. RES. MGMT. (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx. "It's one of the most important changes we see resulting from the Civil Rights Act. . . . Changing the law actually did change people's minds because now it's largely accepted as unjust to discriminate in employment based on race or gender." *Id.*

[57] *Id.*

[58] *Id.*

produces discriminatory outcomes not only in court but in every aspect of daily life, including employment.[59]

Even though Title VII has done the momentous task of beginning to defend Black people in the workplace, in addition to all minorities, women, and other protected groups, Title VII's language is somewhat vague and leaves room for interpretations that are not in the spirit of Title VII's stated goals.[60] Title VII is rife with loopholes that, despite its well intent, allow for continued discrimination of many of the people it was initially created to protect.[61] Congress passed Title VII with the hope that it would create new economic opportunities for minority groups—Black Americans in particular. Through Title VII, Congress eliminated the most egregiously prejudicial acts that had been a routine part of American employment for decades.[62] Now that more than fifty years have elapsed since the enactment of Title VII, defining discrimination and protecting against its impact has become more complex and dynamic.[63] Courts have begun to shape and look at several factors to decide whether an employment practice is discriminatory or not.[64] But even these factors do not cover the complete gamut of discriminatory practices that create disparate outcomes among the different protected classes and their White male peers.[65]

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[59] *Id.*

[60] Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 305 (1983).

[61] See *id.* at 306.

[62] *Id.*

[63] Lytle, *supra* note 56. Discrimination used to be thought of as overt only, but more than five decades after the Civil Rights Act of 1964 was passed we now see discrimination as including unconscious bias and other forms of unconscious discrimination. *Id.* Even though someone discriminates unconsciously, such as by hiring only workers who look like or act like they do without consciously trying to discriminate against other groups, they are still discriminating in hiring decisions which is considered a Title VII violation. *Id.* "[Title VII] bans discrimination that isn't intentional but that has a discriminatory impact." *Id.*

[64] See *id.* Courts look to several factors in determining whether there has been a Title VII violation. *Id.* Courts look to see how similarly situated, majority and minority individuals are treated in the workplace. *Id.* They then look for any signs of overt discrimination before looking to see whether there are statistical patterns of behavior evidencing discrimination. *Id.*

[65] See *id.* Evidence is now emerging to show that protections for formerly incarcerated individuals will need to be increased to further protect minority worker rights, because a higher proportion of minority individuals end up

III. FINDING THE LOOPHOLES, CLOSING THEM, AND FINDING OPPORTUNITIES FOR GROWTH

Even though the Civil Rights Act of 1964, along with Title VII, was enacted a little over fifty years ago, there is still an endless slew of employment discrimination lawsuits being brought against employers, which, in some ways, signals that there are still more loopholes to close and more work to do to end workplace discrimination.[66] For evidence of a Title VII loophole which courts and legislatures across the country have been struggling to close, one need look no further than the issue of hair in the workplace, which courts and legislatures have struggled to take the opportunity to further define race within the context of race-based discrimination. A brief exploration of other Title VII loopholes will aid us in thinking about the issue of hair discrimination and its regulation as we look to what solutions will most likely reduce discriminatory outcomes related to the regulation of hairstyles in employment.

Because of the vague language of Title VII, including its omission of a definition of race,[67] there continued to be disparate employment outcomes between protected and majority groups, with some of the more striking examples litigated being between Black Americans and traditionally White-controlled companies.[68] Certainly disparate economic

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incarcerated than their White counterparts which affects the overall earning potential of certain minority groups. *Id.*

[66] *See id.*

[67] *Questions and Answers About Race and Color Discrimination in Employment*, EQUAL EMP'T OPPORTUNITY COMM'N (May 16, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html ("Title VII does not contain a definition of 'race.'"). The term race is comprised of a myriad of different factors, and racial discrimination is based upon discrimination which is based on these undefined factors. *Id.* The Equal Employment Opportunity Commission notes that certain, albeit undefined, seemingly neutral practices that create disparate impacts can be considered violations of Title VII. *Id.*

[68] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In *Green*, Percy Green sued McDonnell Douglass Corporation for racial discrimination in its hiring and termination practices. *Id.* After Green was fired from McDonnell Douglass, he partook in a Civil Rights protest against the company. *Id.* Even after having been terminated from the company he still needed employment and so he applied to a job posting by McDonell Douglas looking for mechanics. *Id.* Part of the Civil Rights protest Green took part in included blocking roads to the

and employment outcomes are not limited to the comparison between these two groups. Many cases that have further shaped Title VII's coverage of discrimination have come from women fighting against sex-based discrimination in the workplace.[69] Women and minorities have continued to shape and evolve definitions of race and discrimination under Title VII in furtherance of developing a greater understanding of what it truly means to be equal. [70]

In 1971 the Supreme Court ruled standardized aptitude testing, which created disparate employment outcomes for Black versus White job and promotion candidates, was in violation of Title VII.[71] Six years later, the Supreme Court ruled courts can consider relevant job applicant

company, but it was not clear whether Green participated in a subsequent unlawful lock-in of McDonnell Douglas. *Id.* Green was not hired for the mechanic position in large part because he had been a participant in the earlier Civil Rights protest. *Id.* The Supreme Court ruled that, where Green could show that his participation in protest activities was only used as a pretext to racial discrimination, he could succeed in his racial discrimination case. *Id.*

[69] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). In *Phillips*, Ida Phillips applied for a job with Martin Marietta Corporation and was informed that mothers of pre-school aged children were not being considered for that role. *Id.* at 543. Fathers of pre-school aged children were being considered for the role. *Id.* Phillips sued, claiming that she was being discriminated against based on her sex, which is one of the Title VII protected classes. *Id.* The Supreme Court ruled that the different treatment of mothers of pre-school aged children in the application process versus fathers with pre-school aged children was not lawful where there is not evidence that having pre-school aged children is more likely to affect the job performance of the mothers compared to the fathers. *Id.*

[70] *See* discussion, *supra* section II.

[71] Griggs v. Duke Power Co., 401 U.S. 424 (1971). Willie Griggs brought a class action suit against Duke Power Company to address the Duke Power Company internal transfer and promotion policy which kept Black employees at a disadvantage for promotions. *Id.* at 425–28. Duke Power Company required that employees wishing to be promoted from more menial jobs have a high school diploma and pass two standardized aptitude tests. *Id.* This created disparate promotion outcomes as Black applicants were at a disadvantage to pass these aptitude tests, and White applicants were much more likely to pass these tests and be promoted. *Id.* Because a disproportionate number of Black applicants were hired for these more menial positions, the Supreme Court held that Duke Power Company's standardized aptitude tests and high school graduation requirement violated Title VII of the Civil Rights Act of 1964 because they were not relevant to the job in question, and that these requirements were intended to give preference for the job to White employees. *Id.* at 431–32.

statistics in deciding *prima facie* cases of race discrimination.[72] *Prima facie* cases of discrimination arise where a plaintiff can show he or she:

> (1) belongs to a protected class; (2) was qualified for the job; (3) was subjected to an adverse employment action; and (4) the employer gave better treatment to a similarly situated person outside of the plaintiff's protected class.[73]

The *Green* case established the *prima facie* discrimination factors.[74] The first two factors are established based on whether one belongs to a group defined as protected by Title VII, and whether one's resume fits the job description and qualifications.[75] Factors three and four can be more complicated to analyze.[76] In particular, what is considered to be an "adverse action," can be the most complicated to analyze because it is dependent upon which circuit the action is being heard in.[77] Some circuits have more liberal views on what types of actions taken by an employer are considered to be adverse, whereas conservative circuits consider only narrow, overtly discriminatory actions to be adverse.[78] As

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[72] Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977). The United States Attorney General sued Hazelwood School District for discriminatory hiring practices. *Id.* at 301. Hazelwood School District hired a disproportionately low number of Black teachers in comparison to the numbers of Black students present in its schools. *Id.* at 303. Hazelwood School District argued that St. Louis and the county that the schools were in did not have enough qualified Black teachers, and therefore they should not be liable for hiring disproportionately few Black teachers. *Id.* at 303–04. The Supreme Court held that the school district and government should look to relevant statistics, such as the racial makeup of the applicant pool rather than the community at large in determining whether Hazelwood School District was utilizing discriminatory hiring practices. *Id.* at 308–313.

[73] Carla A. Ford, *Gender Discrimination and Hostile Work Environment, Employment Discrimination*, U.S. DEP'T OF JUST. 1, 1 (May 2009), https://www.justice.gov/sites/default/files/usao/legacy/2009/05/07/usab5702.pdf .

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* (discussing how the Fifth and Eighth Circuits have traditionally held only "hiring, firing, promoting, and demoting constitute actionable adverse actions" and that anything leading to desperate impacts outside of these is too narrow).

more litigation arose to challenge preconceived notions of what constituted race-based discrimination and discrimination generally, a growing number of hair based discrimination complaints began to arise. Courts across the nation began to grapple with whether hair and hairstyle discrimination should be a part of what constituted Title VII banned race-based discrimination.[79] The individuals bringing these cases certainly would argue that banning natural hair or hairstyles is the definition of adverse action because having locs, an afro, or braids, would mean not being hired or being fired despite being qualified.[80]

IV. "CLEAN-CUT" [81]

Natural hair, a mere 200 years ago, was "wool" and dreadful, with slave owners punishing slaves by altering or cutting a slave's hair against their will.[82] Although attitudes have shifted over the past two hundred years, natural hair is still seen as unprofessional.[83] Businesses often force employees and job applicants to either cut or make their hair look more European as employers view natural hair as being "less than" compared to White or European hair textures.[84] There are abundant examples of this.[85] Some workplace style consultants maintain that locs are dreadful and that Afros simply have no place in a professional workplace.[86] The forced alterations entirely disregard that Afros, for some Black people, are less of a fashion statement and simply just how their hair grows.[87] Some recruiters and businesses think finding a qualified Black woman to fill corporate director jobs is difficult—not because Black women are not qualified—but because of the appearance of their hair.[88] The struggle is not just that a Black woman must be qualified in the traditional sense, but she must also

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[79] *See* discussion *infra* Section V.

[80] *Id.*

[81] Jena McGregor, *More States Are Trying to Protect Employees Who Want to Wear Natural Hairstyles at Work*, WASH. POST (Sep. 19, 2019), https://www.washingtonpost.com/business/2019/09/19/more-states-are-trying-protect-black-employees-who-want-wear-natural-hairstyles-work/.

[82] *See* White, *supra* note 19, at 46, 55.

[83] *See* McGregor, *supra* note 81(discussing how natural hair is viewed by some in corporate settings as "unprofessional").

[84] *Id.*

[85] Imani Gandi, *Black Hair Discrimination Is Real—But Against The Law?,* REWIRE NEWS (Apr. 17, 2017), https://rewire.news/ablc/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/.

[86] *Id.*

[87] *Id.*

[88] *See* McGregor, *supra* note 81.

be "clean-cut," and wear her hair straightened and slicked back into a ponytail rather than having an Afro or some other natural hairstyle.[89] Because of the perception of natural hair as a symbol for unprofessionalism, there is often more built into the initial interaction between a Black job candidate and a recruiter or interviewer.[90] Even though hair has nothing to do with one's ability to do a job or be a corporate leader, Black professional women have to spend countless hours chemically changing their hair textures and straightening their hair to fit traditional American notions of what professionals look like.[91]

More attention has been given to this issue in recent years due to natural hair becoming more embroiled in politics and growing in popularity due to efforts to normalize natural hair and hairstyles on social media and other online platforms.[92] In 2020, Democratic Presidential candidates Cory Booker and Pete Buttigieg have, like many others, recognized that hair discrimination is a part of racial discrimination.[93] YouTube now has videos about caring for natural hair and discussing ways to talk to employers about natural hair have become more popular as more Black people, and Black women, in particular, have been working to avoid the use of harsh chemicals on their hair while still being able to pursue fulfilling careers.[94] As Black professionals continue to navigate the choppy waters that come with having textured, curly hair in the workplace, businesses across the nation continue to oppose changes to laws that would prohibit them from managing their employees' hair.[95]

As workplaces have diversified, there have been some challenges relating to hairstyle for a multitude of reasons. One of the root causes of

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[89] *See* McGregor, *supra* note 81. Before a job candidate can interview or speak with a recruiter or hiring manager, they are judged based on their appearance. *Id.* This adds an extra layer of complication for Black individuals who are seeking employment and have hair or hairstyles which are typically associated with being Black and having natural hair. *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Presidential candidate Pete Buttigieg called for the inclusion of hair discrimination as a form of racial discrimination. *Id.*

[94] On YouTube there are a variety of Black women who upload videos discussing how they work with their hair and talk about hair care decisions with family and employers. *Id.*

[95] *Id.*

this difficulty is prejudicial employees and managers in the workplace, presenting themselves in more nuanced ways than they had been in the past.[96] Discrimination now presents itself in often softer ways, such as a kind manager subconsciously nudging a White employee towards a management career and another non-White employee to a career filled with more menial tasks and less upward job growth. Over time the well-meaning manager creates disparate impacts that push Black employees further away from promotions, while other perks are given to White employees.[97] Intolerances and prejudices among employees can create difficulty for workplaces that are trying to become more diverse, but certain factors create more difficulty in diversifying workplaces.[98] If the workplace is experiencing pronounced differences between various generations, this might cause more of a challenge to diversifying.[99] Younger workers are typically more well-educated and accepting of racial and other differences, while older workers have more difficulty adjusting to workplace changes.[100] There are further differences between levels of respect or tolerance of diversity based on cultural differences.[101] In addition, the majority of professional, or more well-educated workforces, are made up of larger White populations.[102] Introducing larger populations of Black or other minority employees tends to cause more workplace friction.[103]

V. STATES AND CITIES STAND UP AND FILL IN THE GAPS

New York City, and the states of New York, California, and New Jersey, all passed versions of the CROWN Act.[104] This is important because, in addition to litigation, new legislation and laws that individual states and municipalities pass can help to continue narrowing the loopholes and gaps left by Title VII. In New York City, the New York

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[96] Michael Morris and Susan Fiske, *The New Face of Workplace Discrimination*, FORBES (Nov. 12, 2009), https://www.forbes.com/2009/11/12/discrimination-workplace-prejudice-leadership-managing-bias.html#485fa8121b75.

[97] *Id.*

[98] *Diversity in the Workplace: 4 Common Challenges and Solutions*, BIG THINK EDGE (May 15, 2018), https://www.bigthinkedge.com/diversity-in-the-workplace-4-common-challenges-and-solutions/.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Jackson, *supra* note 14.

City Commission on Human Rights ("NYCCHR") published clarifications to the New York City Human Rights Law ("NYCHRL") which explains that discrimination based on "natural hair or hairstyles associated with Black people" is considered to be a violation of the law.[105] The NYCCHR document also explains why it has stepped up to protect against hair-based discrimination and posits that this is simply a move in the same direction as cases that had come before it.[106] The NYCCHR specifically ties modern-day views on Black hair and hairstyles back to views that White slave owners held during our nation's time of slavery and traces these views from slavery to modern-day.[107] Today, racism, particularly "[a]nti-Black racism," continues to persist and is one of the most enduring forms of American racism, even in progressive cities such as New York City.[108]

The specific guidance from the NYCCHR assumes that employers understand the association between traditionally Black hairstyles and Black people and that employers understand that banning or regulating these hairstyles for purposes of employment is discrimination.[109] According to the NYCCHR, any employer who bans any listed hairstyle violates the NYCHRL and may be subject to liability.[110] Additionally, any

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[105] *Id.*

[106] "These unconscious and conscious biases keep us from even having the opportunity to have a seat at the table. We haven't even had a chance to introduce ourselves, and there [are] these assumptions of unprofessionalism." *Id.*

[107] *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, N.Y.C. COMM'N ON HUMAN RIGHTS, 1,4–5 (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf. "There is a widespread and fundamentally racist belief that Black hairstyles are not suited for formal settings, and may be unhygienic, messy, disruptive, or unkempt. Indeed, white slave traders initially described African hair and locs as 'dreadful,' which led to the commonly-used term 'dreadlocks. . .' [I]n 2014, the U.S. Department of Defense, the nation's largest employer, enacted a general ban on Black hairstyles, including Afros, twists, cornrows, and braids which was later reversed after Black service members expressed wide outrage. . . . The Army also removed the terms 'matted and unkempt' from its description of Black hairstyles in its appearance regulations." *Id.*

[108] *Id.* One of the reasons why the NYCCHR expanded the definition of race to include race-based characteristics, such as hair, was because the racial disparities caused by a hair related bias tend to be more likely to affect Black people and traditionally Black hairstyles. *Id.*

[109] *Id.* at 6–7.

[110] *Id.* at 7.

employer who requires that employees alter their hair to conform to, or look more like, European beauty and hair standards will also face liability.[111] Some policies that businesses assume are neutral, but have disparate outcomes, such as banning shaved patterns in hair or hair extensions, are also violations of the NYCHRL.[112]

California Senate Bill 188, known as the CROWN Act, bans hairstyle discrimination.[113] The Californian CROWN Act adds to the state's California Fair Employment and Housing Act, enhancing and elaborating upon the race definition by adding characteristics that are "historically associated with race, including, but not limited to, hair texture and protective hairstyles."[114] The CROWN Act explains some of the historical reasons why legislatures felt compelled to pass the law and create additional protections for Black employees across the state.[115] In addition to explaining the historical reasoning for the bill, the CROWN Act also discusses at some length certain traits associated with Black people and how those traits or characteristics, such as hair and natural hairstyles, continue to be looked down upon, which in turn creates disparate impacts in employment, schooling, and other areas of Californian life which are now regulated by this bill.[116] The CROWN Act continues to reiterate that discrimination based on hair type and natural hair presentation tends to be something which singles out the Black

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[111] *Id.* "A grooming policy requiring employees to alter the state of their hair to conform to the company's appearance standards, including having to straighten or relax hair (i.e., use chemicals or heat. . .)" is a violation of the NYCHRL. *Id.*

[112] *Id.* at 8.

[113] CAL. GOV'T CODE § 12926 (West 2020); s*ee also,* Del Sandeen, *Seven Protective Hairstyles for Every Skill Level*, BYRDIE (June 11, 2019), https://www.byrdie.com/protective-hairstyles (giving a simplified explanation of protective hair styles, which include hairstyles used to protect the roots of the hair from physical and chemical damage, that save their wearer time when getting ready for the day, and reduce time needed for overall maintenance of the hair).

[114] CAL. EDUC. CODE § 212.1 (West 2019); CAL. GOV'T CODE § 12926 (West 2019); *Discrimination: Hairstyles*, Cal. S. Bill 188 (2019).

[115] *Id.* "The history of our nation is riddled with laws and societal norms that equated 'blackness,' and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment. This idea also permeated society understanding of professionalism. Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional." *Id.*

[116] *Id.*

community more than other group, and that this form of discrimination "is in direct opposition to equity and opportunity for all."[117] The CROWN Act, having only gone into effect on January 1, 2020, forces employers in the state to review their grooming and appearance policies to ensure that they accommodate anyone with natural hair or any type of protective hairstyle.[118] Employers outside of states that have adopted CROWN Acts are encouraged to keep apprised of legal developments in their communities as still more CROWN Act style legislation is expected to become law across the country.[119]

More cities and states are beginning to follow suit and pass their own CROWN Acts.[120] Cincinnati, Ohio has also expanded its definition of discrimination to include discrimination based on hairstyle, becoming the second city to ban hair discrimination.[121] Cincinnati, Ohio joining its predecessors and enacting still more CROWN Act style legislation will hopefully lead to more cities and states adopting CROWN Acts or other similar hair discrimination laws across the country. Since the state of California passed its CROWN Act, six more states have followed suit. New York state followed the lead of New York City and became the second state to pass its own CROWN Act.[122] Governor Cuomo, like so many others, acknowledged the discrimination that was inherent in policies that police how people, and Black people in particular, have to keep their hair to their employment.[123] The CROWN Act amended the definition of race found in section 292 of New York state's Human Rights

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[117] *Id.*

[118] Natasha L. Domek & Lauren J. Blaes, *A Heads Up on the CROWN Act: Employees' Natural Hairstyles Now Protected*, NAT'L L. REV. (Aug. 22, 2019), https://www.natlawreview.com/article/heads-crown-act-employees-natural-hairstyles-now-protected.

[119] *Id.*

[120] Jackson, *supra* note 14.

[121] *Id.*

[122] *Governor Cuomo Signs S6209A/A7797A to Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles or Textures Associated With Race*, N.Y. STATE GOVERNOR ANDREW M. CUOMO (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-s6209aa7797a-make-clear-civil-rights-laws-ban-discrimination-against-hair.

[123] *Id.* "For much of our nation's history, people of color—particularly women—have been marginalized and discriminated against simply because of their hair style or texture. By signing this bill into law, we are taking an important step toward correcting that history and ensuring people of color are protected from all forms of discrimination." *Id.*

Law "to include, 'traits historically associated with race, including but not limited to hair texture and protective hairstyles.'"[124]

New Jersey became the third state to pass the CROWN Act, which "makes it illegal to target people at work, school or in public spaces" because of their hair type or hairstyle.[125] The Executive Director of the New Jersey affiliate of the American Civil Liberties Union ("ACLU") commented that "adding hair discrimination to the protections offered in the Law Against Discrimination is an influential recognition of the myriad ways that racism expresses itself and provides people with a powerful tool to combat it."[126] New Jersey ended up getting to the point where it was imperative that it pass a CROWN Act and acknowledge hair-based racial discrimination, as hair discrimination came to the forefront in a dramatic way when the state became the center of a hair discrimination debate in December of 2018.[127] A Black high school student in New Jersey had his locs cut off during a wrestling match by a White school official after a White referee told him to cut his locs off or forfeit the match.[128] Video of the child having his hair cut off was viewed by millions and sparked a national debate about hair and race.[129] In passing the new CROWN Act, New Jersey Governor Phil Murphy said that "no one should be made to feel uncomfortable or be discriminated against because of their natural hair."[130] The New Jersey CROWN Act now bans discrimination based on hair type and hairstyles that are associated with race, and in doing so creates avenues to penalize those who discriminate based on hair in workplaces and schools, like the school where the high school student was forced to cut his hair to wrestle.[131]

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[124] *Id.*

[125] Sophie Lewis, *New Jersey Becomes Third State to Ban Discrimination Based on Hair*, COLUM. BROAD. SERV. NEWS (Dec. 21, 2019), https://www.cbsnews.com/news/crown-act-new-jersey-third-state-ban-discrimination-natural-hair/ (explaining the importance of New Jersey's CROWN Act legislation not only for the workplace, but also in schools).

[126] *Id.*

[127] Laurel Wamsley, *Adults Come Under Scrutiny After HS Wrestler Told to Cut His Dreadlocks or Forfeit*, NAT'L PUB. RADIO (December 27, 2018), https://www.npr.org/2018/12/27/680470933/after-h-s-wrestler-told-to-cut-his-dreadlocks-or-forfeit-adults-come-under-scrut.

[128] *Id.*

[129] *Id.*

[130] Mariel Padilla, *New Jersey Is Third State to Ban Discrimination Based on Hair*, N.Y. TIMES (December 20, 2019), https://www.nytimes.com/2019/12/20/us/nj-hair-discrimination.html.

[131] *Id.*

Unfortunately, hair-based discrimination is rampant in all parts of the country, not just the coastal regions. In Texas, the discrimination a black high school-aged boy has faced based on keeping his locs in accordance with his Trinidadian cultural heritage has sparked a national outcry.[132] DeAndre Arnold's Texas high school refused to allow him to continue attending school, outside of in-school suspension, and would not allow him to walk in the high school graduation ceremony if he did not align his hair with strict Eurocentric guidelines.[133] So, as progress is being made, and more states continue to mull over adopting CROWN Acts of their own, we acknowledge that there are states like Texas who have not passed a CROWN Act and that other organizations may need to step in and create governance and change in this area. Organizations and businesses themselves can be changemakers, and C-suites can create lasting change for those who work under them at all levels of business, if for no other reason than to avoid public relations nightmares such as those that the small-town Texas high school, which must now grapple with race relations.

Next, we will explore various ways businesses can make a substantive change within their own organizations, whether it be to avoid a media firestorm such as the one Starbucks recently dealt with or to genuinely create accepting and safe workplaces for all as Dove is hoping to do.

VI. CREATING CHANGE: WHAT IMPACT CAN BUSINESSES HAVE?

In so many ways, corporate America is on the forefront of national and regional change, in part because businesses are so heavily regulated by different national and local rules. But there are also businesses that have done the bare minimum to comply with regulation, which is evidenced by their failure to protect black employees' hair and hairstyles.

There have been many instances where minorities have not been hired, have been fired, or have been told to leave for the day because their

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[132] Lateshia Beachum, *Student Will Be Barred from Graduation Unless He Cuts His Dreadlocks, School Says*, WASH. POST (Jan. 24, 2020), https://www.washingtonpost.com/education/2020/01/23/texas-dreadlocks-suspension/.

[133] *Id.*

outward appearance was indicative of their minority status.[134] In our society, "[p]rofessionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional."[135] Some hairstyles typically worn by black individuals, such as locs, are seen as messy or dirty, with hiring managers assuming that the individual wearing the hair is incapable of managing their hair's cleanliness.[136]

Several opportunities for growth in business practices and state and local law exist, which are clearly defined by the gaps of the Civil Rights Act of 1964. The Civil Rights Act and Title VII were revolutionary for its time, but since then, employers and some states and municipalities have used loopholes as excuses for legal discrimination. For example, Title VII prevents discrimination based on race, but it does not prevent discrimination on particular characteristics that are indicative of a particular race, such as hair texture or style, or ways of speaking that might be a cultural characteristic of a particular race or ethnicity, or of many other cultural and other norms that are characteristics of many protected groups.[137] To get away with legal discrimination, businesses and employers often say that they want to maintain a certain type of image and that there are strict rules and standards for how employees are expected to look or dress to comply.[138] Human resources officers at these businesses might say something such as, "[I]t is important . . . that client-facing employees are clean and well-groomed" when they are justifying why locs, braids, or other traditionally non-European hairstyles are not allowed in the workplace.[139] Part of the reasoning behind why some businesses have previously banned certain hairstyles in the workplace is not just because there is a perception that these hairstyles are unclean, but

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[134] *Jack Astor's Waitress Claims She Was Sent Home Because Hair Was in a Bun*, CAN. BROAD. CORP. NEWS (Mar. 10, 2016), https://www.cbc.ca/news/canada/toronto/jack-astors-hair-1.3484037.

[135] Camille Hamilton Pating & Yuki Cruse, *California Lawmakers Ban Workplace Discrimination Based on Hair*, SOC'Y FOR HUM. RES. MGMT. (July 9, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-law-will-ban-workplace-discrimination-based-on-hairstyle.aspx (quoting legislative introduction from section 1 of Cal. S. Bill 188 (2019)).

[136] *Id.*

[137] Jackson, *supra* note 14.

[138] *Id.*

[139] *Id.*

businesses also assume that customers would prefer not seeing these hairstyles when they are at a business.[140]

A perfect example of this is in *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*. Without giving deference to the fullness of the cultural significance of hairstyles and hair types within the black community and how banning certain protective and other styles would affect particularly black women, a federal court ruled that moderating hairstyles is not discrimination.[141] For many black people, these practices produce discriminatory outcomes and daily dilemmas about what hairstyle to wear to fit into the mold of the of majority workplaces, which are dominated by naturally straight or wavy hair types. The court in *Catastrophe Management Solutions* did dance around the issue of hair discrimination in the workplace affecting mainly black employees, but rather than taking the opportunity to work through something as sensitive as black hair in the workplace, the court chose to continue a tradition of turning a blind eye to racist hair policies simply because they appeared to be facially neutral.[142] The ruling in *Catastrophe Management Solutions* is just one more reason why businesses need to take up the fight for diversity and inclusion on their own rather than waiting for courts or the legislature to act.

Far too many people, like Chastity Jones, are denied employment and economic opportunity with far too many employers like Catastrophe

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[140] *Id.*

[141] *Id.* at 1030. In *Catastrophe Management Solutions,* Chastity Jones, a black woman with locs, was interviewed and given a contingent offer of employment with Contingent Management Solutions. *Id.* at 1021. The offer of employment was contingent upon Jones cutting off her locs, as the company policy did not allow "excessive hairstyles" such as locs. *Id.* at 1022. The human resources manager asked her if her locs contained hair and stated that company policy did not allow locs because "they tend to get messy. . . you know what I am talking about." *Id.* at 1021. She then gave Jones an example of a man who cut his locs so that he could accept his offer of employment. *Id.* at 1021–22. When Jones told the human resources manager that she would not cut off her locs, Catastrophe Management Solutions immediately rescinded her offer of employment. *Id.* at 1022. The court ruled that Catastrophe Management Solution's hair grooming policy did not discriminate based on race and therefore did not rise to the level of racial discrimination under Title VII and suggested that the democratic process would be better suited to define race-based characteristics, such as hair, than the court would be. *Id.* at 1034–35.

[142] *Id.* at 1032.

Management Solutions due to their hair. Conversely, employers like Starbucks are trying to break the mold by not waiting for the government to act, but by learning from their own mistakes to create more inclusive environments for staff and customers. Although not directly related to hair discrimination, there are many lessons we can take away from Starbucks' corporate diversity programs as many of Starbucks' efforts on this front grew out of a widely televised profiling of two black men that led to their arrest, release, and the public embarrassment of the coffee behemoth.[143]

In the spring of 2018, police were called on and arrested two black men, who had asked to use the bathroom at a Starbucks while waiting for a colleague to arrive for a real estate-related business meeting.[144] As a result, there were protests and an uproar about racial bias in business and about the racial profiling of black individuals as criminals generally.[145] Starbucks reached a confidential settlement with the two men, which included developing various opportunities and plans for action surrounding diversity issues.[146] In addition to the confidential settlement that was reached, in May of 2018, Starbucks closed all of its stores for one day to complete a racial bias and awareness training.[147] The national discussion that followed considered whether this sort of day long training actually had a positive long term effect towards the goal of promoting diversity and inclusion.[148] Research suggests that, rather than one daylong training, continuous education and reeducation of managers and executives who model inclusivity and take action when discrimination is occurring would be more helpful for diversity in the workplace.[149]

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[143] Yon Pomrenze & Darran Simon, *Black Men Arrested at Philadelphia Starbucks Reach Agreements*, CABLE NEWS NETWORK (May 2, 2018), https://www.cnn.com/2018/05/02/us/starbucks-arrest-agreements/index.html.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Jennifer Calfas, *Starbucks Is Closing All Its U.S. Stores for Diversity Training Day. Experts Say That's Not Enough*, TIME (May 28, 2019), https://time.com/5287082/corporate-diversity-training-starbucks-results/.

[148] Studies have shown that some employees who are made to attend mandatory diversity trainings may feel stronger negative feelings about diverse groups after the trainings, and single trainings are not enough to remove entirely unconscious biases. *Id.*

[149] Cornell's executive diversity training program and other similar programs are a good way to start educating leaders on diversity and inclusion so that they can model inclusivity habits and behavior for their reports. *Id.*

Starbucks' model, combined with additional training opportunities for corporate leaders, would be a great way to start addressing diversity and inclusion issues in businesses across the country. Businesses can then do more than train their employees and management, and some have started to do more to support diversity and hair in the workplace and in all parts of life. Dove, a beauty and skincare company owned by Unilever, has publicly taken a stand against hair type discrimination and the systemic racism hair discrimination flows from.[150] Dove believes that Black lives matter, and through corporate philanthropy and partnerships with organizations such as the National Urban League and the Western Center for Law on Poverty, Dove is advocating for the CROWN Act to become federal legislation.[151] Dove has created the CROWN Fund, which is a $5 million fund to be used to support the Black community and fight systemic racism.[152] Dove, through its CROWN Coalition, co-sponsored California's CROWN Act legislation[153] proving that businesses can truly be changemakers when they put their expertise and resources to good work. The CROWN Coalition has continued its fight, with the U.S. House of Representatives having passed a federal CROWN Act which is awaiting Senate approval as of the time of this writing.[154]

VII. MODERN DAY, SLAVERY ERA PUNISHMENT

Black Americans, as is well documented, have suffered the ill effects of discrimination since the inception of the United States.[155] The

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[150] *Our Commitment to Ending Systemic Racism*, DOVE, https://www.dove.com/us/en/stories/about-dove/commitment-to-end-systemic-racism.html (last visited on March 31, 2021).

[151] *Id.*

[152] *Id.*

[153] Dove, *The CROWN Act: Working to Eradicate Race-Based Hair Discrimination*, https://www.dove.com/us/en/stories/campaigns/the-crown-act.html?utm_source=google&utm_medium=cpc&utm_campaign=Always%20On_CN000557_LV5_CH2215_BH0162_US_NonBrnd-Crown-Act-BMM&utm_term=+crown++act&gclsrc=aw.ds&&gclid=Cj0KCQjwt4X8BRCPARIsABmcnOoGEpbMMFt6YvS4FCx7a6bLqJmpyO7h5nD40ABohnU09HjCR-JqOekaAi0MEALw_wcB (last visited on March 31, 2021).

[154] *Id.*

[155] Jeffery Robinson, *Five Truths About Black History*, ACLU, https://www.aclu.org/issues/racial-justice/five-truths-about-black-history (last visited on March 31, 2021).

nation was "founded on White supremacy," as is evidenced by the "more than 130 slave statutes [used] to regulate the ownership of Black people" in just the state of Virginia alone.[156] As the United States moved on from slavery and through the Jim Crow and Civil Rights era, Black Americans continued to struggle to become full participants in American life. So much of this struggle comes from difficulty in fully integrating into the American workforce because of firmly held beliefs, rooted in slavery, that Black people were simply inferior. Natural hair and hairstyles, which were seen as a sign of inferiority during slavery, are now viewed as a badge of incompetence by certain employers. In slavery and in the twenty-first century workplace, black hair was and is seen as "dreadful." Slave owners used to punish their slaves by cutting their hair and removing that last bit of control that they had over their lives,[157] and in the twenty-first century, some employers force Black employees to cut or alter their natural hair to be allowed to accept offers of employment.[158]

Some managers and businesses hold the false belief that locs are messy, natural hair is unkempt, and continue to cling to a myriad of other untrue assumptions about Black hair. They make the unfortunate leap in logic that assumes Black people cannot manage a job in the way that it is assumed they cannot manage their hair, not considering the countless hours and dollars that Black people spend caring for their hair. These harmful beliefs are used by employers to discriminate against and deny equal opportunity to individuals belonging to an entire racial minority group. America generally, and American workplaces specifically, should not continue further into the twenty-first century using the same or similar manner of thinking once used by slave owners to justify their abhorrent treatment of slaves. All Americans, particularly Black Americans and Black women, need businesses to stand up and look at their policies in order to hire and promote a diverse workforce. Businesses need the unique voices and innovation of thought that the full inclusion of Black people into their workplaces would bring, regardless of hair or hairstyle. The old punishments of slave owners should no longer permeate the American workplace.

Providing unbiased, equal opportunities to all employees regardless of the appearance of an employee's hair is one way that businesses, even without the direct influence of state or federal anti-discrimination laws, can create real, positive change in the lives of people

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[156] *Id.*
[157] White, *supra* note 19.
[158] Willon & Diaz, *supra* note 9.

who for generations have been discriminated against for the color of their skin and the texture of their hair. Businesses should create and implement their own version of the CROWN Act, and make clear to employees and management through policies, education, and consequences that discrimination based on hair will no longer be tolerated. This will lead businesses away from public relations nightmares and into successful, inclusive futures. Waiting for a state or city to pass a CROWN Act simply continues to contribute to the delay of meaningful Black workforce participation in the United States. If massive, global corporations like Starbucks can continue to pilot inclusionary programs, and if body care titan, Dove, can mobilize their resources to get into the fight for federal CROWN Act legislation, other businesses can take steps today to remove discriminatory hair policies from their books.

VIII. CONCLUSION

Hair based discrimination, which began during slavery, is as old as the United States of America.[159] It continued through the reconstruction of the South and through the Jim Crow Era, at which point the Civil Rights Act of 1964 was passed. Title VII of the Civil Rights Act of 1964 has provided important protections for Black Americans in particular, but also for other minorities, women, and other protected classes in the workplace.[160] Even with the strides made to increase diversity and inclusion generally and, in the workplace, specifically, there is still much work left to be done to fill gaps in Title VII that continue to allow for discrimination in the workplace. The CROWN Act is a recent, powerful example of what some states and cities are doing to combat loopholes in Title VII as states and cities across the nation continue to adopt hair type and hairstyles into their definitions of race.[161] This allows for the regulation of more subtle forms of discrimination, such as businesses refusing to hire Black people by claiming they do not allow certain protective hairstyles such as locs or bantu knots. Businesses can look to other businesses' successful implementation of diversity policies and use those successes as springboards to implement their own versions of the CROWN Act and other inclusive policies in order to create more diverse workforces. Once businesses have done the important work around

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[159] *See,* White & White *supra* note 19.

[160] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq (1964).

[161] *See,* McGregor *supra* note 81.

thinking about what challenges they have, they can move to thinking about what they might do to start chipping away at these issues in meaningful ways that are appropriate for their own individual work cultures. Dove and its CROWN Coalition are exemplars for other businesses who wish to step up and speak out to end hair-based discrimination in the United States.