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# A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair

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## I. INTRODUCTION

This article challenges a relatively universal judicial and societal assumption that employers' enactment and enforcement of grooming codes are inconsequential to women's access to, and inclusion in, American workplaces. Specifically, this article provides a multidimensional analysis of workplace grooming codes, shedding light on the comparable journeys of Black[1] and Muslim women whose hair and hair coverings are subject to employer regulation. This article attempts to fill a gap at the intersection of race, religion, and gender within the scholarly literature examining workplace grooming codes, which deprive and tend to deprive women of color employment opportunities for which they are qualified. In doing so, I acknowledge that Black and Muslim identities are not mutually exclusive, as those who identify as Black or African descendant may also be Muslim. Further, this

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

article in no way purports that the experience of Muslim women and Black women is a monolith, nor does it project that the course for Muslim women who choose to wear a hijab[2] and Black women who choose to don a natural hairstyle is identical in the workplace and beyond.

This article simply aims to illuminate how these women, who are racialized as non-white due to their physical appearance and/or their religious faith and observances, share similar experiences as it relates to workplace inclusion and exclusion vis à vis what adorns their heads. Indeed, workplace prohibitions against Black women's natural hairstyles and Muslim women's donning of a hijab are closely aligned forms of race and gender-based discrimination, triggering parallel actual as well as perceived stigmatization, vulnerability, and exclusion for these women of color, which civil rights constituencies have not fully exposed or addressed. First, Part II briefly details the prohibitions against private workplace discrimination under Title VII of the 1964 Civil Rights Act, and delineates the need for a multidimensional analysis of grooming codes banning and limiting hijabs and natural hairstyles in the workplace. In so doing, this article draws upon the works of notable critical race and sexuality theorists in its contention that a "multidimensional" analysis of the discrimination that women of color as a collective experience in the workplace—at the intersection of race, religion, and gender—is vital for a deeper understanding of the civil rights issues at stake, as well as for increased and sustained civil rights advocacy challenging the legality of such grooming codes.

Part III examines a recent Title VII case decided by the Third Circuit involving three Muslim women's unsuccessful challenge against their employer's "no headgear" policy in *EEOC v. Geo Group Incorporated*. Next, this article compares *GEO Group* to the seminal Title VII case involving Black women's challenge to an employer's prohibition against braided hairstyles in *Rogers v. American Airlines* and its progeny, namely *Pitts v. Wild Adventures*: a braids case decided over thirty years after *Rogers*. Part III synthesizes management and judicial responses in *GEO Group*, *Rogers*, and *Pitts*. This Part demonstrates the ways in which management effectuates a particular gender subordination, stigmatization, and exclusion via its enactment and enforcement of grooming policies against Black and Muslim women. This Part also illustrates the resulting vulnerability, disempowerment, and difference in treatment, terms, conditions, and privileges of employment that Black and Muslim women encounter due to manage-

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[2] Throughout this article, I refer to Muslim women's head coverings interchangeably as a hijab, khimar, and headscarf.

ment responses to their hair-related decisions and judicial legitimatization of these responses.

Part IV provides a multidimensional analysis of the legal protection for the donning of hijabs and natural hairstyles in private workplaces as well as its socio-political and personal meaning for Muslim and Black women. Accordingly, this Part situates employer appearance codes affecting Black and Muslim women within a broader social context. Part IV also elucidates unifying and distinctive threads amongst Black and Muslim women who don natural hairstyles and hijabs. Lastly, Part V proposes that the meaning of Title VII's plain language and cross-coalitional advocacy should be enhanced so that antidiscrimination law and doctrine can meaningfully attend to the deprivation of equal employment opportunities for Black and Muslim women, which oft goes under-discussed in our civil rights discourse and unredressed within our discrimination frameworks.

## II. RELIGIOUS, SEX, AND RACE DISCRIMINATION IN THE PRIVATE WORKPLACE

### A. Title VII of the 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act expressly prohibits covered employers from discriminating against individuals on the basis of race, religion, sex, national origin, and color.[3] Expressly, section 703(a) of Title VII of the 1964 Civil Rights Act makes it unlawful for employers

> to fail or refuse to hire or to discharge any individual or otherwise 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 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.[4]

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3 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

4 42 U.S.C. § 2000e-2(a)(1)–(2) (2000). Where an employment practice is facially discriminatory on the basis of sex, religion, or national origin, the employer can escape Title VII liability by demonstrating the employment practice is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." 42 U.S.C. § 2000e-2(e) (2000). Where the employment practice is not expressly discriminatory, a plaintiff may prove unlawful discrimination either through direct or circumstantial evidence. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003). Though not mandatory, when analyzing circumstantial cases of intentional discrimination, the vast majority of courts apply the burden-shifting framework promulgated by the Supreme Court: a plaintiff must establish a prima facie case that raises

The U.S. Supreme Court has interpreted section 703(a) as prohibiting not only intentional discrimination,[5] but also unintentional discrimination[6] on the enumerated proscribed grounds. Generally, Black women's challenges against workplace grooming code barring natural hairstyles have been theorized as a hybrid form of intentional and unintentional discrimination or simply as a form of intentional discrimination.[7] These grooming codes cases are analyzed through alternative theoretical constructs; the grooming codes are: discriminatory on their face; unequally burdensome or disproportionately impactful to Black women; and/or unlawfully motivated by race and/or gender though facially neutral policies.

Generally, Title VII religious-based challenges against grooming codes have been analyzed under an accommodation framework that does not necessarily consider the employer's intentionality in enacting the appearance mandates.[8] Title VII defines religion as inclusive of "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[9] Accordingly, a covered employer also violates Title VII's prohibition against religious discrimination if it fails to make good faith efforts to reasonably accommodate an employee's religious observance, practice, and belief that conflicts with an employment requirement of

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a presumption of unlawful discrimination; the defendant rebuts this presumption by articulating a legitimate, nondiscriminatory reason; and to satisfy her burden of production and persuasion, a discrimination plaintiff must produce persuasive evidence that the employer's asserted reason is either false and/or that the employer's underlying motivation for the adverse employment action was more likely than not a discriminatory reason. *See generally* McDonnell Douglas v. Green, 411 U.S. 792 (1973); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

5 *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970) (holding that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation") (emphasis in original). In 1991, Congress codified the disparate impact theory, which permits Title VII plaintiffs to succeed on claims of unintentional discrimination by demonstrating that an employment practice disproportionately impacted a protected group and an alternative practice with a less discriminatory impact existed which the employer refused to implement—even if the employer demonstrates that the challenged employment practice is job related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2000).

6 *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970).

7 *See, e.g.*, Rogers v. Am. Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981). *See also* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976); McManus v. MCI Commc'n. Corp, 748 A.2d 949 (2000); Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *4-6 (M.D. Ga. Apr. 25, 2008).

8 *See, e.g.*, EEOC v. Alamo Rent-a-Car, 432 F. Supp. 2d 1006 (D. Ariz. 2006); EEOC v. Kelly Serv., 598 F.3d 1022 (8th Cir. 2010); EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

9 42 U.S.C. § 2000e(j).

which the employer is aware.[10] The employer is not required to implement the employee's proposed accommodation;[11] an employer meets its statutory obligation when it offers any reasonable accommodation to the employee.[12] However, an employer is not obligated to accommodate an employee's religious observance, practice, or belief if an employer can demonstrate that the proposed accommodation is unreasonable or that it would incur an undue hardship in doing so.[13] Yet, an employer's claims of undue hardship[14] must be real and not speculative.[15]

This article's subsequent examination of *EEOC v. The GEO Group*, *Rogers v. American Airlines*, and *Pitts v. Wild Adventures* evinces a particular experience under the law that Black and Muslim women may face when private employers regulate what they can and cannot adorn on their heads in the workplace—irrespective of the legal framework applied to their discrimination claims. By examining these Title VII cases initiated by both Black and Muslim women, one can better appreciate unifying concerns and encounters for women of color whose hair and head coverings are expressly deemed violative of institutionalized workplace norms in light of the parallel ways in which employers and courts have responded to their claims of unlawful discrimination. Accordingly, these grooming codes cases demarcate the ways in which legal doctrine ensconces the prevailing cultural norm—gendered and racialized—which maintains exclusionary barriers on the basis of religion, race, and gender the law was designed to eliminate. A multidimensional analysis of *GEO Group*, *Rogers*, and *Pitts* therefore illustrates the ways in which legal and social norms confine the privilege and freedom of a subset of working women of

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10 *See* Chambers v. Tulon Co. of Richmond, 101 F.3d 1012, 1020 (holding that an employer's duty to accommodate an employee's religious beliefs is triggered when an employer actually knows or should reasonably know that an employee's religious beliefs conflict with an employment requirement).

11 *See* Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 65-66 (1986).

12 *Id*. at 68. The employer is not required to adopt the employee's proposed accommodation; to fulfill its statutory obligation the employer must simply propose any reasonable accommodation that resolves the employee's religious conflict. See id.

13 An accommodation is unreasonable or imposes an undue hardship when it violates the provisions of a collective bargaining agreement, a nondiscriminatory seniority system, engenders more than a de minimis (monetary or non-monetary) cost for the employer or results in differential treatment between employees. *See id.* at 71. *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76-84 (1977).

14 *See* Brown v. Polk, 61 F.3d 650, 655 (8th Cir. 1995) (enumerating ways in which an employer can satisfy its burden of production and persuasion on the issue of undue hardship based upon Title VII precedent).

15 *See* Anderson v. Gen. Dynamics Convair Aerospace Div. 589 F.2d 397, 402 (9th Cir. 1978).

color and leave them uniquely vulnerable to the imposition of discriminatory grooming mandates by employers. Thus, this article's concurrent treatment of Muslim and Black women's Title VII challenges against employer grooming mandates elucidates the limits of current antidiscrimination jurisprudence to effectuate substantive equality and inclusion in the workplace for women of color.

### B. Toward a Multidimensional Analysis of Workplace Grooming Codes that Regulate the Ways in which Women of Color Adorn Their Heads

Elsewhere, I issued a call for renewed attention to and analyses of: unfettered racialized and gendered workplace grooming codes that regulate Black women's hairstyles; attendant deprivation of Black women's acquisition and maintenance of employment; and the resulting denial of civil rights protections against race and gender discrimination for Black women.[16] This article builds upon yet broadens the scope of my previous scholarly investigation of appearance codes in that it illuminates the collective experience of Muslim and Black women subjected to workplace regulations of their hair. In doing so, it provides a more nuanced and holistic perspective on this contemporary civil rights issue by putting forth a "multidimensional" analysis of workplace grooming codes that ban the natural hairstyles and head coverings of women of color. In its "multidimensional" examination of private employers' regulations of Black and Muslim women's hair, and their maintenance of gender-based exclusion, subordination, and stigmatization at the intersection of race and religion, namely, this article draws upon the theoretical insights of notable critical race and sexuality scholars, Professors Darren Hutchinson and Francisco Valdes.[17] As Professor Hutchinson explains, the notion of "multidimensionality" within race-sex equality doctrine is an extension of a fundamental critical race theoretical intervention known as "intersectionality"—most notably advanced by Professor Kimberlé Crenshaw in her seminal article, *Demarginalizing the Intersection of*

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16 *See* D. Wendy Greene, *Black Women Can't Have Blonde Hair...in the Workplace*, 14 J. GENDER, RACE & JUST. 405, 430 (2011). *See also generally* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355 (2008) (hereinafter *What's Hair Got to Do With It*).

17 *See generally* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriers,* 75 DENV. U. L. REV. 1409, 1415 (1998); *see also* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001).

*Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*.[18]

In *Demarginalizing the Intersection of Race and Sex*, Professor Crenshaw delineates the lack of recognition of and remedy for the specific discrimination that Black women suffer due to the interaction between their race and gender within antidiscrimination doctrine because courts have conceived discrimination on the basis of race and gender as mutually exclusive concepts rather than mutually reinforcing constructs.[19] According to Crenshaw, in race and sex discrimination cases, courts ignore the "multidimensionality" of Black women and have viewed discrimination and subordination that Black women contend experiencing along a "single categorical axis."[20] Therefore, "the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences. Per this view, Black women are protected [under antidiscrimination law] only to the extent that their experiences coincide with the experiences of either of these two groups."[21] Such an essentialist concentration "on the [condition of the] most privileged group members," i.e., white women or Black men, within antidiscrimination doctrine and jurisprudence according to Crenshaw, "marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination."[22] Consequently, Professor Crenshaw specifically advocated for the deployment of an "intersectional" framework within antidiscrimination doctrine as well as feminist and anti-racist platforms which seeks to acknowledge and dismantle the particular forms of subordination that Black women experience as "Black women—not the sum of race and sex discrimination, but as Black women."[23]

In his article, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, Professor Darren Hutchinson traces the evolution of intersectionality theory since Professor Crenshaw's seminal work and explains that "post-intersectionality" theorists—for example, "race-sexuality critics, whose scholarship examines the relationships among racism, patriarchy, class domination, and heterosexism"[24]—have expanded the con-

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18 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 (1989).

19 *See generally id.*

20 *Id.* at 139-40.

21 *Id.* at 143.

22 *Id.* at 140.

23 *Id.* at 149.

24 Hutchinson, *supra* note 17, at 309.

tours of intersectionality theory to novel "substantive and conceptual terrains;"[25] Professor Hutchinson's and Professor Valdes' notion of "multidimensionality" is one such analytical tool located within the evolutionary thread of intersectionality theory. According to Professor Hutchinson,

> [m]ultidimensionality "recognize[s] the inherent complexity of systems of oppression . . . and the social identity categories around which social power and disempowerment are distributed." Multidimensionality posits that the various forms of identity and oppression are "inextricably and forever intertwined" and that essentialist equality theories "invariably reflect the experiences of class- and race-privileged" individuals. Multidimensionality, therefore, arises out of and is informed by intersectionality theory.[26]

Professor Valdes further argues that multidimensional theory and praxis are needed for transformative social justice advocacy, as multidimensionality

> reminds all outgroups that all forms of identity hierarchy impinge on the social and legal interests of their members: biases based on race/ethnicity, sex/gender, sexual orientation and other identity features are directly relevant to each of those overlapping groups' social and legal interests because all of those biases impact members of every such group. Multidimensionality tends to promote awareness of patterns as well as particularities in social relations by studying in an interconnected way the specifics of subordination.[27]

Accordingly, though multidimensionality emanates from, and is shaped by, intersectionality theory, multidimensionality is distinctive in its analysis of subordination and privilege among individuals who may similarly experience a form (or multiple forms) of social marginalization.

In proposing a multidimensional framework within equality doctrine, which addresses heterosexual normativity and privilege, Professor Hutchinson submits that "a multidimensional analysis also problematizes the notion of intersecting subordination, the primary focus of intersectionality scholarship."[28] He explains that

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25 *Id.*

26 *Id.* at 309-10 (citing his previous works) (internal citations omitted).

27 Valdes, *supra* note 17, at 1415.

28 Hutchinson, *supra* note 17, at 312.

> [i]ntersectionality, for example, typically considers women of color subordinate relative to men of color and white women. The inclusion of sexuality hierarchies in a multidimensional analysis destabilizes this framework. Heterosexist domination privileges heterosexual women of color (the quintessential subjects of intersectionality) and disadvantages lesbians of color; heterosexism also marginalizes gay men of color and advantages heterosexual men of color. Multidimensionality, therefore, permits a more nuanced examination of the operation of privilege and subordination among oppressed social groups.[29]

This article's multidimensional analysis of grooming codes regulating Muslim and Black women's hair aims to effectuate Professor Valdes' poignant call for the formulation of "critical coalitions that remain true to social justice transformation both within and among traditionally subordinated groups," so that "conceptual frameworks [are developed] that may help foster a culture of understanding and coalition among multiply diverse and overlapping outgroups."[30] By simultaneously examining the contours and consequences of grooming codes that specifically regulate how Black women and Muslim women adorn their heads in the workplace, this article magnifies the extent to which the regulation of women of color's hair is an issue of significant legal, social, and political import deserving of increased attention and coalitional advocacy within civil rights communities generally and workers' rights communities specifically. In so doing, this article exposes similarities and differences in the legal protectionism of workplace grooming codes implicating Black and Muslim women.

This article also contemplates a unique convergence of experience at the intersection of race, religion and gender under the law. For, a Black Muslim woman who dons a hijab and a natural hairstyle may suffer discrimination twofold if an employer institutes a grooming code that bars hijabs and natural hairstyles in the workplace—a double form of discrimination that may simply go unredressed under current Title VII jurisprudence. Therefore, this article embodies a multidimensional analysis of these grooming mandates targeting Black and Muslim women so that women who identify as members of either or both constituencies, as well as individuals committed to advancing their interests, do not devalue their specific, intersecting, and compounding conditions of exclusion, stigmatization, and differential treatment in the workplace, nor do they construct or maintain hierar-

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29 *Id.* at 312-13.

30 Valdes, *supra* note 17, at 1454.

chical and segregationist strategies and activism for gender equality and inclusion.

## III. HAIR MATTERS: *EEOC V. GEO GROUP*, *ROGERS V. AMERICAN AIRLINES* AND ITS PROGENY

### A. *Equal Employment Opportunity Commission v. The GEO Group, Incorporated*

A number of Muslim women have challenged their prospective and current employers' grooming codes banning a hijab in the workplace,[31] and some have been successful in doing so.[32] Despite successful challenges, the exclusionary and subordinating effects of grooming codes on historically and contemporarily marginalized women of color are illuminated in religious accommodation cases involving Muslim women. Though technically framed as religious discrimination, I argue that in order to more fully grasp the individual and collective meaning of grooming mandates regulating what can and cannot adorn women's heads in the workplace, it is helpful to conceptualize accommodation cases initiated by Muslim women as not simply a form of religious discrimination, but also a form of gender-based religious discrimination.[33]

A hijab or a khimar is a particularly gendered symbol of an individual's Muslim faith, as only women wear this head covering.[34] As Sadia Aslam explains,

> the Arabic word *khimar,* comes from the word *khamr,* meaning "to cover," and therefore refers to a piece of cloth used to cover the head. Accordingly, when most Muslims refer to the hijab as a

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31 *See, e.g.*, EEOC v. Alamo Rent-a-Car, 432 F. Supp. 2d 1006 (D. Ariz. 2006); Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. 2009); EEOC v. Kelly Serv., 598 F.3d 1022 (8th Cir. 2010).

32 *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272 (N.D. Okla. 2011).

33 Professor Sahar Aziz shares a similar opinion, arguing that "[d]ebates about a woman's legal right to wear a headscarf inadequately analyze the issues through a narrow lens of religious freedom, while post-9/11, the Muslim headscarf symbolizes more than a mere cloth worn by a religious minority seeking religious accommodation. It is a visible 'marker' of her membership in a suspect group. Thus, the label 'Muslim' is both a religious and racial identifier." Sahar Aziz, *From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 196 (2012).

Another commentator has also noted that the "freedom to wear the veil is certainly, at least for some women, a genuine question of religious manifestation, but also steeped in symbolism and sociopolitical meaning that extend far beyond religious freedom." Sally Pei, Comment, *Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L. J. 1089, 1095 (2013)

34 Professor Aziz likewise deems a Muslim woman's headscarf a "religious gender marker." Aziz, *supra* note 33, at 193.

> headscarf, they are actually talking about the *khimar.* The word, hijab, on the other hand, stems from the Arabic *hajaba,* "to prevent from seeing," and "refers to broader notions of modesty, privacy, and morality."[35]

Furthermore, inherent in the regulation of head coverings worn by Muslim women—like natural hairstyles worn by Black women—and its effects, are uniquely gendered dynamics of power, vulnerability, marginalization and inequality. Situating Muslim women's challenges to employers' prohibitions against hijabs in the workplace within the discourse on gender helps to elucidate the convergence and divergence in the struggle for workplace equality and inclusion among women. Moreover, to place Muslim women's employment discrimination claims solely under the umbrella of religious discrimination obscures the ways in which an employer's ban against a hijab bears on the very nature of one's identity as a *woman* of Muslim faith.[36]

By solely characterizing bans against hijabs in the workplace as a form of religious discrimination, one also fails to acknowledge the gendered meaning of wearing a hijab post-9/11. According to Professor Sahar Aziz, donning a hijab as a Muslim woman post-9/11 "engenders [gender] subordination in ways overlooked by generic strategies against Muslim (male) discrimination . . . [in that a Muslim woman's] headscarf marks her as a terrorist, terrorist sympathizer, unassimilable foreigner, and an oppressed woman."[37] Therefore, in a post-9/11 context, for some, a hijab is a symbol of racialized, religious, and gendered otherness denoting patriarchal subordination, and attendant radicalism and violent threats to socio-political normativity as well as national security, which justifies governmental and private measures to shrink its visibility in myriad spheres.[38] The enactment of grooming codes banning hijabs in American workplaces may very well be symptomatic of the pejorative sociopolitical meaning associated with this uniquely gendered religious garb and corresponding animus, stereotyping or bias at the intersection race, religion, and gender. Notably, however, recent Title VII cases that challenge private employers' bans are generally denominated as an employer's failure to accommodate a

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35 Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees From Discrimination on the Basis of Religious Dress and Appearance*, 80 U.M.K.C. L. REV. 221, 224 (2011).

36 *See* Marie A. Failinger, *Finding a Voice of Challenge: The State Responds to Religious Women and Their Communities*, 21 S. CAL. REV. L. & SOC. JUST. 137 (2012).

37 Aziz, *supra* note 33, at 225.

38 *See* Pei, *supra* note 33, at 1 (explaining that over the past decade, European countries like France and Belgium have proscribed veils worn by Muslim women in public spaces and that other European nations are deliberating whether to enact such proscriptions).

religious observance in accordance with its "neutral" or universal policy of prohibiting hair or head coverings in the workplace, rather than a targeted employment policy ridden with negative racial, gender, and/or religious stereotypes, bias, or animus.[39]

In *EEOC v. GEO Group, Inc.*, three Muslim women—Carmen Sharpe-Allen, Marquita King, and Rashemma Moss—alleged that GEO, a private company contracted to run a prison, violated Title VII's proscriptions against religious discrimination in its adoption and enforcement of a "no headgear policy," which precluded them from wearing a khimar: an Islamic religious head scarf, designed to cover the hair, forehead, sides of the neck, shoulders, and chest.[40] Specifically, these three Muslim women contended that GEO failed to accommodate their religious beliefs in barring them from donning a khimar in the workplace. For several years prior to GEO's implementation of its "zero tolerance headgear policy," Sharpe-Allen and King wore a khimar while working.[41] In fact, during their initial interviews with GEO both women wore a khimar.[42] Notably, GEO enacted the no-headgear policy on the same day that Moss, a correctional officer who recently converted to Islam, sought permission from a supervisor to wear a khimar.[43] Hours after receiving Moss' written request, two supervisors informed Moss that they were denying her request, and that all employees would be banned "from wearing hats and covering their head."[44] On the same day, a memo was issued to the employees stating that "there are no authorized hats, caps, or attire, which can be worn inside the jail and there are no exceptions to this policy."[45] Nonetheless, Moss, Sharpe-Allen, and King sought a religious accommodation to GEO's "no headgear policy" to no avail.

According to Moss, in response to her request to wear a khimar, a supervisor stated that "no religion would be honored in the jail,"[46] yet GEO permitted an exception to its policy requiring male employees to be clean-shaven for male employees who wore beards for religious reasons.[47] Moreover, the women were not permitted to wear khimars though management was aware of the importance that each woman placed on covering her hair in observance of their religious beliefs.[48]

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39 *See generally* EEOC v. GEO Group, Inc., 616 F.3d 265, 277-92 (3d Cir. 2010).
40 *See id.* at 291.
41 *See id.* at 278-80.
42 *See id.*
43 *Id.* at 281.
44 *Id.* at 281-82.
45 *Id.* at 282.
46 *Id.*
47 *Id.*
48 *Id.*

The religious and personal significance of wearing a khimar for Moss, Sharpe-Allen, and King was further diminished when a supervisor explained that GEO was unable to exempt Moss from the grooming policy, as she was potentially responsible for originating "a fad or a fashion statement because [other employees were] wearing the same . . . headscarf."[49]

In a weak (and arguably disingenuous) effort to accommodate the women's religious conflict with the "no headgear policy," management proposed that they could wear a synthetic wig in lieu of a khimar[50]—an eerily similar "accommodation" to a no-braids policy offered to Renee Rodgers, as seen later in *Rogers v. American Airlines*.[51] Contrary to Title VII's objectives, GEO management essentially presented all three women with the same choice: observe your religious beliefs or lose your job.[52] According to Sharpe-Allen, a supervisor informed her that if she wore her khimar to work she would be denied access to the building.[53] Management informed Carmen Sharpe-Allen that she could either work without the khimar, continue wearing her khimar and resign, or be terminated.[54] Sharpe-Allen claimed that she informed her supervisor that she enjoyed her job, but in light of the fact that wearing a khimar to work had not presented any problems in the past, she would not be able to compromise on wearing the khimar while working.[55] By refusing to comply with the directive to return to work without wearing the khimar, GEO fired Sharpe-Allen on the ground that she abandoned her job.[56]

Marquita King, who had worn a khimar for five years until GEO's implementation of a "no headgear policy," was also told that she would be fired if she continued to wear the khimar.[57] Due to the distressing nature of the predicament in which she was placed—either exercise her religious beliefs or lose her job—King took a leave of absence from work and returned to work only to comply with the "no headgear" policy.[58] Rashemma Moss was likewise instructed that she would be suspended without pay if she continued wearing a khimar at

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49 *Id.*

50 *See id.* at 271; *see also id.* at 291 (the court holding that management's proposed accommodation was unreasonable).

51 *See infra* Part III.B-C.

52 *See GEO Group*, 616 F.3d at 282-83.

53 *Id.* at 283.

54 *Id.* at 269.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

work.[59] Faced with the choice of being suspended without compensation or observing her religious beliefs, Moss also stopped wearing the khimar to work.[60]

GEO claimed that it instituted the "no headgear" policy in an effort to "crack down" on employees wearing unauthorized hats or baseball caps, which allegedly made them indistinguishable from prisoners.[61] Moreover, GEO asserted that it would suffer an undue burden if it provided a religious accommodation to its no-headgear policy in that allowing the female employees to wear a khimar would create a safety risk. According to GEO, the khimar could be "taken away from [a female employee] and used against [her], in any form of a choking movement and could be used as a restraint device."[62] Though this reason was based upon conjecture, as no prisoner had ever attempted to choke or strangle an employee with an employee's head covering or any other piece of clothing, the court accepted GEO's rationale.[63]

Thirdly, GEO claimed that it could not make any accommodations to the no-headgear policy because it would cause an undue burden with respect to prison resources, as the prison would have to lock down the prisoners at different checkpoints in order to ensure that the plaintiffs were not smuggling contraband into and around the facility and to ensure against misidentification.[64] Notably, the majority did not find GEO's final reason the most persuasive,[65] and the dissenting justice concluded that it could be inferred that the reasons management offered were pretextual in light of: its inconsistent testimony regarding the underlying motivations for the no headgear policy; the policy was prompted by Moss's request to wear a hijab; a day following the implementation of the policy, Moss was singularly reprimanded for wearing a khimar while other employees were not reprimanded for wearing secular hats; and kitchen staff were still permitted to wear hats though they were in daily contact with prisoners.[66] Nonetheless, the majority held as a matter of law that GEO's blanket enforcement of

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59 *Id.*

60 *Id.*

61 *Id.* at 272.

62 *Id.*

63 *See id.* at 274.

64 *See id.* at 273.

65 *See id.* at 274 (agreeing that "additional time and resources of prison officials" would be necessary to verify the identity of the female Muslim employees donning a khimar at several security checkpoints throughout the prison, yet acknowledging that GEO did not proffer a completely persuasive argument that it would be necessary to "lock down the prisoners in each such location" to ensure accurate identification).

66 *See id.* at 286.

its grooming code against the three female Muslim plaintiffs did not constitute religious discrimination under Title VII.[67]

## B. *Rogers v. American Airlines* and Its Progeny

In 1981, then federal district court judge Abraham D. Soafer decided the seminal case involving the legality of grooming codes that regulate a Black woman's choice of hairstyle under our current antidiscrimination laws: *Rogers v. American Airlines*.[68] In *Rogers*, the court declared that American Airlines' grooming policy that barred employees from wearing braided hairstyles did not violate Title VII's protections against race and gender discrimination.[69] For more than three decades, numerous courts have blindly followed the *Rogers* decision in adjudicating legal challenges to proscriptions against Black women's commonly worn hairstyles—namely natural hairstyles like locks, braids, and twists[70]—in the workplace.[71] In so doing, courts have uniformly rejected Black women's claims that such grooming mandates uniquely discriminate against them on the basis of race and gender in that they not only effectuate unequal burdens on Black women to obtain and maintain employment but also permit arbitrary exclusion of Black women from employment opportunity.[72]

One year into her position as a customer service agent, Renee Rodgers,[73] an eleven-year American Airlines employee, donned a cornrow hairstyle, which American Airlines decided to formally ban. Rodgers challenged American Airlines' grooming policy prohibiting customer service agents from wearing all-braided hairstyles under

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67 *See id.* at 286-289.

68 527 F. Supp. 229 (S.D.N.Y. 1981).

69 *Id.* at 231.

70 Interestingly, however, courts have found that an employer's ban against an Afro may violate antidiscrimination law. *See, e.g.*, Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976).

71 *See, e.g.*, Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (holding that a grooming policy prohibiting employees from wearing natural hairstyles uncovered did not violate federal proscriptions against race discrimination); McBride v. Lawstaf, Inc., No. 1:96-cv-0196-cc, 1996 WL 755779, at *1–2 (N.D. Ga. Sept. 19, 1996) (rejecting plaintiff's Title VII retaliation claim by holding that the plaintiff's opposition to her employer–temporary staffing agency's policy of not referring "qualified applicants with 'braided' hair styles for employment positions" was not protected activity because such policy as a matter of law did not violate Title VII's proscriptions against race–based employment practices).

72 *See, e.g.*, Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *1 (M.D. Ga. Apr. 25, 2008).

73 Professor Paulette Caldwell reveals in her scholarly examination of the case that the accurate spelling of the plaintiff's last name is Rodgers though the official case name spells it Rogers. *See* Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of* Rogers v. American Airlines, *in* RACE LAW STORIES 571, 571 n.12 (Devon W. Carbado & Rachel F. Moran eds., 2008).

Title VII and other civil rights laws.[74] She raised an intersectional claim of discrimination, contending that the grooming policy discriminated against her as Black woman and other Black women since cornrows were "historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of Black women in American society."[75] The court rejected Rodgers' contention that American Airlines' prohibition against all-braided hairstyles constituted a discriminatory policy on the basis of sex or race.

In dismissing Rodgers' discrimination case, the court attempted to analyze her claims as independent and mutually exclusive claims of sex and race discrimination; yet, in concluding that the grooming policy did not violate Title VII's prohibition against sex discrimination, the court expressly considered the extent to which the policy affected employees at the intersection of race and gender.[76] Specifically, the court held that American Airlines' grooming policy did not invidiously nor singularly discriminate on the basis of sex because the policy applied to Black and white men, as well as Black and white women.[77] In its separate analysis of Rodgers' race discrimination claim, the court held that a viable race-based challenge against American Airlines' grooming policy necessitated that Rodgers put forth an essentialist claim that all, most, or only Black Americans wore braided hairstyles.[78] The court reasoned that Rodgers was unable to meet this prima facie requirement by referencing the fact that Bo Derrek, a white actress, donned cornrows in the movie "10."[79] Again, the court looked to an isolated experience of a white woman to determine the legitimacy of Rodgers' race discrimination claim. The court appropriated this exceptional instance of a white woman wearing cornrows as its justification for holding that Rodgers and like plaintiffs could not challenge employer bans against braids on racial grounds, as they could not maintain that only Black women wore braids and this hairstyle therefore held a particular cultural significance for Black women.[80]

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

75 *Id.* at 231-32.

76 *See generally id.* at 231-232; CALDWELL, *supra* note 73 (arguing that the court framed Rodger's intersectional claim of sex and race discrimination as analytically distinct claims and thus failed to recognize that the injury Rodgers allegedly suffered was the consequence of interdependent and mutually reinforcing dynamics of racism and sexism).

77 *Rogers*, 527 F. Supp. at 231.

78 *Id.*

79 *Id.* at 232.

80 Indeed, the court accepted the employer's implication that Rodgers simply mimicked Bo Derek's corn-row style because she began wearing her hair in a similar style "soon after the style had been popularized by [the] white actress." *Id.* at 231.

Consequently, the court could not concede the particular stigmatization and offense that Renee Rodgers, as a Black woman, would experience when American Airlines instructed that: as a customer service representative, her donning cornrows was specifically prohibited because it did not reflect the "conservative and business-like image" that American Airlines' grooming policy intended to enforce;[81] she could wear the cornrows off-duty; and if she were to maintain her cornrows she could not wear her hair freely but rather she would need to "wear her hair into a bun and wrap a hairpiece around the bun during working hours."[82] American Airline's grooming regulations conveyed the message (which the court reified) that cornrows—a natural hairstyle Black women commonly and most notably wear—was an unprofessional and immodest hairstyle in need of covering and thus, an unacceptable and impermissible hairstyle for Black women to wear in their professional capacities, especially when engaging with the public.[83] Indeed, the court was rather dismissive of not only the stigmatic[84] but also the physical injury that American Airlines inflicted upon Rodgers by requiring that she wear a hairpiece to mask her natural hairstyle. In response to Rodger's claims that she suffered severe headaches from wearing a hairpiece, the court suggested rather imperviously that "a larger hairpiece would seem in order."[85]

The court further legitimized American Airlines and subsequent employers' proffers of such "accommodations" or alternative hairstyles to Black women who wear natural hairstyles that the employers subjectively perceive as unprofessional or undesirable even though they may engender physical pain, and additional monetary and/or time investment.[86] Affording legal protection to such subjective policies and practices also reeks of unsettling paternalism, invasiveness, and insolence. Doing so also confers employers with unparalleled power and privilege to instruct Black women on what hairstyles are "best suited" for them personally and professionally. Indeed, more than three decades after *Rogers*, employers remain legally protected

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81 *Id.* at 233.

82 *Id.*

83 It appears that American Airlines permitted Black women who did not work as customer service agents to wear braided hairstyles. *See id.* (opining that Rodgers' acknowledgement that some Black women were allowed to wear cornrows undermined her sex and intersectional sex and race discrimination claims).

84 In addition to a Title VII clam against race and sex discrimination, Rodgers alleged that American Airline's prohibition against braided hairstyles constituted "a badge of slavery" or rather imposed a negative racial stigma in violation of the Thirteenth Amendment. *Rogers*, 527 F. Supp. at 231.

85 *Id.* at 233.

86 *See, e.g.*, Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *1 (M.D. Ga. Apr. 25, 2008).

in meting out unsolicited counsel and limitless conditions on Black women's hairstyle choices.

In *Pitts v. Wild Adventures*, Patricia Pitts, a two-year employee for a Georgia amusement park, alleged that upon wearing a cornrow hairstyle, her supervisor informed her that she did not "approve" of her braids and told Pitts "she should get her hair done in a 'pretty' hairstyle."[87] In response to her supervisor's unsolicited suggestion or directive, Pitts restyled her hair in another natural hairstyle: two-strand twists.[88] Pitts' supervisor again disapproved of her hairstyle because it resembled dreadlocks.[89] Despite her supervisor's disapproval, Pitts refused to change her hairstyle.[90] Soon thereafter, the amusement park's official company policy reflected the supervisor's subjective preferences and opinions of natural hairstyles. The amusement park issued a memo to employees announcing its new policy prohibiting "dreadlocks, cornrows, beads, and shells' that are not 'covered by a hat [or] visor."[91] Thereafter, Patricia Pitts, like Renee Rodgers thirty years prior, challenged Wild Adventure's grooming policy, contending that its' banning "Afrocentric" hairstyles was racially discriminatory.[92] Following the *Rogers* court's lead, the *Pitts* court also held that Pitt's contention that her employer's prohibition against uncovered natural hairstyles was an act of intentional race discrimination was meritless.[93]

Grooming policies like those judicially approved in *Rogers* and *Pitts*, which bar Black women from wearing braided hairstyles or forces their covering, divest Black women of complete autonomy over deeply personal,[94] political,[95] as well as pragmatic[96] grooming choices and bespeak a unique sense of identity informed by broader race and sex dynamics.[97] Moreover, arming employers with unlimited control

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87 *See id*.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at *6.

94 Greene, *supra* note 16, at 428-30.

95 *See* Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365, 369-71 (1991).

96 *See* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1112-1120 (2010) (detailing the ways in which donning natural hairstyles exempts Black women from bearing significant financial costs and time burdens to achieve a straight hairstyle through permanent relaxers, temporary straightening agents, and hair extensions or wigs, resulting physical damage to one's hair and/or scalp as well as negative psychological costs due to attempts to conform to a raced and gendered beauty norm).

97 *See* Greene, *supra* note 16, at nn.6-7 (noting that Black women's natural hair has been and continues to be the subject of negative racial stigmatization and a marker for exclusion, degradation, and dehumanization).

over whether and the manner in which a Black woman can wear a natural hairstyle deprives Black women power and privilege over how they adorn their heads and limits employment opportunities for which they are qualified. Thus, employers' formal and informal regulations of Black women's natural hairstyles essentially amount to arbitrary, discriminatory conditions of employment at the intersection of race and gender.[98]

### C. Hair Matters: Synthesizing *EEOC v. GEO Group*, *Rogers v. American Airlines*, and *Pitts v. Wild Adventure*

Unequivocally, *Geo Group*, *Rogers*, and *Pitts* demonstrate the high level of deference that courts accord to employers in their enactment and enforcement of grooming codes regulating the manner in which women of color can adorn their hair in the workplace. Indeed, in all three cases, these women and their choices concerning their hair were not simply rejected but also denigrated in the process by management. Critical analysis of *Geo Group*, *Rogers*, and *Pitts* present striking parallels in the lack of understanding, respect, autonomy, and dignity the employers conferred to the Black and Muslim female employees who donned natural hairstyles and hijabs in the workplace. As previously stated, a hijab is a gendered religious marker. Though not uniquely worn by women, a braided hairstyle is a racial marker, which can implicate a particular gendered meaning when adorned by women. Indeed, Patricia Pitt's supervisor opined that Pitt's cornrow hairstyle was not "pretty"; thereby in wearing braids, Pitts did not conform to her supervisor's notions of femininity, attractiveness or womanhood.[99] Notably, in *Geo Group* and *Rogers*, the employer suggested to its Muslim female employees to wear a headpiece on the one hand and forced a Black female employee to wear the same on the other hand; in both instances, management's response constituted a clear effort to eliminate or diminish their respective religious and racial markers in the workplace. Consequently, a unifying thread between the express elimination and forced masking of gendered religious or racial markers adorned by Black and Muslim women is the norm of assimilation or homogeneity that the employers sought to achieve in the workplace.[100]

Furthermore, in requesting and mandating that Muslim and Black women cover their hair with hairpieces, management clearly demonstrated its lack of understanding of the particular significance

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98 *See generally id.*

99 *See id*. at 416.

100 *See infra* Part IV.B.

of donning a natural hairstyle or hijab for these women, as well as a lack of engagement with the women to understand the importance of the way in which they adorn their hair. Cumulatively, *Rogers* and *Pitts* legitimize employer requests and mandates concerning Black women's natural hairstyles (which are not afros) in the workplace that are not only stigmatizing, intrusive, and offensive, but also result in physical discomfort and significant investments in time, energy, and finances. Current antidiscrimination doctrine therefore accords employers a particular privilege and power over Black women, in that legally protected formal and informal regulation of and conditions placed upon their natural hair subject Black women to a unique vulnerability, disempowerment, and devaluation in the American workplace. Correspondingly, unrestrained authority to regulate Black women's natural hair indeed deprives and tends to deprive Black women of employment, privilege, freedom, equality in treatment and full recognition as a woman within their workplaces. Yet, in upholding American Airline's grooming policy, the *Rogers* court opined that employers' policies prohibiting braided hairstyles and requiring their disguise while working were a matter of minimal importance, as they "at most [had] a negligible effect on employment opportunity."[101] The court further proclaimed that such appearance mandates "[did] not offend a substantial interest"[102] that Black women may hold. Unfortunately, antidiscrimination doctrine remains affixed to such notions as it pertains to the contours and consequences of workplace regulations of Black women's natural hairstyles.[103]

The Third Circuit in *GEO Group* acknowledged the unreasonableness of GEO management's proposal to have women wear wigs in lieu of khimars, in light of the fact that the women explained they wore a khimar to specifically cover their hair as an act of "guard[ing] [her] modesty" in accordance with their interpretation of the Koran.[104] GEO management was quite dismissive of the plaintiffs' individual and collective religious reasons for wearing a khimar, evidenced by their supervisors' responses to their requests for religious accommodation. By proposing that they wear wigs in lieu of a khimars, GEO management simply disregarded the women's express religious beliefs.

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

102 *Id.* at 233.

103 *See, e.g.*, Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (holding that employers' prohibitions against natural hairstyles do not violate antidiscrimination protections against race discrimination because such bans "[do] not implicate a fundamental right"). *See also, e.g.*, McBride v. Lawstaf, Inc., No. 1:96-CV-0196-CC, 1996 WL 755779, at *2 (N.D. Ga. Sept. 19, 1996) (holding that an employer's policy barring braided hairstyles does not violate Title VII as a matter of law).

104 EEOC v. GEO Group, 616 F.3d 265, 291 (3rd Cir. 2010).

The supervisors further diminished the religious significance of wearing a khimar for Sharpe-Allen, Moss, and King and other Muslim women by equating it to a "fad" or fashion statement. In doing so, management implied that permitting one woman to wear a khimar resulted in organized acts of female empowerment on the part of other Muslim women who also wore khimars—perceived acts of collective identity formation and activism—that needed to end.[105]

Indeed, with respect to GEO management, its lack of engagement with Sharpe-Allen, Moss, and King defied its legal obligation to make a "good faith effort" to accommodate their religious observances. Yet, despite its claim that no religion would be honored in the workplace, GEO management expressly accommodated the religious observances of male employees by exempting men who wore beards for religious reasons from its policy that male employees be clean-shaven. In so doing, GEO privileged the religious observances and beliefs of male employees over those of female employees. Thus, one could surmise that gender-based religious animus or bias animated GEO management's decision not to exempt the Muslim women from its grooming policy. Furthermore, one could also conclude that GEO's headgear proscription equated to a deliberate effort to cease Muslim women's donning of this particular gender-based religious garment, and, as women, the attendant expression of their religious identity and freedom as well as their autonomy, agency, and status equal to that exercised by, and conferred to, men in the workplace. Accordingly, it is important to conceptualize workplace bans against religious attire worn uniquely by women as a matter of gender equality and inclusion and thus situate the legal challenges against these grooming policies within women's rights discourse, advocacy, and movements.[106]

Though the courts' views differed regarding the legality of an employer's requirement that a Black woman wear a head piece to cover her natural hairstyle, and an employer's suggestion to a Muslim woman that she wear a wig in place of a khimar, the courts in *Geo Group*, *Rogers,* and *Pitts* maintained grooming policies affecting women of color that were equally stigmatizing, exclusionary, intrusive, and

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105 *See also* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 169 (7th Cir. 1976) (Black female plaintiff similarly alleging that while being informed she was denied a promotion because of her Afro hairstyle, a supervisor also accused of her "being a leader of the girls on the floor").

106 *See generally* Failinger, *supra* note 36. *See also* Aziz, *supra* note 33, at 239 (arguing that a Muslim woman who dons a hijab is "caught in the crosshairs of intersectionality at her own peril" as Islamic, and Black civil rights organizations as well as antidiscrimination doctrine fails to address the particular subordination at the intersection of race, religion, in gender that Muslim women suffer).

offensive. Indeed, GEO management openly contemplated the physical exclusion of Muslim women who wore a khimar on its premises and in doing so, demonstrated unmitigated contempt for, and control over, Muslim women's rights to express their religious identity. One supervisor informed one of the plaintiffs that if she arrived to work wearing her khimar she would be barred from entering the workplace, and that GEO planned to not only prohibit Muslim employees from wearing a khimar, but also Muslim women who donned khimars while visiting prisoners.[107] By upholding GEO Group's "zero tolerance no-headgear policy"—again prompted by Moss's request to wear a khimar after her conversion to Islam—the Third Circuit seemingly maintained a discriminatory policy at the intersection of religion and gender in that it appears GEO Group specifically targeted Muslim women, the wholesale exclusion of their bodies when donning a khimar, and the amputation of their religious personhood.

In all three cases, by not complying with discriminatory and arbitrary grooming policies, women of color lost or were at risk of losing their jobs for which they were qualified. Moreover, by upholding all of the challenged grooming policies, the courts in *Geo Group*, *Rogers*, and *Pitts* subjected women of color to an unjustified deprivation of economic security that employment provides in addition to comparable vulnerability, lack of agency, autonomy, and dignity. Indeed, Black and Muslim women who feel complete by wearing natural hairstyles or a hijab yet who are forced to cover and deny an inherent part of their individual identity as a woman are differently burdened than other women and men in this regard. For, these women of color are required to engage in "identity performance" which "can be at odds with the employee's sense of identity [and thus] to the extent the employee's continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is continual harm to that employee's dignity."[108]

## IV. A MULTI-DIMENSIONAL ANALYSIS OF HIJABS AND NATURAL HAIRSTYLES IN THE WORKPLACE AND BEYOND

### A. Legal Protection for Hijabs and Natural Hairstyles in the Workplace

*Geo Group*, *Rogers*, and *Pitts*, reveal that as women of color, Black and Muslim women are subject to grooming codes that are the

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107 *See GEO Group*, 616 F.3d at 282.

108 Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman,* 11 J. CONTEMP. LEGAL ISSUES 701, 719-28 (2001).

products of racial and gender stereotypes and bias and they bear analogous forms of exclusion, subordination, and stigmatization due to their intersectional identities. These cases also illustrate that for some Black women, the decision to wear natural hairstyles as well as for some Muslim women, the decision to wear a hijab in the workplace is an emancipatory act, which signifies a demand for equal treatment and full recognition of their dignity, personhood, freedom, and autonomy as women. Despite the similarities in the legal treatment of these women of color and their corresponding experiences, significant divergences in the legal recognition of Muslim and Black women's ability to wear hijabs and natural hairstyles respectively in the workplace exist, which is important to note.

Namely, with respect to the legal recognition of Black women's right to wear a natural hairstyle in the workplace, courts have expressed that only a workplace ban against an afro may violate antidiscrimination protections against race discrimination.[109] Indeed, since *Rogers*, courts have repeatedly held that workplace bans against natural hairstyles that Black women don, like twists, locks, or braids, as a matter of law do not violate prohibitions against race discrimination.[110] The *Rogers* court reasoned that a workplace ban against braided hairstyles on its face did not constitute racial discrimination because unlike an afro (which theoretically is a protected hairstyle),[111] a braided hairstyle is "not the product of natural hair growth but of artifice."[112] Per the court's reasoning, presumably Black people are born with an afro; thus, an afro is an immutable, "natural" trait for most if not all individuals who identify as Black. Moreover, a braided hairstyle is not and cannot be achieved through the styling of one's naturally textured hair; rather, it is only accomplished through the addition of natural or synthetic hair.[113] In its lack of understanding of the diversity of hairstyles and hair textures of (as well as the socio-cultural and intrinsic significance of hair for) those who identify as Black women, regrettably, the *Rogers* court fortified a narrow legal principle that protection against race discrimination is extended to challenges against employ-

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109 *See* Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981). *See also* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d at 168-69 (holding that a Black female plaintiff filed a sufficient EEOC charge alleging race and gender discrimination after her supervisor allegedly informed her that she was denied a promotion because she was unable to represent the company wearing an afro).

110 *See supra* note 103.

111 *Rogers*, 527 F. Supp. at 231.

112 *Id.* at 232.

113 *See* Onwuachi-Willig, *supra* note 96 (explaining the difference between synthetic and natural hair and braided hairstyles and arguing that this evidence may be helpful to a grooming codes case).

ment policies and practices that implicate inherent, "immutable" characteristics.[114]

Naturally, Renee Rodgers and subsequent Black plaintiffs challenging grooming codes barring natural hairstyles could not satisfy the foregoing legal prerequisites for race and gender discrimination cases, which "simply missed the point" according to Professor Paulette Caldwell, that "women of color should not necessarily be denied relief because a challenged employment practice does not harm the men of their racial group or white women,"[115] or women or men who do not identify as Black. Furthermore, as I have previously argued, by endorsing an immutability requirement, which has become imbedded in antidiscrimination doctrine,[116] a court dismisses the nuanced nature of the racialization process, whereby the conceptualization of "race includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group."[117] Thus, the construction of race embodies the observation and signification of both mutable and immutable characteristics—an understanding that the *Rogers* court (and later the *Pitts* court)[118] rejected in its adoption of an immutability requirement, which affords relief for differential treatment based upon presumably inherent, unalterable physical traits, like skin color, and thereby superficially narrows the purview of protection against race discrimination under current antidiscrimination laws.[119]

Judicial promulgation of this immutability requirement is based upon a legal, political, and social fiction that race is a biological and fixed construct. As a result, if any characteristic or behavior is to be deemed "racial" in nature, every individual, if not most individuals who identify or are perceived as a member of a particular racial group, must share in or display the characteristics or behaviors at issue. Notably, the conceptualization of religion, unlike race, is not as grounded

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114 *Id.*

115 Caldwell, *supra* note 73, at 377.

116 *See* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011).

117 Greene, *What's Hair Got to Do With It*, *supra* note at 16, at 1385.

118 Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *5-*8 (M.D. Ga. Apr. 25, 2008).

119 *See* Greene, *supra* note 16, at 426 (arguing that when courts have imposed an immutability requirement in race discrimination cases challenging workplace grooming codes such courts have "delineated a clear, yet arbitrary, distinction between choice and no choice and thus what [is] considered lawful and unlawful in race discrimination cases involving mutable characteristics").

in this fiction of immutability, as it is pervasively recognized that religion is a mutable feature of one's identity since an individual can ascribe to various religious faiths or none at all throughout her lifetime. Consequently, legal doctrine does not require a religious discrimination plaintiff to demonstrate that individuals who share in the plaintiff's religious identity ascribe to identical religious beliefs and observances. Therefore, in order to maintain a viable claim of religious discrimination, a Muslim woman need not demonstrate that all or most Muslim women wear a hijab in observance of their religious beliefs.[120]

However, to assert an actionable race-based (or intersectional race and gender-based) challenge against workplace grooming codes that proscribe natural hairstyles, Black women must satisfy an immutability requirement by demonstrating that all, most, or only individuals who identify as Black or as Black women wear natural hairstyles. Fundamentally, Black women cannot meet such an essentialist requirement. Therefore, antidiscrimination law leaves Black women unprotected against the enforcement of workplace grooming codes that effectuate differential treatment at the intersection of race and gender. The operation of the immutability requirement has essentially obliterated legal recognition for natural hairstyles worn by Black women and legal protection against grooming codes barring or diminishing these hairstyles in the workplace. As a consequence, employers are afforded limitless prerogative and freedom to expressly subordinate and usurp an inherent part of many Black women's identity, as well as constrain the ways in which a Black woman can wear her hair in the workplace,[121] even though such mandates implicate race and gender and are irrelevant to job performance and qualifications.

Conversely, as it relates to Black and Muslim women's prerogative concerning their hair, antidiscrimination law affords Muslim women a legal right to don a hijab in the private workplace—though not absolute[122]—and a resulting privilege of legal recognition which Black women simply do not possess. Indeed, Muslim women have brought successful legal challenges against workplace grooming codes banning hijabs whereas Black women have enjoyed minimal extralegal success and effectively no legal success in their challenges against natural hairstyle prohibitions in the workplace.[123] Despite

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120 *See* EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1285 (N.D. Okla. 2011).

121 *See generally* Greene, *supra* note 16.

122 *Abercrombie*, 798 F. Supp. 2d at 1272.

123 *See* Greene, *supra* note 16, at 414 (noting the influence of protests and boycotts that civil and labor rights communities organized against national employers who prohibited braided hairstyles in the mid to late 1980s).

Muslim women's relative legal privilege and success, judicial decisions that uphold arbitrary workplace regulations, which are fraught with disrespect for, and refutation of, Black and Muslim women's deeply personal choices as women to cover or not to cover their hair convey a message to Black and Muslim women, as well employers, that the inclusion of these women of color in American workplaces can rest upon their compliance with express and implicit forms of race, religion, and gender subordination, marginalization, and exclusion.

### B. Hijabs and Natural Hairstyles: A Multidimensional Analysis of Meaning for Women of Color

In recognizing Muslim women's relative yet imperfect privilege of protection and recognition under the law to wear a hijab in the workplace, it is important not to dismiss the interconnectivity between the socio-political and personal meaning of Black women's natural hairstyles and Muslim women's hijabs, and the resulting shared and divergent experiences for these women of color. First, not all Muslim women wear a hijab, and those who wear a religious head covering commit to doing so for myriad reasons. For example, many Muslim women wear a head covering as a reflection of their spiritual and physical modesty in observance of their religious beliefs.[124] Others may don a hijab in furtherance of both their faith and practical concerns "such as avoiding the negative effects of obsession with beauty and sexuality on women"[125] like sexual objectification and sexual harassment.[126] Accordingly, Muslim women who wear a hijab often feel that doing so is liberating and self-empowering and view the hijab as a signification to others to treat them equally and with respect.[127] Some Muslim women also believe that wearing a hijab provides an opportunity to contest misunderstandings and stereotypes within both Muslim and non-Muslim communities about Islam, Muslim women, and their roles in society.[128]

Similarly, not all Black women wear natural hairstyles, and for those Black women who do, the reasons are likewise varied and are

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124 Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L. J. 441, 449 (2008)

125 EEOC v. GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010).

126 *See* Hera Hashmi, Comment, *Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 409, 415 (2010).

127 *See* Abdo, *supra* note 124, at 449-50.

128 *See* Kristin Choo, *Walking the Tightrope Muslim Women Who Practice Law Are Asserting Themselves in Efforts to Reconcile Traditional Beliefs with Modern Secular Society*, ABA J., Feb. 2013, at 38, 45.

not mutually exclusive.[129] Black women may wear a natural hairstyle to minimize or eliminate the physical and financial inconveniences that come along with wearing straightened hairstyles.[130] Black women may wear their hair naturally for aesthetic reasons, as a form of racial/ethnic expression, and/or to challenge pervasive expectations and pressures to wear a straightened hairstyle as an implicit petition for genuine inclusion, respect, and equal treatment.[131] Finally, Black women donning natural hairstyles are also simply wearing their hair the way in which it grows on their heads—with or without any motive or meaning. Thus, like hijabs for some Muslim women, donning natural hairstyles for some Black women is a defining feature of their identity and personhood.

How women adorn their heads are particularly personal choices; yet, "a black woman's hair [and more specifically, her choice to wear a natural hairstyle] continues to threaten the social, political, and economic fabric of American life"[132] in analogous ways to Muslim women donning a hijab. According to Professor Paulette Caldwell, "what links [an] afro or natural hairstyles and so-called 'artificial ones' (such as braids) is a question of assimilation"[133] in that donning an afro or any other natural hairstyle, much like donning a hijab, can be perceived as a "challenge to the status quo, especially its dominant cultural manifestations, [and] are identified as major threats to central national values."[134] Consequently, vis á vis their natural hairstyles and religious hair coverings, Black women and Muslim women are marked as racial and gendered "others," as they do not represent the prevailing white, female, Protestant normative standard of womanhood and they are deemed "radical" or "militant."

Indeed, the perceived subversiveness contemporarily associated with Black and Muslim identities and the undeniable interconnectivity between the socio-politically constructed identities of Blacks and Muslims was best illustrated on the infamous cover of the New Yorker magazine entitled "The Politics of Fear." On the July 2008 magazine cover, a caricature of then Presidential candidate, Senator Barack Obama, is wearing traditional religious attire worn by male Muslims in tact with a turban, burning an American flag while bumping fists with his wife, Michelle Obama, whose caricature is donning an en-

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129 *See* Caldwell, *supra* note 95, at 367. *See also* Onwuachi-Willig, *supra* note 96.

130 *See generally* Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 411 (2007).

131 *Id*. at 419-20.

132 *See* Caldwell, *supra* note 95, at 367.

133 *Id*. at 391-93.

134 *Id*.

larged afro, a military inspired outfit and an AK-47.[135] Most notably, an afro adorned Mrs. Obama's head which conveys a deep socio-political meaning; for, Black women's donning of a natural hairstyle—namely afros—has denoted and continue to denote Black women, much like the headscarf marks Muslim woman: as an anarchist generally, and as "a disloyal and Anti-American terrorist or terrorist sympathizer" more specifically.[136]

This caricature aligns the experience of Muslim and Black women in very poignant ways in that the afro is central to the signification of Mrs. Obama's perceived racialized and gendered radicalism; she, as a Black woman, was perceived to be "angry and unpatriotic" during the 2008 campaign.[137] Significantly, the cover portrayed Mrs. Obama's perceived radicalism as a co-extension of her husband's perceived radicalism and otherness cultivated by external perceptions that he is a Muslim terrorist and is not an American citizen.[138] However, in lieu of portraying Mrs. Obama as a woman who shares the same religious (and quite possibly racial) identity as her husband—which would have likely been signified by her caricature donning gendered religious attire like a hijab—the cover specifically locates Mrs. Obama's perceived radicalism within her identification as a Black American woman who is not Muslim. Mrs. Obama's afro in contrast to her typically conservative, straightened hairstyle, much like a Muslim woman's hijab, is a raced and gendered marker that is essential to the characterization of her as a rebellious and disloyal other who repudiates American values and thus, a violent threat to American security.

Indeed, Muslim women's headscarves and Black women's naturally textured hair have been searched at airport security checkpoints as a security measure.[139] According to a Black woman, whose naturally textured hair placed in a bun atop of her head was searched by a TSA agent in a Seattle airport, felt that this search not only infringed upon her personal space but also constituted an act of racial discrimination, as TSA agents did not search other women whose straightened hair was in a similar hair bun or ponytail nor was the search of her hair conducted pursuant to a formal policy.[140] A Muslim female attorney wearing a hijab also recounted her feeling of being the victim of dis-

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135 *Barak Obama Controversy*, WOOPIDOO!, http://www.woopidoo.com/biography/barack-obama/new-yorker.htm (last visited May 29, 2013).

136 Aziz, *supra* note 33, at 224.

137 *Barak Obama Controversy*, *supra* note 135.

138 *Id.*

139 *See e.g.*, Allen Shauffler, *TSA to Woman: We're Going to Have to Search Your Hair*, http://www.king5.com/news/local/TSA-to-woman-Were-going-to-have-to-examine-your-hair-125112189.html (last visited July 20, 2013).

140 *Id*.

crimination: she was subjected to extra security searches in airports—on both legs of her trip—and during one leg while standing in the security queue, a security guard pointed at her and yelled, "Scarf!".[141] Afterwards, she informed her husband that she rather drive 25 hours than fly to Yellowstone National Park for an upcoming family vacation because she simply was not prepared to "go through [the] emotional humiliation [she suffered] again."[142] Similarly, another Muslim woman claimed that she felt "violated," "upset," "offended," and "harassed" by incessant, intimidating demands by National Guard personnel that she remove her hijab during an airport security search—even after she explained she could not take off her hijab in public in accordance with her religious beliefs.[143]

Black women's natural hairstyles and Muslim women's hijabs have been politicized and denigrated and thus have served as a site of subordination, exclusion, and marginalization within personal and professional relationships,[144] and in private and public spaces, like schools, airports, and workplaces, compelling Black and Muslim women to make a difficult decision not to wear a natural hairstyle and not to cover their hair in order to avoid negative social and economic repercussions[145] that may result in "spirit injury."[146] Yet, distinctively Muslim women (and those who are perceived as Muslim) are often faced with the choice of wearing a headscarf so as to avoid physical injury and violence. Some Muslim women are simply afraid of wearing any type of religious head covering because of the possibility of being violently attacked. On September 11th, 2001, in Brooklyn, New York,

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141 Choo, *supra* note 128.

142 *Id*.

143 Samar Kaukab v. Maj. Gen. David Harris, SPC, et. al, 2003 WL 26128443 (N.D. Ill. 2003)

144 Onwuachi-Willig, *supra* note 96, at 1106-10 (discussing how Black women are wary of wearing natural hairstyles because of the repercussions they may face in their professional and personal lives).

145 *See* Greene, *What's Hair Got to Do With It*, *supra* note 16, at 1392-94 (detailing the real life decisions of Black women not to wear their hair natural while seeking employment because of their fear that a prospective employer will deny them an employment opportunity for which they were qualified due to their hairstyle).

146 According to Wing and Smith, "[s]pirit injury' is a [Critical Race Feminism] term that contemplates the psychological, spiritual, and cultural effects of [racist, sexist, and like discriminatory] assaults upon women." Adrien K. Wing and Monica Nigh Smith, *Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 777(2006). Relatedly, Wing and Smith acknowledge that "French Muslim women who are not permitted to wear [a headscarf] in school [pursuant to the French government's ban] might feel some of the symptoms of spirit injury, including defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, [and] acute despair/emotional death." *Id.* (citing Adrien Katherine Wing and Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 289 (2002) (internal quotations omitted).

rocks were hurled at two Muslim women, and days later a woman from Pakistan who donned a scarf was physically attacked in Florida.[147]

Professor Aziz also details countless examples of Muslim women and those perceived to be Muslim encountering "palpable discrimination in employment and public spaces [post-9/11 . . . which have compelled Muslim women] to remove the headscarf [in order] to be free from physical harassment, obtain gainful employment, and meaningfully participate in civic life."[148] Across the country, Muslim women who don headscarves have suffered violent physical attacks, sexual harassment, death threats, in addition to religious and racial epithets in open spaces, like neighborhood streets, gas stations, and college campuses.[149] Some of these instances of extreme verbal and physical abuse Muslim women have suffered have also occurred in front of their children and anti-Muslim sentiment has been imputed onto the children whose mothers don a hijab, resulting in significant levels of bullying, harassment, and terrorization of Muslim children at school.[150] In addition to these acts of racial and religious violence, state courts and state court judges in various parts of the country have excluded Muslim women who wear a hijab; in fact, one African American Muslim woman was held in contempt of court and sentenced to ten days in jail for refusing to remove her hijab upon the judge's order.[151] Consequently, the capricious enforcement of "no hats" policies, which exclude religious head coverings, likewise implicate Muslim women who are court employees and Muslim women who are performing their work, educational, and civic responsibilities in the courts like litigants, attorneys, law students, and jurors.

In light of the actual and potential threats to their (as well as their children's) emotional, spiritual, and physical being, livelihoods, and mortality, Muslim women who don hijabs are subject to indiscriminate acts of disrespect and disregard for their humanity in public, social spaces. This leaves Muslim women uniquely vulnerable in conducting their daily lives—a kind of vulnerability Black women wearing natural hairstyles generally do not experience. Therefore, despite the relative legal privilege Muslim women may hold with respect to donning a religious head covering, Black women possess a relative social privilege in their ability and freedom to wear natural hairstyles. Nonetheless, it should not be discounted that both Black and Muslim

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147 *See* Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. & CULTURE 1, 19 (2002).

148 *See generally* Aziz, *supra* note 33, at 239.

149 *See id*. at 245-53.

150 *See id*. at 251-53.

151 *See id*.

women may experience "daily microaggressions, rude behavior, dismissive statements, or outright disrespect [because of their hairstyles and head coverings which] [c]umulatively, [ . . . can] have adverse consequences on [their] well-being."[152]

Furthermore, as *GEO Group*, *Rogers*, and *Pitts* illustrate, the denial or termination of employment across industry type as well as the deprivation of equal conditions and privileges in the workplace are real and not conjectural for Black women who wear natural hairstyles and Muslim women who wear hijabs. Indeed, these are not isolated incidences.[153] Accordingly, the journey for Black and Muslim women uniquely converge, as both Black and Muslim women are left to seriously (and legitimately) deliberate whether to don natural hairstyles and hijabs respectively and a Black Muslim women who wears a hijab and a natural hairstyle may contemplate whether to don either or both. The next section, therefore, briefly proposes legal and advocacy interventions to address and redress the intersecting and compounding discrimination that Black and Muslim women may suffer due to the imposition of arbitrary grooming codes barring natural hairstyles and/or hijabs in the workplace.

## V. A Call For Legal and Cross-Cultural Coalition Advocacy

Though many commentators have observed that courts have interpreted antidiscrimination law in such a constricted manner that numerous gaps and inefficiencies exist within the legal protection against race, gender, and religious discrimination in the workplace,[154] continued advocacy to amend the law and its interpretation is not a futile endeavor. Increased awareness and advocacy within civil rights organizations concerning the limited and nonexistent protections for women of color wearing natural hairstyles or religious head coverings in the workplace are likewise needed. Therefore, this article briefly contemplates how the plain language of Title VII and civil rights advocacy can be utilized more effectively to address the differential treatment, exclusion, and stigmatization that Black women donning natural hair and Muslim women donning hijabs encounter when employers ban or regulate how they adorn their hair.

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152 *Id.* at 246.

153 *See e.g., supra* note 103; EEOC v. White Lodging Serv. Corp., 2010 WL 9485608 (W.D. Ky. March 31, 2010).

154 *See generally*, *e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L.L. Rev. 91 (2003); William R. Corbett, *Fixing Employment Discrimination Law*, 62 S.M.U. L. Rev. 81 (2009); Sandra Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69 (2011).

Generally, Title VII cases involving Black women's challenges against workplace prohibitions against natural hairstyles, a hybrid disparate treatment/disparate impact framework. In Title VII cases challenging workplace prohibitions against Muslim women donning hijabs, a religious accommodation framework is generally appropriated.[155] *GEO Group*, *Rogers*, and *Pitts* illustrate, however, the implementation of grooming codes cannot always be neatly packaged as independent issues of intentional discrimination, unintentional discrimination, or organizational necessity. Rather, the imposition of workplace grooming codes can simultaneously disproportionately impact or unequally burden[156] individuals on the basis of proscribed characteristics *and* can be motivated by the consideration of proscribed characteristics. Additionally, grooming codes constitute express and informal barriers to acquiring and maintaining employment across industry and organization type, often implemented without any correlation to job performance or qualification. Therefore, conceptualizing the aforementioned discrimination claims initiated by Black and Muslim women through the prism of singular, isolated analytical frameworks does not fully capture the deprivation of employment opportunities regardless of industry type as well as unequal conditions and privileges of employment that Black and Muslim women suffer due to the enforcement of arbitrary grooming codes.

Plaintiff-side employment lawyers and judges should, therefore, enhance the meaning of Title VII's plain language by viewing these prohibitions against, and regulation of, Black women's natural hairstyles and Muslim women's donning of a hijab as a violation of section 703(a)(2) which makes it unlawful for a covered employer 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 [. . .] because of such individual's race, color religion, sex, or national origin."[157] Professor Sandra Sperino acknowledges in her article, *Rethinking Discrimination,* that

> some courts have gone so far as to state that [703(a)(2)] of Title VII's operative language relates to disparate impact, while

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155 *See generally* Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, U. CINN. L. REV. 1411 (2009) (arguing for a more unified conceptualization of intentional religious discrimination cases and religious accommodation cases rather than treating them as analytically and factually distinct).

156 *See* Jesperson v. Harrah's Operating Co., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (holding that for an employer to be held liable for sex discrimination under Title VII where its appearance mandates are different for male and female employees, the female plaintiff challenging such mandates must demonstrate that the grooming code imposed unreasonable or unequal burdens on female employees).

157 42 U.S.C.§ 2000e-2(a)(2) (2000).

> [703(a)(1)] relates to disparate treatment. Such thinking is not required by the operative language of the federal employment discrimination statutes, but flows from the ways in which the courts [and employment discrimination lawyers] think about discrimination frameworks.[158]

Accordingly, "[Section 703(a)(2)] only requires that the terms or conditions of plaintiff's employment were affected or that the [employer's] conduct did or tended to deprive a plaintiff of employment opportunities [on the basis of Title VII's proscribed grounds.]"[159]

The previous analysis of *GEO Group*, *Rogers*, and *Pitts* demonstrates that grooming codes prohibiting hijabs and natural hairstyles in fact deprive Muslim and Black women from employment for which they are qualified on the basis of race, religion, and gender. Close scrutiny of these three cases also reveals the parallel forms of subordinating, stigmatizing, exclusionary, and differential treatment that Black and Muslim women experience in tandem with management's implementation of grooming codes because of their intersecting identities. Black, Muslim women may also endure such discrimination in the terms, conditions, and privileges of employment and deprivation of employment on the basis of race, religion, and gender if an employer prohibits both hijabs and natural hairstyles. Based upon a pure application of Section 703(a)(2) to the factual circumstances underlying challenges against grooming codes that bar hijabs and natural hairstyles, such appearance standards violate Title VII's express proscriptions against race, religion, and gender discrimination.

Though courts often view these grooming codes as harmless acts of employer prerogative, multidimensional and intersectional analyses of workplace grooming codes banning and regulating natural hairstyles and hijabs delineate that employers' implementation and enforcement of these mandates arbitrarily deprive or tend to deprive Black women and Muslim women acquisition and maintenance of employment for which they are qualified in violation of Title VII's plain language. In order to obtain or maintain employment, Black and Muslim women's conformity with such exclusionary workplace grooming mandates may in effect require their compliance with express and implicit forms of gender-based subordination and differential treatment in the workplace to which other women and men are not subject. Civil rights and workers' rights constituencies, therefore, should begin to address the myriad consequences of workplace bans

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158 Sperino, *supra* note 154, at 101-02.

159 *Id.* at 97.

against hijabs and natural hairstyles through meaningful coalition building and advocacy efforts.

Viewing these grooming codes cases through a multidimensional lens illuminates the individual and collective harm of employers' seemingly innocuous implementation and enforcement of grooming codes implicating Black and Muslim women's hair. Uniquely, Black and Muslim women experience economic and stigmatic injury due to employment conditions that moderate and exclude their presence—via their hair—from private workplaces, regardless of the industry or organization type. Indeed, workplace regulations banning hijabs and naturally textured hairstyles may doubly affect women of color who are both Muslim and Black and don hijabs and natural hair. Consequently, granting indefinite power to private employers to specifically regulate the hair of women of color may not simply reify but also amplify their exclusion from the workplace and corresponding social, economic, political and legal disadvantage at the intersection of race, religion, and sex. Thus, contemporary civil rights and workers' rights discourse and advocacy efforts that challenge workplace grooming codes banning Black women and Muslim women from wearing natural hairstyles and hijabs in the workplace should be developed in such a way that the intersecting and exclusive interests of Black and Muslim women are neither marginalized nor privileged.

## VI. Conclusion

In its multidimensional analysis of grooming codes prohibiting and regulating the ways in which Black women can don natural hairstyles and Muslim women can don a hijab in the workplace, this article aims to highlight the distinctive and interactive nature of these workplace conditions affecting women of color. In so doing, this article points out that though Muslim women may possess a greater legal privilege and right to wear a hijab in the workplace than Black women who don natural hairstyles, one woman's relative legal privilege does not override the similar vulnerability, disempowerment, stigmatization, exclusion, and corresponding differential treatment with respect to the terms, conditions, and privileges of employment that Black and Muslim women uniquely experience in the workplace. Furthermore, Black Muslim women may be subjected to a double form of exclusion if an employer bans both hijabs and natural hairstyles in the workplace.

Accordingly, the journeys of Black and Muslim women overlap in ways that are not often acknowledged and appreciated by law and society. This article calls for jurists, practitioners, and civil and workers' rights advocates to fully recognize the interconnectedness of the experience of these women of color. This article submits that these con-

stituencies not only enhance the meaning of Title VII's plain language but also engage in cross-cultural coalition discourse and advocacy efforts so that the multidimensional experiences of women of color who don hijabs and natural hairstyles—in the workplace and beyond—are meaningfully addressed. In this vein, this article argues that more substantive protection for Muslim women who don hijabs and *actual* protection for Black women who don natural hairstyles should and can be provided under contemporary antidiscrimination law and doctrine.