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### Reconsidering the Immutability of "Race": An Examination of the Disconnect Between "Race" in Title VII Jurisprudence and Social Science Literature

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Reconsidering the Immutability of “Race”: An Examination of the Disconnect Between “Race” in Title VII Jurisprudence and Social Science Literature

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## I. INTRODUCTION

Born of the American Civil Rights Movement, the Civil Rights Act was enacted in 1964 to promote race, ethnicity, sex, and religious equality.<sup>1</sup> The Civil Rights Act was meant to establish legal remedies for those who experience discriminatory employment practices.<sup>2</sup> Congress' purpose in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."<sup>3</sup>

Title VII makes it unlawful for an employer to discriminate against an employee or candidate for employment on the basis of that person's race, color, religion, sex, or national origin. Unlawful "discrimination" could take many different forms, such as discrimination in hiring or firing someone, compensating some employee or employees less than others (which might look like providing different salary, bonus, and promotion opportunities). Unlawful discrimination might also include providing different work conditions (such as less preferable team assignments or fewer resources to certain employees), or creating or allowing an abusive work environment (such as one that includes violence, threats, slurs, "jokes," or threatening graffiti).

The Equal Employment Opportunity Commission ("EEOC") and the courts are responsible for handling complaints of people who have experienced the types of discrimination Title VII was meant to address. The courts are ultimately responsible for interpreting the statutory language of the Title VII.

A plaintiff may recover under Title VII by arguing either a disparate treatment theory or a disparate impact theory.<sup>4</sup> This means a complainant can either argue that they were treated differently by the employer because they are part of a protected class or that some policy of the employer has a negative effect disproportionately on employees who belong to a protected class.

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1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

2. Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U.L. REV. 469, 471 (2010).

3. *McDonnell Douglas*, 411 U.S. at 800 (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

4. *EEOC v. Catastrophe Mgmt. Sol.*, 837 F.3d 1156, 1161 (11th Cir. 2016).

Despite the fact that Title VII prohibits discrimination based on race, neither Title VII nor the EEOC define “race.”<sup>5</sup> Instead, “the meaning of the word ‘race’ in Title VII is, like any other question of statutory interpretation, a question of law for the court.”<sup>6</sup>

One of the most important rules in Title VII claims is that employers may not discriminate based on immutable characteristics related to race, although they *may* discriminate based on mutable characteristics, even if those characteristics correlate with racial identity.<sup>7</sup> Immutable characteristics are those with which one is born and cannot change, whereas mutable characteristics “may be changed at will.”<sup>8</sup>

## II. REEVALUATING THE EFFECTIVENESS OF TITLE VII’S RACE PROVISION IN LIGHT OF MODERN SOCIAL SCIENCE THEORIES

### A. *Historical and Scientific Context of Understanding “Race”*

A brief look into American legal and scientific history of conceiving of “race” lends context to my argument that mutability ought not to be the touchstone for determining Title VII protection.

In the early to mid-twentieth century, “most states that made racial distinctions in their laws provided statutory racial definitions, almost always focusing on the boundaries of Black identity.”<sup>9</sup> For example, many states had laws that defined a person who was a “Negro” or “mulatto” by the amount of “Negro blood” in their ancestry, ranging from a “one-fourth” ancestry rule in Oregon to Alabama’s “one

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5. *Id.* (“Title VII does not define the term ‘race.’ And, in the more than 50 years since Title VII was enacted, the EEOC has not seen fit to issue a regulation defining the term.”).

6. *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016).

7. *See Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (applying the immutable characteristic limitation to national origin); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091-93 (5th Cir. 1975) (holding that “[p]rivate employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights,” and a hairstyle is not an immutable characteristic); *Auguste v. Homes for the Homeless*, 2016 U.S. Dist. LEXIS 118331, at \*3 (E.D.N.Y. 2016) (“The only thing that federal law prohibits is discrimination against plaintiff on the basis of immutable characteristics, such as his race, his national origin, his gender, his age, or, additionally, his religion.”); *see also* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1514 (2011).

8. *Earwood v. Cont’l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) (“hold[ing] that a sex-differentiated hair length regulation that is not utilized as a pretext to exclude either sex from employment does not constitute an unlawful employment practice as defined by Title VII” since hairstyles are mutable characteristics).

9. IAN HANEY LÓPEZ, *WHITE BY LAW* 83 (2011).

drop rule.”<sup>10</sup> Such rules about “purity” of blood do not exist in the law today, but the question of what “race” means is still very much unsettled.<sup>11</sup>

The way “race” is handled in Title VII – that race is based upon immutable characteristics – demonstrates an incomplete departure from the idea that race is biologically based.<sup>12</sup> This is understandable since Title VII was passed in an era where the “conceptualization of racial identity as biological, fixed, and inherent” was a prevailing viewpoint on race.<sup>13</sup> Title VII’s language on the protected class of race has not been updated since its enactment and the idea of race as biologically based lives on in Title VII jurisprudence.

### *B. Revisiting the Mutability of “Race” Under Modern Theories*

Just as the legal concept of race shifted over the last century, the trend among social scientists is now that “race” is not a characteristic based in human biology, but rather a set of characteristics that are seen as indicative of identities.<sup>14</sup> In fact, in 1999, eighty percent of cultural anthropologists and 69 percent

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10. Paul Finkelman, *The Color of Law*, 87 NW. U.L. REV. 937, 955 n. 96 (citing PAUL MURRAY, *STATES’ LAWS ON RACE AND COLOR* (1950)).

11. *See, e.g.*, *EEOC v. Catastrophe Mgmt. Sol.*, 837 F.3d 1156, 1156 (11th Cir. 2016).

12. *Id.* at 1170-72 (acknowledging that there are compelling arguments for interpreting “race” as a social construct but refusing to adopt that interpretation because there was no precedent for such).

13. D. Wendy Greene, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 131 (2013).

14. *See, e.g.*, JOHN BAUGH, *OUT OF THE MOUTHS OF SLAVES: AFRICAN AMERICAN LANGUAGE AND EDUCATIONAL MALPRACTICE* 9 (1999) (writing from the perspective that linguistic features associated with race are based in social, geographic, and historical factors); Bertrand & Mullainathan, *supra* note 78 (hypothesizing that employers would make assumptions about applicants’ racial identities based on names alone); Purnell, Idsardi & Baugh, *supra* note 78 (demonstrating that landlords made racial determinations based on language use alone, thereby disproving the idea that racial determinations must be made by evaluation of another’s physical characteristics).

Many legal scholars who study social science also generally see race as socially based. *See, e.g.*, Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, MIXED RACE AMERICA AND THE LAW 102 (Kevin R. Johnson ed., 2003) (“Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.”).

of physical anthropologists rejected the notion that “[t]here are biological races in the species *Homo sapiens*.”<sup>15</sup>

Although the trend among social scientists has been to reject the concept of “race,”<sup>16</sup> we still make racial classifications that bear social – and legal – consequences. We make judgements about others’ racial identities by examining people’s names;<sup>17</sup> physical characteristics, such as skin color, hair texture, and nose or eye shape;<sup>18</sup> language use;<sup>19</sup> social associations, like friends, family, and membership in an organization like the South Asian Bar Association.<sup>20</sup> When people interact, they are constantly participating in the “social construction” race.<sup>21</sup> The danger in classifying others into racial categories, social scientists warn us, is that we may ignore intragroup variation and oversimplify in our minds the way diversity functions in society.<sup>22</sup>

When misinformation about “race” is reinforced to the point that is “truth,” courts fail to consider racial identities as socially constructed. The courts’ focus on the immutable characteristics related to race ignores the fact that the discriminatory animus in cases involving so-called biological racial [] traits and voluntary, performed racial [] traits operates identically.”<sup>23</sup>

### C. *When a Mutable Characteristic Indexes Race: Missed Opportunity for Title VII*

#### *Protection in EEOC v. Catastrophe Management Solutions*

A 2016 11th Circuit decision inspired a national debate about Title VII’s ability to ensure equal employment opportunities for individuals of all races. In *EEOC v. Catastrophe Management Solutions*, the

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15. Leonard Lieberman, Rodney C. Kirk & Alice Littlefield, *Perishing Paradigm: Race: 1931-99*, 105 AM. ANTHROPOLOGIST 110, 111-12 (2003) (examining trends in the use of racial classification by anthropologists and anthropology publications over the course of the twentieth century).

16. Lieberman, Kirk & Littlefield, *supra* note 15, at 111-12.

17. Leong, *supra* note 2, at 480.

18. *Id.* 478-79.

19. *Id.* at 479-80.

20. *Id.* at 480-81.

21. ADRIAN HOLLIDAY, INTERCULTURAL COMMUNICATION AND IDEOLOGY 139 (2011).

22. Mary Bucholtz & Kira Hall, *Language and Identity*, A COMPANION TO LINGUISTIC ANTHROPOLOGY 369, 371 (Alessandro Duranti ed., 2004).

23. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U.L. REV. 1134, 1141 (2004) (arguing for the adoption of a “race/ethnicity performance framework” to be used to evaluate Title VII race claims).

11th Circuit found that there was no Title VII violation where an employer required a newly hired employee to remove her dreadlocks if she wished to be employed by the company.<sup>24</sup>

Catastrophe Management Solutions (“CMS”) is a company based in Alabama, that offers customer service support to insurance companies.<sup>25</sup> In 2010, Chastity Jones, an African American woman, completed an online employment application for a customer service representative position at a CMS call center.<sup>26</sup> CMS’ advertisement for the position indicated that in order to be qualified, a candidate should have basic computer knowledge and professional phone skills.<sup>27</sup> A few days after Jones sent in her application, she attended an interview at CMS wearing a blue business suit and short dreadlocks.<sup>28</sup> After her interview, Jones was informed, along with other applicants, that she had been hired and that she needed to complete pre-employment paperwork.<sup>29</sup>

However, during a private meeting with the white female human resources manager, Jones learned that she would not be able to complete the hiring process unless she changed her hairstyle from dreadlocks to another style.<sup>30</sup> CMS had a supposedly “race-neutral” grooming policy that was officially published as follows: “All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]”<sup>31</sup> The HR manager told Jones that the reason for the company’s rule was that dreadlocks “tend to get messy[.]”<sup>32</sup> This idea that dreadlocks are messy, dirty, or unprofessional is a racial stereotype that I grew up with, so my knowledge about that stereotype made me believe Ms. Jones had in fact experienced discrimination.

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24. EEOC v. Catastrophe Mgmt. Sol., 837 F.3d 1156, 1172 (11th Cir. 2016).

25. *Id.* at 1158.

26. *Id.* at 1158-59.

27. *Id.*

28. *Id.* at 1159.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

The EEOC filed a complaint on behalf of Jones in federal court, alleging that CMS' refusal to hire Jones because of her dreadlocks violated Title VII because it constituted disparate treatment based on race.<sup>33</sup> The EEOC argued that race is a socially constructed concept and, therefore, that hairstyles and other traits may be so strongly associated with race that employers may discriminate on the basis of race based on that hairstyle.<sup>34</sup> The EEOC explained that dreadlocks are a common hairstyle for black people, as dreadlocks are particularly "suitable for black hair texture."<sup>35</sup> Furthermore, the EEOC demonstrated that even the term "dreadlock" is historically linked to black individuals' hair: the term originated during the time of the slave trade, when slave traders referred to the African slaves' hair as "dreadful" after it was "matted with blood, feces, urine, sweat, tears, and dirt."<sup>36</sup> The court did not accept the EEOC's arguments, deciding instead that "discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not."<sup>37</sup>

The court entertained the argument that race is a social construct and therefore discrimination may occur on the basis of traits that are socially interpreted as being associated with a particular race.<sup>38</sup> However, the court ultimately refused to part from precedent and recognize discrimination based on racially-associated characteristics, particularly because the application of such a rule would be unclear and complex.<sup>39</sup> The court also called for these questions of defining "race" and unlawful discrimination to be answered by Congress or the Supreme Court.<sup>40</sup>

The court explained:

[E]ven if courts prove sympathetic to the "race as culture" argument, and are somehow freed from current precedent, how are they to choose among competing definitions of "race"? How are they (and employers, for that matter) to know what cultural practices are associated with a particular "race"? And if cultural

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33. *Id.* at 1162.

34. *Id.* at 1160.

35. *Id.*

36. *Id.* at 1159.

37. *Id.* at 1167.

38. *Id.* at 1170-72.

39. *Id.* at 1171.

40. *Id.* at 1172.

characteristics and practices are included as part of “race,” is there a principled way to figure out which ones can be excluded from Title VII’s protection?<sup>41</sup>

This case demonstrates concerns about the adequacy of Title VII in advancing equal opportunity for workers of all races and in eradicating racial discrimination in the American workplace. What was perhaps most troubling about the court’s decision was that the defendant employer was allowed to render an adverse employment decision based upon Jones having a hairstyle that indexes African American-ness. Indeed, the plaintiff could have chosen to alter her hairstyle if she wanted to meet the employer’s demands. However, she should not have had to change her hair from a neat, professional hairstyle that is well-suited to her hair type. The court ought to have refocused its inquiry onto CMS’ contention that dreadlocks are not allowed in their workplace because they “tend to get messy,”<sup>42</sup> an unsubstantiated racial stereotype. Well-groomed deadlocks certainly bear no health or safety risks that are not also a feature of other hairstyles.

There is no reasonable explanation for CMS’ prohibition against dreadlocks besides the elimination of a personal grooming characteristic that indexes blackness, so the ban on dreadlocks should have been deemed to violate Title VII because the ban was clearly a pretext to exclude racial minorities from employment at CMS.<sup>43</sup> Although the basis of the defendant’s discrimination was a *mutable* characteristic associated with the protected class of race, the plaintiff should have been allowed to recover because there was no reasonable explanation for the dreadlock ban other than that the rule was a pretext for discrimination against black employees.

### III. THE FUTURE OF TITLE VII’S RACE PROTECTIONS

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41. *Id.*

42. *Id.* at 1159.

43. *But see* Earwood v. Cont’l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (holding that held that a “sex-differentiated hair length regulation” was not unlawful under Title VII as discriminatory to male employees because the court found the regulation was not being “utilized as a pretext to exclude either sex from employment.”).

If Congress were to update Title VII to reflect the modern understanding of race, the focus of Title VII should continue to be prohibiting discrimination based on personal characteristics that do not materially affect a person's ability to perform a job.<sup>44</sup>

Title VII's interpretation of "race" should be shifted from viewing the protected classes as rigid categories to a more comprehensive trait-based discrimination model. The modern understanding of racial identity, evidenced in legal and scientific trends, is that race is more than a biological reality.<sup>45</sup> Instead, while "immutable" characteristics like skin tone and facial features contribute to one's performance of racial identity, there are a host of mutable characteristics, such as language use and hairstyle, that index racial identity. An employer might render an adverse employment action based on an employee or applicant's mutable characteristic, which is lawful under Title VII but is nonetheless based on racial animus.<sup>46</sup> The Title VII construction of "race" ought to be updated to protect against these forms of racial discrimination.

One method of implementing a model that prohibits racial discrimination based on immutable or mutable traits is to advocate for the courts' adoption of such a rule. It seems unlikely that a court would adopt such a radical definition of "race" without guidance from Congress, particularly because defining "race" would complicate employers' duties and courts' factual determinations. Also, a court might have to wade through a variety of experts' definitions of race before settling on a rule that may be as uncertain as the one it replaces.<sup>47</sup> Attorneys would argue over the social significance of personal traits. Because of the complexity of the issue, it seems unlikely that a court would be willing to break with precedent and establish this new rule.<sup>48</sup>

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44. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

45. See, e.g., *Lieberman and Kirk*, *supra* note 15.

46. See, e.g., *Catastrophe*, 837 F.3d 1156 (refusing to recognize a Title VII violation when employer discriminated on the basis of a mutable trait that indexed race).

47. *Id.* at 1170-71 ("[T]he call for interpreting 'race' as including culture has not been unanimous. This is in part because culture itself is (or can be) a very broad and every-changing concept.").

48. "Assuming . . . that courts were willing to adopt such a shared understanding of Title VII, that would only be the beginning of a difficult interpretive battle, and there would be other very thorny issues to confront, such as which cultural characteristics to protect." *Id.* at 1171.

Another option to implement the trait-based model would be for Congress to amend Title VII to define race. The vast majority of anthropologists do not recognize “race” as a reality,<sup>49</sup> but if Congress were to eliminate race altogether as a protected class, then it would be left to consider how to adequately protect employment opportunities for all. Surely, the term “race,” or some equivalent like “ethnicity,” should be maintained to protect minority groups’ civil rights.

#### IV. CONCLUSION

In conclusion, the challenge of revising Title VII language, EEOC policy, and judicial interpretation of “race” certainly presents a daunting task for legislators, the EEOC, and the judiciary, since their modifications would reflect a more truthful, but infinitely more complex, understanding of racial identity.<sup>50</sup> Likewise, any court’s recognition of a definition of race that extends beyond the traditional, albeit ambiguous, legal conceptions of race, could set a controversial precedent that would broaden the reach of Title VII outside the legislatures’ (and employers’) desired scope. However, fear of the complexity of the issue of defining “race” should not prevent those in power from giving Title VII the force it needs to adequately promote equal employment opportunities for all.

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49. Lieberman & Kirk, *supra* note 15, at 137.

50. *Catastrophe*, 837 F.3d at 1171.