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#SeeHerName: Using Intersectionality and Storytelling to Bring Visibility to Black Women in Employment Discrimination and Police Brutality

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#SEEHERNAME

USING INTERSECTIONALITY AND STORYTELLING TO BRING VISIBILITY TO BLACK WOMEN IN EMPLOYMENT DISCRIMINATION AND POLICE BRUTALITY

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I. INTRODUCTION

On February 26, 2012, George Zimmerman attacked and fatally shot Trayvon Martin in Sanford, Florida.[1] The seventeen-year-old boy was only carrying an Arizona Iced Tea and a bag of Skittles when Zimmerman killed him.[2] In 2013, Zimmerman was charged, inter alia, with second-degree murder in *Florida v. Zimmerman*.[3] That July, a six-person jury found Zimmerman not guilty on all charges.[4] The night of the verdict was a turning point that shifted the minds of many in Black America. That night, Alicia Garza, a civil rights activist and community organizer, wrote in a Facebook post "a love letter to black people."[5] In that post, she affirmed the Black community of its worth, writing "black lives matter." The phrase had never before been used.[6]

On August 9, 2014, a different shift happened—this time, a shift in the movement of Black America. In Ferguson, Missouri, police officer Darren Wilson killed Michael Brown, an eighteen-year-old Black boy, by gunshot.[7] Ferguson became ground zero, as a nationwide movement against police brutality and anti-Black racism engulfed the United States of America. That same year, police killed forty-three-year-old Eric Garner in Staten Island, New York,[8] and twelve-year-old Tamir Rice in Cleveland, Ohio.[9] Eric Garner, Mike Brown, and Tamir Rice joined Trayvon Martin in becoming household names and faces. The stories of those and other Black men and boys killed by the police became "an impetus for public

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[1] *Trayvon Martin Shooting Fast Facts*, CNN (Oct. 9, 2020), https://www.cnn.com/2013/06/05/us/trayvon-martin- shooting-fast-facts/index.html.
[2] Leo Benedictus, *How Skittles became a symbol of Trayvon Martin's innocence*, THE GUARDIAN (July 15, 2013), https://www.theguardian.com/world/shortcuts/2013/jul/15/skittles-trayvon-martin-zimmerman-acquittal.
[3] *Trayvon Martin Shooting Fast Facts*, *supra* note 1.
[4] *Id.*
[5] *See* Alicia Garza, THE PURPOSE OF POWER (2020).
[6] Garza is the co-creator of #BlackLivesMatter and the Black Lives Matter Global Network. It should be noted that the Network's co-creators—Garza, Patrisse Cullors, and Opal Tometi—are all Black women. BLACK LIVES MATTER, https://blacklivesmatter.com.
[7] *Timeline of Events in shooting of Michael Brown in Ferguson*, THE ASSOCIATED PRESS (Aug. 8, 2019), https://apnews.com/article/9aa32033692547699a3b61da8fd1fc62.
[8] Daniel Pantaleo killed Eric Garner by illegal chokehold. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric- garner-police-chokehold-staten-island.html.
[9] Timothy Loehmann killed Tamir Rice in less than two seconds after arriving on the scene where Rice was playing with a toy gun. Shaila Dewan and Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015) https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html.

policy debates on the future of police in America."[10]

While Black America was rightfully disturbed by the unjust police killings of Black men and boys, the country was largely silent about the 2014 police killings of several Black women and girls, including Gabriella Nevarez, Aura Rosser, Michelle Cusseaux, and Tanisha Anderson.[11] Recognizing the lack of discussion and visibility of Black women and girls, the African American Policy Forum and the Center for Intersectionality and Social Policy Studies launched the #SayHerName campaign in December 2014.[12] The campaign works to bring awareness and visibility to these Black women and girls and their stories and support a gender-inclusive approach to racial justice that centers all Black lives equally.[13]

The conversation about police brutality in the United States centers on Black men and boys and how they are systematically criminalized and feared by the state and the country. Black women and girls have also been killed by the police and disproportionately subjected to police brutality; however, their names and, much more, their stories are rarely heard. Neither the "killings of Black women, nor the lack of accountability for them, have been widely elevated as exemplars of the systemic police brutality that is currently the focal point of mass protest and policy reform efforts."[14] This disparity in discourse indicates that Black women and their experiences are invisible.

Part II of this article defines and outlines intersectionality, the legal theory through which society and the law see Black women and their unique experiences. Part III uses the intersectionality framework to examine the unique challenges Black women face in the domains of employment discrimination and police brutality. Part IV examines, through the lens of narrative and storytelling, how historically false narratives have contributed to existing intersectional injustices Black women face in employment discrimination and police brutality. Part V argues that until society and the law acknowledge and account for the lies, omissions, and their implications for Black women, Black women will continue to suffer from invisibility. By unearthing the lies and contextualizing them, society and the law can be better informed on how to address and remedy the injustices brought on by intersectional issues.

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[10] Kimberlé Crenshaw and Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, AFRICAN AMERICAN POLICY FORUM 1 (2015), https://www.aapf.org/sayhername. [hereinafter Say Her Name Report].
[11] *Id.*
[12] #SayHerName Campaign, AFRICAN AMERICAN POLICY FORUM, https://aapf.org/sayhername.
[13] Say Her Name Report, *supra* note 10, at 6.
[14] *Id.* at 1.

II. INTERSECTIONALITY

In 1989, Professor Kimberlé Crenshaw introduced the legal theory of intersectionality in her seminal article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*.[15] In the article, Crenshaw explained how race and gender often interact to create multiple dimensions of experiences for Black women in the workplace.[16] Centering on three employment discrimination cases,[17] Crenshaw criticized the failure of Title VII of the Civil Rights Act of 1964 ("Title VII") to accommodate plaintiffs at the intersection of two or more protected categories (i.e., race and sex), the judiciary's narrow view of discrimination, and how single-issue analyses harmfully limit how the law considers both racism and sexism.[18] Through this theoretical framework, Crenshaw discussed how Black women face discrimination in ways that are unique from the discrimination Black men or white women face.[19] Black women often face "double-discrimination—the combined effects of practices which discriminate on the basis of race" and also "discrimination as Black women—not the sum of race and sex discrimination, but as Black women."[20] This framework has evolved, particularly in social discourse, to discuss intersectional identities of all kinds, yet the theory's roots— Black women at the intersection of race and gender—inform the discussion in this article.

III. INTERSECTIONAL CHALLENGES IN 2021

This section explores two key domains in which intersectional issues arise: employment discrimination and police brutality. First, this section discusses Black women's experiences with employment discrimination by examining Title VII, its interpretation, and shortcomings. This section also reviews intersectionality's legal status by examining race-based hair discrimination cases. Second, this section explores the similarities and differences in how Black men and women experience police brutality and the importance of acknowledging and correcting the notable absence of Black women in police brutality discourse.

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[15] 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).
[16] *Id.*
[17] DeGraffenreid v. General Motors, 413 F. Supp. 142 (E.D. Mo. 1976); Moore v. Hughes Helicopter, 708 F.2d 475 (9th Cir. 1983); Payne v. Travenol, 673 F.2d 798 (5th Cir. 1982).
[18] Crenshaw, *supra* note 15, at 152.
[19] *Id.* at 149.
[20] *Id.*

A. Employment Discrimination

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[21] Employment discrimination cases are generally placed within two categories, as Title VII prohibits both "disparate treatment" and "disparate impact" discrimination.[22] Disparate treatment occurs when an employer intentionally discriminates based on a protected characteristic, whereas disparate impact occurs when a facially neutral employment practice or decision has a discriminatory effect.[23]

To succeed in a disparate treatment claim under Title VII, a plaintiff must establish purposeful discrimination under the three-part framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.[24] First, plaintiffs must make a *prima facie* case by articulating that (1) they belong to a racial minority; (2) they applied and were qualified for a job for which the employer sought applicants; (3) despite their qualifications, they were rejected; (4) after their rejection, the employer left the position open and continued to seek applicants from people of the plaintiffs' qualifications.[25] Second, once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to "articulate[26] some legitimate nondiscriminatory reason" for its rejection.[27] Third, should the employer satisfy the burden of production, the burden then shifts back to the plaintiff to show that the employer's stated reason was pretextual for the discriminatory decision.[28] Ultimately, the burden of persuasion remains with the plaintiff.[29]

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[21] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e-2.
[22] Yvette Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PENN. J. L. & SOCIAL CHANGE 1, 4 (2019).
[23] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
[24] McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).
[25] *Id.* at 802.
[26] Employers only have to articulate a nondiscriminatory reason; they do not have to prove that the articulated reason was the *actual* reason. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.").
[27] *McDonnell Douglas*, 411 U.S. at 802.
[28] *Id.* at 804.
[29] *Burdine*, 450 U.S. at 256 ("The plaintiff retains the burden of persuasion.").

1. Intersectionality's Legal Status

Intersectionality is a framework through which people, and the law, can see where one's various identities collide and interlock.[30] As previously stated, Title VII protects against discrimination on the basis of "race, color, religion, sex, *or* national origin."[31] Crenshaw and other intersectionality scholars have criticized Title VII's use of the word "or," as the word makes it difficult for plaintiffs to bring a claim on more than one protected category.

Some courts have embraced intersectionality theory in Title VII to allow plaintiffs to bring claims under more than one protected category.[32] The leading case that followed this practice is *Jefferies v. Harris County Community Action Association*.[33] In *Jefferies*, the court asserted that "[t]he use of the word 'or' evidences Congress's intent to prohibit employment discrimination based on any or all of the listed characteristics."[34] Most federal courts have followed the *Jefferies* approach, including a few circuit courts,[35] concluding that Title VII "also protected individuals against discrimination based on the combination or 'intersection' of two or more protected classifications, even in the absence of evidence showing the defendant discriminated solely on the basis of one protected classification."[36] Even the Supreme Court, albeit in dicta, favorably cited the *Jefferies* approach.[37] Further, the Equal Employment Opportunity Commission ("EEOC") Compliance Manual states:

> Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian

[30] "It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things." *Kimberlé Crenshaw on Intersectionality, More Than Two Decades Later*, COLUM. L. SCH. (June 8, 2017), https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later.
[31] 43 U.S.C. § 2000e-2(a)(1) (emphasis added).
[32] *See* Diane Avery et al., EMPLOYMENT DISCRIMINATION LAW 47 (8th ed. 2010).
[33] Jefferies v. Harris County Cmty. Action Ass'n*,* 615 F.2d 1025 (5th Cir. 1980).
[34] *Id.* at 1032.
[35] Westmoreland v. Prince George's Cty, 876 F. Supp. 2d 594, 604 (D. Md. 2012) (citing Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1561-62 (9th Cir. 1994); Hucks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003)).
[36] Brown v. OMO Group, Inc., 2017 WL 1148743, at *1 (D.S.C. Mar. 28, 2017).
[37] *See* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 n. 10 (1999).

> American women from discrimination based on stereotypes and assumptions about them "even in the absence of discrimination against Asian American men or White women." The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute—e.g., race and disability, or race and age.[38]

Despite the law's evolution toward embracing intersectionality in Title VII cases, statutory language has not changed nor has much of its interpretation.[39] Many courts have refused to use an intersectional framework and instead require plaintiffs to choose only one of the protected categories.[40] Forcing plaintiffs to choose only one protected category is problematic because those who face intersectional discrimination (i.e., Black women) must bisect their identity to take advantage of Title VII protections, leaving them without an adequate remedy.[41]

2. Hair Discrimination

One area that has gained traction in law and social discourse is "grooming codes discrimination"[42] or discrimination on the basis of hairstyle. Grooming codes discrimination causes a "specific form of inequality and infringement upon one's personhood resulting from the enactment and enforcement of formal as well as informal appearance and grooming mandates, which bear no relationship to one's job qualifications and performance."[43] Black women are 1.5 times more likely to

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[38] EEOC, OFFICE OF LEGAL COUNSEL, DIRECTIVES TRANSMITTALS, EEOC COMPLIANCE MANUAL 3, 8-9 (2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination [hereinafter EEOC Compliance Manual].

[39] *See* Bradley A. Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, GEO. MASON U. C.R. L.J. 199, 214 (2006) ("Despite a number of court decisions that have validated intersectional claims, none of these decisions have generated enough publicity or been handed down by a court with sufficient authority to set a genuine precedent in an area lacking clear guidance"); *see also* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. REV. 713, 727 (2015) ("Despite the integral role of intersectional experiences in informing the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between.").

[40] Pappoe, *supra* note 22, at 7.

[41] *Id.*

[42] "Grooming codes discrimination" was coined by D. Wendy Greene. D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017).

[43] *Id.* at 990.

be sent home from work because of their hair,[44] eighty percent more likely to feel required to change their hairstyle for work,[45] and thirty percent more likely to be made aware of a grooming policy.[46] Black women's hair is 3.4 times more likely to be seen as unprofessional.[47] If one conducted a Google search for "unprofessional hairstyles for women," most of the images would be of Black women in natural hairstyles; conversely, a Google search for "professional hairstyles for women" boasts of mostly white women whom almost all have straight hair.[48] Currently, Title VII does not protect against discrimination on the basis of hairstyle.

The seminal case on Black hair, grooming restrictions, and the latter's effect on Black women is *Rogers v. American Airlines*.[49] Renee Rodgers, an American Airlines flight attendant, filed a suit under Title VII, arguing that the airline discriminated against her "as a woman, and more specifically a black woman" via its grooming policy that prohibited customer-contact employees, like flight attendants, from wearing braids.[50] Rodgers asserted that cornrows, her hairstyle, have "special significance for black women" and have been "historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[51] The district court separated Rodgers' claim into two separate analyses: a sex discrimination analysis and a racial discrimination analysis.[52] The court did not, as Rodgers requested in her complaint, employ an intersectional analysis that accounted for both race and sex.

The court first dismissed Rodger's claim of gender discrimination on the ground that the prohibition on braids applied to both men and women.[53] Further, the court reasoned that women wearing braids more often than men was

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[44] *The CROWN Research Study*, DOVE (2019), https://thecrownact.com.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *See* GOOGLE IMAGES, images.google.com. This has been criticized for several years without change. *See also* Leigh Alexander, *Do Google's 'unprofessional hair' results show it is racist?*, THE GUARDIAN (Apr. 8, 2016), https://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms- racist.
[49] 527 F. Supp. 229 (S.D.N.Y. 1981). The published case name misspells the plaintiff's last name; the correct spelling is "Rodgers." This article will use "Rodgers" when referring to the plaintiff and "*Rogers*" when referring to the case. *See* Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. American Airlines*, RACE LAW STORIES 571, 572 (2008) (revealing the misspelling and proper spelling of Rodgers).
[50] *Rogers*, 527 F. Supp. at 231.
[51] *Id.* at 231-32.
[52] *Id.*
[53] *Id.* at 231.

inconsequential, as the policy did not "regulate on the basis of any immutable characteristic of the employees."[54] The court then dismissed Rodgers' claim of racial discrimination.[55] The court underscored that the policy applied to all races,[56] then it used the immutability doctrine to ground its distinguishable legal treatment of cornrows and afros.[57] According to the court, federal protections against racial discrimination are limited to employers discriminating based on immutable characteristics.[58] Immutable characteristics or traits are those "with which one is born, are fixed, difficult to change, and/or displayed by individuals who share the same racial identity."[59] Under this, the court reasoned that an actionable racial discrimination claim required evidence that showed Black people exclusively or predominantly wore braids.[60] "By articulating this evidentiary standard, it appears that the *Rogers* court presumed that a workplace prohibition against afros constituted a form of race discrimination because African descendants predominantly or exclusively don or are born with an afro."[61] The court, however, noted that Rodgers "first appeared at work in the all-braided hairstyle" soon after Bo Derek, a white actress, popularized cornrows (among non-Black people) while wearing them in a film.[62] Because of this, the court reasoned that Rodgers did not meet its essentialist requirement and devalued the reality that cornrows have cultural significance.[63]

Though the court conceded that a policy prohibiting afros might offend Title VII because afros fall under immutable characteristics, it contended that braids were different because the hairstyle was an "easily changed characteristic."[64] In short, the court dismissed Rodgers' claims because the policy did "not regulate on the basis of any immutable characteristic" and it applied equally[65] to both races and sexes."[66] It never addressed the intersectional claim as presented.

A more recent example is found in *EEOC v. Catastrophe Management*

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[54] *Id.*
[55] *Id.* at 234.
[56] *Id.* at 231.
[57] Greene, *supra* note 42, at 998.
[58] *Rogers*, 527 F. Supp. at 231-32.
[59] Greene, *supra* note 42, at 998 (citing *Rogers*, 527 F. Supp. at 231-32).
[60] *Id.* (citing *Rogers,* 527 F. Supp. at 232).
[61] *Id.*
[62] *Rogers,* 527 F. Supp. at 234.
[63] Greene, *supra* note 42, at 998-99 (citing *Rogers*, 527 F. Supp. at 232) ("The court effectively concluded that since *a* white woman braided her hair, donning cornrows could in no way inform Ms. Rodgers' understand of herself as a Black woman.").
[64] *Rogers*, 527 F. Supp. at 232.
[65] The themes from this article contend that the application was not, in fact, equal.
[66] Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 Geo L. J. 1080, 1091-92 (2010).

Solutions.[67] In 2010, Chastity Jones applied to Catastrophe Management Solutions ("CMS") to work in its call center, and CMS eventually offered Jones the job.[68] To secure her schedule, Jones had to meet with the company's human resources manager, Jeannie Wilson, a white woman.[69] After meeting with Wilson, Jones prepared to leave. On her way out, Wilson asked whether Jones' hair was in "dreadlocks,"[70] to which Jones replied in the affirmative.[71] Wilson then said she could not hire Jones "with the dreadlocks," telling Jones, "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[72] Wilson also told Jones that a Black male applicant cut his locs as a condition of employment, implying that Jones would have to do the same thing.[73] After Jones expressed that she would not cut her hair, Wilson rescinded the job offer and asked for Jones' paperwork.[74] Jones returned the paperwork then left.[75]

The EEOC sued on behalf of Jones and was informed by critical race scholarship in its arguments. The EEOC first argued that the immutability doctrine is rooted in a now-debunked view of race as a biological construct instead of a social one.[76] In order to maintain white superiority in practices like slavery or race-based violence, "social, political, and legal actors actively fostered notions of race and racial difference as inheritable and fixed."[77] Because of this, race has never been exclusively based on one's skin color or heritage.[78] Historically and presently, mutable characteristics like one's hair texture and hairstyle, dress, name, or accent have been treated as indicators of racial identity by both law and society.[79] The EEOC then argued that distinguishing between natural hair growth and natural hairstyles as immutable and mutable, respectively, was disingenuous.[80] Afros, braids, and locs are all ways to wear natural hair, so the styles are linked.

Meaningfully, the EEOC highlighted the burdens and consequences Black

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[67] 852 F.3d 1018 (11th Cir. 2016).
[68] *Id.*
[69] *Id.* at 1021.
[70] *Id.*
[71] *Id.*
[72] 852 F.3d 1018, 1021.
[73] *Id.* at 1021-22.
[74] *Id.* at 1022.
[75] *Id.*
[76] Greene, *supra* note 42, at 1009; Pl.'s Br. in Opp'n to Def. Catastrophe Mgmt. Solutions' Mot. to Dismiss, EEOC v. Catastrophe Mgmt. Solutions, 11 F. Supp. 3d (2014) (No. 13-cv-00476-CB-M), 2014 WL 4745282, at *6 [hereinafter Plaintiff's Brief].
[77] Greene, *supra* note 42, at 1009.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1011; *see* Plaintiff's Brief, *supra* note 76.

women uniquely face from grooming codes that prohibit natural hairstyles. The EEOC explained that workplace prohibitions against afros, locs, braids, and twists effectively require Black women to wear straightened hair by way of weaves, wigs, or extensions or by applying extreme heat or chemical relaxers to their hair.[81] The Commission noted that these methods of achieving and maintaining straightened hair are expensive, time-consuming, and damaging to Black women's physical well-being.[82] Further, these upkeep methods can also damage Black women's emotional well-being.[83]

A recent study found that Black women are more likely to spend more time on their hair than white women do, go to hair salons more often than white women do, spend more money on products for their hair than white women do, report higher levels of anxiety related to their hair compared to white women, are twice as likely to feel social pressure to straighten their hair for work, and are three times as likely to not engage in exercise and other physical activities because of their hair since maintaining straightened hair as a Black woman is a significant monetary and time investment.[84]

The district court rejected the EEOC's arguments and dismissed the complaint, holding the EEOC could not bring a plausible claim of intentional race discrimination.[85] On appeal, the circuit first addressed the EEOC's theory of liability. The court concluded that the EEOC was conflating disparate impact and disparate treatment theories of liability by describing the consequences of CMS' policy with terms like "adverse effects," "impact," and "disadvantage."[86] Following this, the circuit court did not consider the burdens or consequences of a locs ban on Black women.[87] The court stated that its focus would be on analyzing whether the protected trait motivated American Airlines' decision to impose its policy.[88] To answer the question, the circuit court concluded that a protected trait under Title VII is one that an individual is "born with or cannot change."[89] The circuit court then reasoned that "discrimination on the basis of black hair *texture* (an immutable characteristic) is prohibited by Title VII, while adverse action on

[81] First Amended Complaint at ¶ 27, EEOC v. Catastrophe Mgmt. Sols., FEDERAL SUPPLEMENT (S.D. Ala. 2014) (No. 14-13482).
[82] *Id.*; Greene, *supra* note 42, at 1012.
[83] *The "Good Hair" Study*, Perception Institute, https://perception.org/goodhair (last visited Apr. 21, 2021).
[84] *Id.*
[85] *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014).
[86] EEOC v. Catastrophe Mgmt. Sols., 837 F.3d 1156, 1158-1162 (11th Cir. 2016), withdrawn by EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).
[87] Greene, *supra* note 42, at 1021.
[88] EEOC v. Catastrophe Mgmt. Sols., 837 F.3d at 1163.
[89] EEOC v. Catastrophe Mgmt. Sols., 837 F.3d at 1172 n.4.

the basis of black hair*style* (a mutable choice) is not."[90] This resulted in the circuit court's ruling that for locs to be seen as a racial instead of a cultural characteristic, plaintiffs would have to claim that locs were not a "function of personal choice, but rather that all, and/or only, individuals who identify as African descendants donned locks or are born with them."[91] Critical race theory teaches that such a task is impossible.[92]

While courts are reluctant to protect Black women against hair discrimination, some legislative changes have been made. In 2019, the CROWN Coalition and Dove created the CROWN (Creating a Respectful and Open World for Natural Hair) Act. The CROWN Act's purpose is to "ensure protection against discrimination based on race-based hairstyles by extending statutory protection to hair texture and protective styles such as braids, locs, twists, and knots in the workplace and public schools."[93] On July 3, 2019, California was the first state to sign the CROWN Act into law. After Deandre Arnold, an eighteen-year-old Texas high schooler, was told he would not be able to graduate unless he cut his locs, Academy Award winner Matthew A. Cherry invited him to the 92nd Academy Awards show on February 9, 2020.[94] The CROWN Act, which was already being discussed, received a boost when Cherry advocated for it in his acceptance speech. So far, the CROWN Act is law in nine states and recently passed in the United States House of Representatives.[95]

B. Police Brutality

Awareness of anti-Black police brutality and racial injustice in the United States is at an all-time high and steadily increasing since the killing of Michael Brown. On May 25, 2020, Derek Chauvin killed George Floyd, an unarmed Black man, by pressing his knee into Floyd's neck for nine minutes and twenty-nine

[90] EEOC v. Catastrophe Mgmt. Sols., 837 F.3d at 1167 (11th Cir. 2016).
[91] Greene, *supra* note 42, at 1022 (citing EEOC v. Catastrophe Mgmt. Sols., 837 F.3d 1156 (11th Cir. 2016)).
[92] *See, e.g.,* Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) ("There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.").
[93] The CROWN Act, https://www.thecrownact.com (last visited Apr. 21, 2021).
[94] Amir Vera, *What You Need to Know about the CROWN Act*, CNN (Feb. 9, 2020), https://www.cnn.com/2020/02/09/entertainment/crown-act-oscars-trnd/index.html.
[95] The CROWN Act, https://www.thecrownact.com (last visited Apr. 21, 2021) (States at the time of publication include California, New Jersey, New York, Colorado, Washington, Virginia, Maryland, Connecticut, and Delaware).

seconds.[96] Floyd's death, captured on video, went viral and sparked new life into the long and widespread movement against and debate on police brutality and racism in the United States. Protests and discourse worldwide have pressured police departments and politicians in the United States and abroad to come up with a solution.

The general discourse around anti-Black police brutality does not largely include Black women. For the most part, statistics and discussions are either gender neutral[97] or exclusively focused on Black men. Discussion on Black women who are victims and survivors of police brutality is rare. Because of this, finding information about Black women who have suffered from police brutality is laborious, allowing for Black women to be erased from the narrative and rendering them invisible.[98]

1. Black Women and Black Men Experience Police Brutality Similarly

This erasure of Black women is not the result of missing data. Black women's experiences with police brutality often fall within commonly understood narratives used to discuss police brutality against Black men.[99]

> Even where women and girls are present in the data, narratives framing police profiling and lethal force as exclusively male experiences lead researchers, the media, and advocates to exclude them. For example, although racial profiling data are rarely, if ever, disaggregated by gender and race, when race and gender are considered together, researchers find that "for both men and women there is an identical pattern of stops by race/ethnicity."[100]

The killing of Breonna Taylor is a recent and popular[101] example of Black women

[96] Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported,* N.Y. TIMES (March 30, 2021), https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html.
[97] *See e.g., People shot to death by U.S. police, by race 2017-2020*, Statista (Nov. 30, 2020), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race (a gender-neutral reporting); Justin Nix et al., *A Birds Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 CRIMINOLOGY & PUBLIC POLICY 309 (2017) (discussing how Black *people* who were killed by police were twice as likely as white people to be unarmed).
[98] Say Her Name Report, *supra* note 10, at 4.
[99] *Id.* at 7.
[100] *Id.* at 4.
[101] As discussed throughout this paper, a Black woman who is a victim of police brutality rarely

falling within familiar police brutality narratives. On March 13, 2020, Taylor, a 26-year-old Black female emergency medical technician, was asleep with her boyfriend when Louisville police officers forcibly entered her apartment.[102] The police officers fired sixteen rounds of bullets into the apartment—six of those bullets struck and killed Taylor.[103]

The killing of Mya Hall provides another example. National Security Agency ("NSA") police killed Hall, a Black transgender woman, on March 30, 2015, in Baltimore, Maryland—just weeks before Freddie Gray's death grabbed national headlines.[104] Hall took a wrong turn onto NSA property and crashed into a security gate and police car.[105] Though Hall was unarmed and nonthreatening to the facility, NSA officers did not attempt to use nonlethal force; instead, they fatally shot her.[106]

2. Black Women and Black Men Experience Police Brutality Differently

While Black women are killed by the police in situations and ways that are similar to those of Black men, Black women are also killed in gender-specific contexts (i.e., domestic violence responses).[107] Further, police are less likely to protect Black women when their partners or community members murder, beat, or abuse them.[108] The invisibility of Black women, especially in their unique experiences, leads to less demand for police accountability when police kill Black women.

For example, in Philadelphia, Pennsylvania, on December 22, 2002, Nizah Morris, a Black transgender woman, was found injured and unconscious.[109] Minutes before, police officers dropped Morris off at home.[110] Thomas Berry, one of the police officers, returned to where Morris was reported to be bleeding and unconscious and, instead of helping her, covered "her face while she was still alive."[111] Morris was left, without help, at the scene of the crime for forty minutes

becomes a household name. It should be noted that wide knowledge and subsequent outrage about Taylor's death was not immediate but happened after several months.

[102] Richard A. Oppel Jr., et al., *What to Know about Breonna Taylor's Death*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/article/breonna-taylor-police.html.

[103] *Id.*

[104] Say Her Name Report, *supra* note 10, at 8.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 21.

[108] *Id.*

[109] *Id.* at 25.

[110] Say Her Name Report, *supra* note 10, at 25.

[111] Princess Harmony Rodriguez, *Whose Lives Matter: Trans Women of Color and Police*

before being taken to a hospital.[112] She died two days later of a severe head injury, resulting from being beaten with the butt of a gun. Police claimed not to know what happened, and Morris' death remains unsolved.[113] The gender-specific violence perpetrated by police against Black women continues in 2021, with Black transgender women even more vulnerable.

3. Why Include Black Women?

Including Black women and girls in the discourse around police brutality is needed for several reasons. To start, more inclusive discussion broadens the narrative and enhances the understanding of the structural relationship between Black communities and the police.[114] "Acknowledging and analyzing the connections between anti-Black violence against Black men, women, transgender [people], and gender-nonconforming people reveals systemic realities that go unnoticed when the focus is limited exclusively to cases involving [cisgender Black men]."[115] Society cannot fully consider all of the ways Black people are victimized by police brutality until it considers all Black people.

Another reason why centering all Black lives in police brutality discourse is important is that it allows society to realize that isolated "fixes" are not effective.[116] Ultimately, including Black women and girls in police brutality discourse signals that *all* Black lives matter.[117] Families of Black women who were killed by the police are less likely to be invited to speak at rallies and do not receive the same level of media attention, political consideration, or community support as do families grieving Black men killed by the police.[118] Black women and girls deserve the same level of collective outrage that Black men and boys receive when they are brutalized and killed by police with impunity.

IV. THE BASIS OF OUR PRESENT TROUBLE

Bringing visibility to Black women in the eyes of the law and social justice movements is not easy. The problem of Black women's invisibility is rooted in a

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Violence, BGD (Dec. 9, 2014), https://www.bgdblog.org/2014/12/whose-lives-matter-trans-women-color-police-violence/.

[112] Say Her Name Report, *supra* note 10, at 25.

[113] *Id.*

[114] *Id.* at 6.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Say Her Name Report, *supra* note 10, at 7.

historical system of oppression that is based on lies and omissions. The relationship between Black women and the state was birthed in violence fueled by those lies and omissions.[119] Masters of the enslaved could legally kill, maim, and mutilate Black people;[120] to justify that violence, white people lied.[121]

A. Promiscuity

Black women's enslavement was marked by sexual abuse and rape, driven by white people's moral depravity or economics.[122] To justify it, white people claimed that "Black women were lascivious, wild creatures without morals, who needed to be tamed in order to get any work out of them."[123]

The violence Black women experienced was often, and is still, as deeply rooted in gender as in color.[124] An immense part of that dually rooted violence includes the rape and sexual assault of Black women—practices maintained by false narratives created and protected by tropes, stereotypes, and law. In the Jim Crow era, a century of legal racial segregation, white men continued to sexually assault and kill Black women. During this time, the law not only failed to protect Black women but also helped those who harmed them.[125] The dehumanization of

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[119] Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 44 (2017).

[120] A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 36 (1978).

[121] "[T]he people . . . who settled the country had a fatal flaw. They could recognize a man when they saw one. They knew . . . he wasn't anything else but a man. But since they were Christian, and since they had already decided that they came here to establish a free country, the only way to justify the role this chattel was playing in one's life was to say that he was not a man, because if he wasn't a man then no crime had been committed. That lie is the basis of our present trouble." James Baldwin, Address at Second Baptist Church (May 10, 1963) (transcript available in the American Archive of Public Broadcasting).

[122] *See* Jacobs, *supra* note 119, at 44-45 ("When importation was banned, the holders turned towards making their own human captives, frequently by raping Black women or 'breeding' them (often against their will) with other Black male slaves."); *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY, 24 (1997) ("The essence of Black women's experience during slavery was the brutal denial of autonomy over reproduction. Female slaves were commercially valuable to their masters not only for their labor, but also for their ability to produce more slaves. The law made slave women's children the property of the slaveowner. White masters therefore could increase their wealth by controlling their slaves' reproductive capacity. With owners expecting natural multiplication to generate as much as 5 to 6 of their profit, they had a strong incentive to maximize their slaves' fertility.").

[123] Jacobs, *supra* note 119, at 45.

[124] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, STAN. L. REV., 581, 598 (1990).

[125] *See* Ruth Thompson-Miller & Leslie H. Picca, *"There Were Rapes!": Sexual Assaults of African American Women and Children in Jim Crow*, 23 VIOLENCE AGAINST WOMEN 934, 935-36

Black women by white people continued as they created tropes about Black women's inherent promiscuity.[126]

One false, dominant narrative about Black women was the Jezebel stereotype. While white men portrayed white women as models of self-control, modesty, and sexual purity, they simultaneously portrayed Black women as animals—specifically, sexual animals who lacked control over their libido.[127] Black women were caricatured as "purely lascivious creature[s]: not only [were they] governed by [their] erotic desires, but [their] sexual prowess led men to wanton passion."[128] These historical tropes birthed stereotypes and false narratives that continue to dominate today's minds, laws, and policies; further, those false narratives serve as the foundation for how the country and, specifically, the government sees (or does not see) Black women and the violence perpetrated against them.

Unsurprisingly, another false, dominant narrative about Black women was that they were inherent liars.[129] During slavery, Black people could not testify in court against white people, as they were considered incapable of being honest.[130] "[African women were believed to be] ignorant, . . . treacherous, thiev[es] and mistrustful."[131] This narrative also continued postbellum and remained in the courts.[132] Social scientists who study prosecutions of rape cases have noted jurors' resistance to believing Black women, and judges tend to consider the testimony of Black women as less credible than the testimony of others.[133]

(2017); *see also* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N. C. L. REV. 969, 1056-57 (1992) (outlining states whose laws explicitly defined rape as a crime that could only be committed against white women and states whose laws did not have that language but whose courts did not prosecute rapes against Black women).

[126] DEBORAH G. WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 126 (1985); *See* Jacobs, *supra* note 119, at 46.

[127] *The Jezebel Stereotype*, Ferris State University, https://www.ferris.edu/jimcrow/jezebel/; WHITE, *supra* note 126, at 38.

[128] ROBERTS, *supra* 122, at 10-11.

[129] Jacobs, *supra* note 119, at 48.

[130] Higginbotham & Jacobs, *supra* note 125 at 994-97; THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 232 (1996).

[131] Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 635 (2000) (citing Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WISC. L. REV. 1003, 1033 (1995)).

[132] For example, a judge in a 1912 case wrote, "This court will never take the word of a nigger against the word of a white man." Crenshaw, *supra* note 15, at 158.

[133] Gary LaFree et al., *Rape and Criminal Justice: The Social Construction of Sexual Assault*, Vol. 71 I. 2, 219-20 (1989) (quoting a juror who said, "[n]egroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."); *see*

The narratives of Black women as immoral, oversexed creatures protected the white men who brutalized them.[134] More troubling was that the law echoed those narratives, and in the eyes of the law, Black women could not be raped.[135] Lies about Black women led to the sequential omission of accounts of sexual violence perpetrated against them. During American slavery, the rape of a Black woman by any man of any race was not a crime; rape statutes defined rape only as a crime against white women.[136] "The crime of rape does not exist in this State between African slaves," a defense attorney argued in *George v. State*.[137] "The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery."[138] Further, the narrative of Black women being dishonest closed the door for Black survivors of sexual violence to be believed. Literature on sexual violence and Black women in the United States is scarce, as the discourse around sexual violence still largely centers on white women.[139] The false narrative of Black women's hypersexuality—and Black women's vulnerability to being sexual assault—continued postbellum and remain relevant to current issues regarding how the law perceives Black women who have been sexually assaulted or raped.

B. Superhumanization

A recent study found that white people were more likely to "implicitly and explicitly superhumanize" Black people.[140] Another study found that white people, including white medical students and healthcare professionals, were more likely to believe that Black people's bodies are unable to feel pain, have "less sensitive nerve endings," and are "biologically different" from and stronger than white people's bodies.[141] These current beliefs are also rooted in historical lies

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also Geneva Brown, *Ain't I a Victim: The Intersection of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 154-55 (2012).

[134] Jacobs, *supra* note 119, at 47.

[135] Harris, *supra* note 124, at 599.

[136] *See* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118 (1983); *see also* MORRIS, *supra* note 130, at 305.

[137] 37 Miss. 316, 318 (1859).

[138] *Id.*

[139] Harris, *supra* note 124, at 598.

[140] Jesse Singal, *White People Think Black People Are Magical*, THE CUT (Nov. 14, 2014), https://www.thecut.com/2014/11/white-people-think-black-people-are-magical.html; Adam Waytz et al., *A Superhumanization Bias in Whites' Perceptions of Blacks*, 6 Soc. Psy. and Personality Sci. 352, 352 (2014).

[141] Kelly M. Hoffman et al., *Racial bias in pain assessment and treatment recommendations, and*

about Black people.[142] While this false narrative most obviously implicates issues in the healthcare sector, particularly for Black women, it also carries implications in police brutality. The superhumanizing of Black people—most often Black men but also Black women—can lead to Black women being "treated punitively, denied help, and left to suffer in unbearable circumstances while in police custody."[143]

V. RECOMMENDATIONS

Eradicating double-discrimination on the basis of race and gender will not be simple nor found in a single solution. To tackle the unique employment discrimination Black women face, all three branches of government must take action to acknowledge and make space for Black women in the intersection. To properly address police brutality, policymakers and individuals must advocate and learn through an intersectional framework. People and structures in power must work separately and collectively toward Black women's equality.

A. Employment Discrimination

The governmental branches should exercise their powers to address intersectional discrimination. The EEOC should provide guidance on interpreting Title VII, Congress should amend Title VII, and courts should adopt intersectional analytical frameworks.

1. Executive

The EEOC has acknowledged intersectional discrimination;[144] however, it did not provide courts with guidance on how to interpret Title VII to allow for actionable intersectional claims.[145] The EEOC should issue clear guidelines for the judiciary regarding intersectional claims.[146] Doing so would allow courts to acknowledge that intersectional discrimination is cognizable and help them create an analytical framework for adjudicating intersectional claims.[147]

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false beliefs about biological differences between blacks and whites, 113 PNAS 4296, 4298 (2016).

[142] Waytz et al., *supra* note 140, at 352-53.

[143] Say Her Name Report, *supra* note 10, at 18.

[144] EEOC Compliance Manual, *supra* note 38.

[145] Pappoe, *supra* note 22, at 17.

[146] *Id.* at 18.

[147] *Id.*

2. Legislative

Congress should amend Title VII of the Civil Rights Act to clearly state that discrimination is prohibited on the basis of race, color, religion, sex, *or* national origin. Others have suggested that the language should include "or any combination thereof" at the end of the list of protected categories.[148] A change of this sort would be a strong signaling in support of intersectionality.

3. Judicial

Courts that have not yet joined the ranks of those that have adopted an intersectional framework for distinct discrimination claims should do so. If courts unanimously use an intersectional analytical framework, Black women in all parts of the country can make more holistic claims in court without needing to bisect their identity in hopes of receiving some protection. To achieve this, courts should account for the sociopolitical and legal history of Black women when crafting this framework.[149]

B. Police Brutality

Policymakers should form agendas and platforms that view issues through an intersectional framework. This gender-inclusive lens will better address police violence because the myriad of ways Black people are affected will be seen.[150] Policymakers should also support and introduce gender-specific policies to address the unique issues Black women experience with police.[151] Individuals should be diligent to discover and uplift the names and stories of Black women who suffer from police brutality. At protests and demonstrations, in public spaces or private homes, individuals can search for a Black woman and say her name. For a Black woman's name to be said, her name must first be seen. One by one, truth by truth, society can work to bring visibility to Black women.

VI. CONCLUSION

In seeking to make a living and claim space in social justice movements, Black women are fighting for visibility in their life and death. Black women have a unique

[148] *Id.*
[149] *Id.* at 21.
[150] *Id.* at 31.
[151] Pappoe, *supra* note 22, at 31.

identity because they are at the intersection of at least two protected categories: race and gender. However, the country's legal system and social justice movements do little to see Black women and their unique identity in that intersection. This invisibility precludes Black women from enjoying legal protections, social value, and, ultimately, freedom. Black people cannot be free until *all* Black people are free. True liberation can only be found by first unearthing historical lies and omissions that inform and have formed today's problems. After that unearthing, society must tell the truth and do the work to make its spaces more inclusive of those in the intersection.