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Amending Title VII to Eradicate Discrimination based on Religious Apparel

Rabia Hassan

Introduction:

Sex-based discrimination in the workplace is not novel or commonplace. After decades of struggle, the Federal government finally recognized that discrimination in the workplace was a severe and pervasive problem that was repugnant to the ideals espoused in the U.S. Constitution. Attempting to remedy this, Congress passed Title VII of the Civil Rights Act of 1964, (“Title VII”)¹, prohibiting discrimination in the workplace based upon classifications of sex, race, color, religion or national origin. While there is undoubted consensus that Title VII revolutionized and served as a “linchpin”² of employment discrimination law, the shortcomings present in the legislation became readily apparent.

First, the protections of Title VII only apply to “employers with 15 employees or more.”³ While this targets large to mid-size businesses and brings them under the purview of the law to prevent employment discrimination, small businesses and domestic workers are not covered.⁴ Second, the application of Title VII to regulate and police unlawful employment practices and employment discrimination occurs through disparate treatment and disparate impact, both of

¹ See Title VII of the Civil Rights Act, 42 U.S.C. §2000 et seq. (LexisNexis 2012).

² See KATHERINE T. BARTLETT & DEBORAH L. RHODE, GENDER and LAW: THEORY, DOCTRINE, COMMENTARY 61 (Aspen, 5th ed. 2010) (describing the central and vital role accorded to Title VII in employment discrimination law, both on the Federal and state level). Each state has an anti-discrimination law which is modeled on part, if not completely on Title VII. See, e.g., N.J. STAT. ANN. §10:5-1 (West 2012).

³ See 42 U.S.C. §2000e-2 (LexisNexis 2012).

⁴ See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 505-506 (2006); *Wein v. Sun*, 936 F. Supp. 282, 283 (E.D.Pa. 1996).

which only address forms of discrimination which fall within the specific categories set out in the statute.⁵ In general disparate treatment focuses on banning employment discrimination which occurs through the “inconsistent application of rules and policies to one group over another,” usually members of a protected class.⁶ Disparate impact instead focuses on outlawing legislation and policies which “results when rules applied to all employees have a different and more inhibiting effect on...minority groups than on the majority.”⁷ Title VII allows for plaintiffs to bring employment discrimination claims based on sex. However, if a plaintiff is unable to demonstrate that an employer’s actions are motivated by an intent to discriminate against a particular sex, or have an impact on a particular sex, their Title VII claim will most likely fail.

Discrimination claims which do not neatly fall within the “disparate treatment” or “disparate impact” theories of Title VII, cannot be litigated against under Title VII. Therefore, a vast array of plaintiffs are denied Title VII remedies based on otherwise legitimate claims of employment discrimination based on the categories specified under Title VII. This is particularly apparent in appearance discrimination claims.⁸ While women have always faced some form of appearance discrimination,⁹ women who constitute minorities face this to a greater degree, not only socially but also in the workplace, as they are “[h]eld to idealized standards of Anglo-American features and to [such] grooming standards.”¹⁰ Holding women of minority groups to such standards in the United States, enables employers to discriminate against them on

⁵ See *id.* 42 U.S.C. §2000e-2(k) (LexisNexis 2012).

⁶ See *Equal Employment Opportunity Terminology*, U.S. NAT’L ARCHIVES & RECS. ADMIN., (Dec. 04, 2012), <http://www.archives.gov/eoo/terminology.html>.

⁷ See *id.*

⁸ See *infra* Part II.

⁹ See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1034 (2009) (arguing that discrimination based upon appearance is invidious and as pervasive as other forms of discrimination prohibited by Congress, because it stems from homogenous societal norms of what is ‘attractive’).

¹⁰ See *id.* at 1053.

the basis of religion and national origin but without being reprimanded because discrimination based on appearance does not fall within the scope of Title VII.

The gaps within the framework of Title VII, while problematic in general, prove especially problematic during times of social upheaval, such as after September 11, 2001.¹¹ After 9/11, the backlash against Muslims and those who appeared to “look” Muslim increased. This occurred in the employment context as employers further regulated not only security clearance and access employees would receive based on their name, but also their dress standards.¹² While issues of national origin and religion are relevant, sex was particularly impacted in appearance-based policies initiated by employers, by the sole fact that a majority of those targeted were women. Given the compelling argument articulated by Deborah Rhodes regarding the overarching discrimination based on appearance, both men and women face, albeit to a larger degree women, this paper examines appearance discrimination in the context of a watershed event, such as 9/11.

The political and social ramifications after 9/11 not only give credence to the presence of appearance discrimination, but also point to the deficiencies in Title VII, as the latter fails to address new forms of employment discrimination which discriminate against individuals through a combination of traits.¹³ Because sex stereotyping informs the workplace environment,

¹¹ See Sandra R. McCandless & Khoa Ngo, *Employment Discrimination on the Basis of National Origin and Religion in the Post 9/11 Era*, A.B.A., Jul. 2008, at 2.

¹² See *id.* at 4-8.

¹³ See *infra* Part III, (discussing the theory of Intersectionality as it pertains to race and gender; see, e.g., *DeGraffenreid v. General Motors*, 413 F. Supp 142, 142-145 (E.D. Mo. 1976); *Moore v., Hughes Helicopters*, 708 F.2d 475, 475-486 (9th Cir. 1983). While Courts have discussed whether or not a viable nexus exists between race and gender, this paper argues that an equally compelling nexus exists between religion and gender. Recognizing appearance discrimination as a viable form of discrimination is necessary in order to demonstrate the interaction between the religious and sex-based identities of individuals).

appearance discrimination is on the rise and particularly against Muslims post 9/11.¹⁴ This paper proposes that one way to restrict the impact of appearance discrimination and curb the use of new forms of discrimination is amend Title VII. The amendment should prohibit the use of religious apparel by employers as a factor in designing standards of professionalism. The amendment would recognize the pervasiveness of appearance discrimination and thus widen the scope of anti-discrimination law to better protect the rights of minority groups.

Part I: Title VII and Its Shortcomings

Title VII assesses unlawful employment discrimination through the paradigm of two arguably restrictive theories: disparate treatment and disparate impact. Disparate treatment discrimination targets “employment rules or decisions that treat an employee *less favorably* than others because of the employee’s race, sex, religion or national origin.”¹⁵ In the context of sex-based employment discrimination, disparate treatment cases generally appear as pretext¹⁶ or mixed-motive claims¹⁷, where the burden of proof is always on the plaintiff to demonstrate that the negative employment decision directed by the employer towards the employee, was overwhelmingly because of the employee’s sex.

¹⁴ See McCandless & Ngo, *supra* note 12, at 3-4.

¹⁵ See BARTLETT & RHODE, *supra* note 2, at 61-62.

¹⁶ See *id.* at 63-70 (indicating the classic treatment of pre-text disparate treatment cases by the Federal Courts through *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992). Once a plaintiff asserts that an employer’s adverse action was because of the employee’s sex, in order to shift the burden back to the plaintiff, the employer must demonstrate that the employment decision stems from a non-discriminatory reason. In order to rebut the presumption created by the employer, the plaintiff must then show that the non-discriminatory reason is but a “pretext” for the underlying or real motive of sex-discrimination).

¹⁷ See BARTLETT & RHODE, *supra* note 2, at 62 and 70-74 (showing the U.S. Supreme Court’s treatment of a mixed-motive disparate treatment through *Price Waterhouse v. Hopkins*, U.S. 228 (1989). Once a plaintiff asserts that an employer’s employment decision was based on discriminatory and non-discriminatory reasons, the employee must further show that it would have taken the same course of action).

Although many employment discrimination cases are largely the result of sex stereotyping, it is not prohibited by the Federal Courts in either a disparate treatment analysis or a disparate impact analysis.¹⁸ In the Court's dissent in *Price Waterhouse v. Hopkins*, the Chief Justice of the Supreme Court, along with Justices Kennedy and Scalia noted that even though "Title VII creates no independent cause of action for sex stereotyping...evidence of sex-stereotyping...is relevant [because it goes towards affirming or disproving] discriminatory intent [and thus whether or not] the discrimination caused the plaintiff harm."¹⁹ Proving discriminatory intent in disparate treatment cases is difficult without giving considerable weight to sex-stereotypes, other than in cases where the discrimination is so pervasive and apparent.

Under the disparate impact theory of employment discrimination, a plaintiff must show "that a facially neutral job requirement or policy *disproportionately* affects women and that this requirement or policy is not related to job performance."²⁰ In these instances, there is no requirement for a plaintiff to demonstrate that the policy reflects discriminatory intent on the part of the employer. In order to refute disparate impact claims, an employer needs to either refute the claim by presenting facts supporting the policy's nexus with job performance, or by demonstrating that the facially neutral job requirement is justified as a business necessity.²¹

Within disparate treatment theory, sex-stereotyping is also a problem. First, employers can assert a bona fide occupational qualification²² and easily shift the burden of proof back onto the plaintiff. Second, in order to assess whether or not policies placed unequal burdens on a

¹⁸ See *Equal Employment Opportunity Terminology*, *supra* note 6 and 7.

¹⁹ See BARTLETT & RHODE, *supra* note 6, at 74.

²⁰ See *id.* at 61-62.

²¹ See BARTLETT & RHODE, *supra* note 2, at 61-62.

²² See BLACK'S LAW DICTIONARY (9th ed. 2009 (stating generally that a bona fide occupational qualification is an affirmative defense to discrimination where a sex-based requirement or restriction is permitted because it is essential to the business operations of an employer).

group based on their sex, invidious forms of discrimination such as appearance discrimination cannot be adequately addressed.²³ In *Jespersen v. Harrah's Operating, Inc.*, the Court held that the employer's policy requiring female employees to wear make-up did not constitute sex-based employment discrimination under Title VII.²⁴ The majority justified its reasoning by stating that the policy did not "[i]ndicate any discriminatory or sexually stereotypical intent on the part of Harrah's [and instead conformed with] an overall apparel, appearance and grooming policy that applies largely to both men and women."²⁵

The dissent disagreed, asserting instead that the grooming policy implemented by Harrah's, the "Personal Best" program, placed an unequal burden on the plaintiff, as it was motivated by the employer's sex stereotyping, reflective sex stereotyping held by society.²⁶ Furthermore, the dissent considered that "Harrah's...policy that required women to conform to a sex stereotype by wearing full make up [to be] sufficient 'direct evidence' of discrimination."²⁷ The dissent highlighted the nuanced form of sex discrimination exercised by Harrah's, which the majority had failed to recognize. Harrah's "Personal Best" grooming policy did in fact disproportionately impact women as opposed to men.

The separate requirements, viewed individually, indicate broader gender-stereotyping which is dangerous because it suggests "[t]o the public that [without such a grooming policy] women would be unable to achieve a neat, attractive and [therefore] professional appearance."²⁸ In addition, while men and women are both held to community-based grooming standards, the

²³ See BARTLETT & RHODE, *supra* note 2, at 83-91(asserting that disparate impact of employer policies are viewed in the context of overall community standards as viewed in *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006)).

²⁴ See BARTLETT & RHODE, *supra* note 25, at 87-88.

²⁵ See *id.* at 88.

²⁶ See BARTLETT & RHODE, *supra* note 25, at 88-89.

²⁷ See *id.* at 89.

²⁸ See BARTLETT & RHODE, *supra* note 2, at 90.

fact that both must maintain neat and attractive appearances does not equally burden each sex, to achieve such an outcome. As discussed in the second dissent “...the application of makeup is an intricate and painstaking process that requires considerable time and care [unlike] the time it would take a man to shave.”²⁹ Requiring women to undergo a complete transformation of their facial appearance in order to comply with an employer’s grooming standards is both burdensome and demeaning, given that the judicial system is affirming blatant sex-stereotyping in the workplace.

In sum, the current structure of Title VII and its application place an unequal burden on women. Sex stereotyping has different consequences and expectations for women and men, which is neither cured under a disparate theory framework nor a disparate impact framework. This results in women facing a new more nuanced form of discrimination, which Title VII does not protect against: appearance based discrimination.

Part II: Appearance Discrimination as an Invidious Form of Discrimination

The persistence of appearance discrimination best shown in *Jespersen v. Harrah’s Operating Company, Inc.*, is reflective of the deficiencies present in the overall structure of Title VII. By intentionally failing to recognize appearance discrimination as a separate and pervasive form of sex-based discrimination, the judiciary legitimizes the stereotype that women’s faces, unlike men’s faces, are “...incomplete and...unprofessional” without full makeup.”³⁰ A

²⁹ See BARTLETT & RHODE, *supra* note 2, at 91 (asserting that while both applying makeup and shaving constitute daily rituals performed by both women and men, the fact that they constitute daily rituals is the extent of their similarities. Any comparison conducted to examine the burden experienced by each sex in carrying out the abovementioned tasks would not be accurate, because applying makeup every day is more time and labor intensive compared to shaving).

³⁰ See *id.* at 88.

discussion on appearance discrimination is relevant because it informs community standards and expectations, regarding professional appearance and conduct in a workplace environment. The legal consequences of such expectations contribute to the proliferation of new forms of employment discrimination.

The Significance of Appearance in Forming Community Biases:

Discrimination based upon appearance is “[a]t least widespread as other forms of prohibited bias.”³¹ It offends both equal opportunity and individual dignity when used to discriminate against individuals in the workplace.³² Not only do such stereotypes “...reflect overbroad or inaccurate generalizations [but] they [are] self-perpetuating.”³³ Therefore, group disadvantages become compounded and are reinforced. In particular, members of minority groups, faced with discrimination based on their appearance, are “[p]revent[ed] from developing their full capacities,” on top of discrimination already directed towards them as a result of either their race, gender, class, disability or sexual orientation.³⁴ As Rhode asserts, studies demonstrate that the appearance standards to which minorities are held and considered ideal are Anglo-American features.³⁵ Cultural standards or hallmarks of beauty such as African American weaves or other hairstyle choices are therefore no longer recognized as attractive or professional, as they are not considered “neat or well-groomed.”³⁶ Under Rhode’s conception of appearance

³¹ See Rhode, *supra* note 6, at 1060.

³² See *id.* at 1050-1051 (stating that “...in many contexts, appearance bears no relationship to competence and discrimination on that basis undermines values pertaining to both efficiency and equity”).

³³ See Rhode, *supra*, note 6, at 1051.

³⁴ See, e.g., J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2359-2360 (1997); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-2429 (1994).

³⁵ See Rhode, *supra* note 6, at 1053 (quoting Tracey Owens Patton, *Hey Girl, Am I More Than My Hair?: African American Women and Their Struggles with Beauty, Body Image and Hair*, 18 NWSA J. 24, 25 (2006)).

³⁶ See, e.g., Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579 (2006); *Hollins v. Atlantic Co.*, 188 F.3d 652, 655-657 (6th Cir. 1999) (where hairstyles now had to be approved by an African American employee’s white supervisor and only sanctioned hairstyles would be considered “neat”. The sanctioned hairstyles were those already worn by white women workers).

discrimination, Harrah's "Personal Best" grooming policy would constitute unlawful employment discrimination under the theory of appearance discrimination, because it classifies attractiveness, professionalism and self-worth based on one set of preferences.³⁷ What is particularly troubling and dangerous about discrimination based on appearance is that it creates biases which serve as the basis for legal treatment or restriction of individuals, reflecting either an affirmation or disapproval for such choices, which have punitive ramifications.³⁸ Biases inform and affect the treatment of individuals in the workplace, as innate feelings and assumptions cannot be relegated to the private sphere.³⁹

Appearance Policies Reflect an Overall Preference towards the Anglo-American Look:

Employer policies regarding grooming and appearance standards not only reflect an inherent bias about appearance, but also about how appearance informs other characteristics held by workers, such as professionalism or competence. Despite the multiculturalism and diversity in the workplace, Anglo-American appearance ideals have become the norm and therefore constitute the appearance of the ideal worker. Appearance discrimination therefore also perpetuates the idea of cultural and religious diversity as being the antithesis of professionalism. This is problematic in that it not only discriminates based upon one, single and restrictive notion of professionalism, but "[r]equires conforming to conventional norms [that] infringe [on]

³⁷ See Rhode, *supra* note 6, at 1035-1036 (asserting that regardless of variety of cultures which comprise the United States, "the globalization of mass media and information technology has brought an increasing convergence in the standards of attractiveness").

³⁸ See *id.* at 1037-1039 (stating how bias' on appearance become ingrained from childhood and persist into adulthood. Ramifications to individual choices and beliefs occur when such bias' "skew judgments about competence and job performance"); David Landy & Harold Sigall, *Beauty is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness*, 29 J. PERSONALITY & SOC. PSYCHOL. 299 (1974); Nicole

³⁹ See Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 91 (2003) (stating that bias' towards older women workers led to ageism in the workplace and reinforcing the idea that bias' permeate into the public sphere).

individual autonomy.”⁴⁰ While some individuals may not view their appearance or matters relating to grooming as vehicles of self-expression or reflective of core-held beliefs, several individuals, a majority of whom constitute minority populations in the United States, view outward appearance as “[c]entral to their personal...religious, racial and gender affiliations”.⁴¹ A failure on the part of employers to accommodate self-expression by regulating the appearance of individuals, impinges on their rights of self expression given in the Constitution and is both *de jure* and *de facto* unlawful employment discrimination.⁴²

Lack of Legal Remedies for Appearance-based Discrimination Claims:

Challenges brought against both cultural and sex-stereotyping fail however, because of the narrow and restrictive view of the categories of discrimination. The case of *Rogers v. American Airlines*, highlights the need to reform and re-conceptualize the federal law’s understanding of discrimination in order to account for discrimination based on appearance. Doing so would in turn, curtail unlawful employment discrimination perpetrated by employers which go unprosecuted because they do not conform to the standard forms of discrimination recognized by Title VII. In *Rogers v. American Airlines*, the Southern District of New York held that the airline’s prohibition on braided cornrows did not constitute either race or sex discrimination as “...the plaintiff had not demonstrated ‘that an all-braided hair style is worn exclusively or predominantly by black people.’”⁴³ By failing to recognize the significance or importance of braided hair to the African American woman employee, the Court denied the

⁴⁰ See Rhode, *supra* note 6, at 1058 (re-asserting the idea espoused by Susan Sontag that individual self-expression stems from closely held beliefs).

⁴¹ See Rhode, *supra* note 6, at 1058.

⁴² See ,e.g., Anita L. Allen, *Undressing Difference: The Hijab in the West*, 23 BERKLEY J. GENDER L. & JUST. 208, 211-216 (2008) (indicating the importance of the headscarf to the cultural and religious identity of Muslims and showing it is akin to the yarmulke to those of the Jewish religion).

⁴³ See Rhode, *supra* note 6, at 1059 (citing the majority’s holding in *Rogers v. Am. Airlines, Inc.*, 527 F.Supp. 229 (S.D.N.Y. 1981)).

plaintiff's cultural beliefs and right to self-expression solely on the grounds that she could not demonstrate that hair braiding was an exclusive or dominant preference of African American females and therefore could not qualify as a closely-held belief.⁴⁴ This case is reflective of the general treatment given to claims which do not neatly fit within the already prescribed categories of discrimination. In claims involving grooming policies which impact the beliefs and practices of religious groups for instance, Courts have been increasingly deferential to the business justifications provided by employers, in denying employee requests for accommodations to wear head coverings (hijabs) or maintain beards.⁴⁵ The failure to “question the sex stereotypes underlying conventional ‘community standards’ and to demand a reasonable business justification from employers,”⁴⁶ allows for appearance discrimination claims to persist.⁴⁶

Employer Justifications for Implementing Appearance-based Policies and Why Such Justifications Fail:

The general argument used to legitimize discrimination based on appearance relies on “[e]mployee attractiveness [which is] an effective selling point and [are] part of an employer’s strategy to ‘brand’ the seller through a certain look.”⁴⁷ Employers who have brought forth such an argument essentially articulate a standard of beauty which captures the “classic American” look.⁴⁸ Such policies blatantly constitute race, ethnic, sex and age-based discrimination and are

⁴⁴ See Rhode, *supra* note 6, at 1059 (citing *Rogers*, 527 F. Supp. at 231-232); see e.g. Paulette M. Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 41 DUKE L.J. 365, 371-372 (criticizing the Court’s upholding of employer policies which banned hair pieces in the workplace because it symbolizes the legitimization of sex and race-based discriminatory policies based upon a failure to understand the cultural importance of appearance).

⁴⁵ See e.g. *EEOC v. Am. Airlines, Inc.*, No. 02 C 6172 (N.D. Ill. Sept. 3, 2002) (order of resolution); *EEOC v. Fed. Express Corp.*, CV100-50 (S.D. Ga. May 24, 2001) (consent decree); see generally *infra* Part III.

⁴⁶ See Rhode, *supra* note 6, at 1077.

⁴⁷ See *id.* at 1064.

⁴⁸ See Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at A12 (where Abercrombie & Fitch’s policy of hiring workers that fit its look policy rendered its sales staff being composed of “young, trendy and not too ethnic” workers); see also Steven Greenhouse, *Abercrombie & Fitch Bias Case is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16 (indicating that due to its discriminatory hiring policy, based on

thus prohibited under federal law. However, unless an employer's policy blatantly discriminates based on the aforementioned categories, Courts are unlikely to find that employers violated Title VII, even if "look" policies are based upon double standards or serve to perpetuate them, even when such policies bear no apparent relationship to job performance.⁴⁹

Critics who oppose recognizing appearance discrimination as a viable form of discrimination, state additionally, that it is too amorphous to police. Their main concern is that appearance and grooming practices are extremely subjective, making it near impossible for Courts to determine when an employer is discriminating based upon such practices.⁵⁰ Increased litigation costs, enhanced judicial activism and the detrimental cost to "truly" invidious forms of discrimination⁵¹ are concerns which critics feel demonstrate that more harm than good will occur by amending Title VII to recognize appearance discrimination or concomitantly, authorizing appearance-discrimination statutes. In fact, several federal judges such as Richard Posner, have asserted that the "law on sex stereotypes has already 'gone off the tracks' in reasoning,"⁵² and "federal judges have too much to do to become embroiled in petty disputes about where women can and can't wear pants."⁵³ The aforementioned remarks trivialize the issue and therefore fail to recognize that while certain employer "look" policies can be trivial, when such policies take into account stereotypes and inhibit individuals self-expression based upon their race, religion or ethnicity, their constitutional rights are violated.

its appearance policy, Abercrombie & Fitch was forced to settle claims against it for race discrimination after it agreed to "integrate its staff and advertisements").

⁴⁹ See Rhode, *supra* note 6, at 1065 (specifically alluding to *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106-1107 (9th Cir. 2006)).

⁵⁰ See *id.* at 1068-1069 (asserting the holding of the Court in *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 914 (D. Nev. 1993) where it stated that "no Court can be expected to create a standard on such vagaries as attractiveness").

⁵¹ See Rhode *supra* note 6, at 1069.

⁵² See *id.* (quoting Judge Posner in *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066-1067 (7th Cir. 2003)).

⁵³ See Rhode, *supra* note 6, at 1069 (quoting *Rappaport v. Katz*, 380 F. Supp. 808, 811-812 (S.D.N.Y.1974)).

Those who criticize appearance discrimination legislation put forth additional arguments, all of which are not sustainable. First, these critics argue that “[p]rejudice based on appearance is more natural and harder to eradicate than other forms of bias,”⁵⁴ which studies demonstrate is a false assumption.⁵⁵ Shifts in popular opinion have been driven in part by legal interventions regarding other forms of discrimination, which previously were considered commonplace in society.⁵⁶ There is therefore no reason to assume that initiatives prohibiting appearance discrimination would not cause similar shifts in social thinking and perceptions.

Second, they argue that “[p]rohibiting [appearance] discrimination would erode support for other civil rights legislation.”⁵⁷ This argument loses legal weight because in cities, counties and states which passed ordinances prohibiting appearance discrimination, there were no severe repercussions or mass frivolous legal claims brought forth.⁵⁸ In fact in one of the only states which passed a statutory ordinance prohibiting appearance discrimination, Michigan, out of 30 complaints of violations of appearance discrimination, only 1 went to Court.⁵⁹ At a minimum, by recognizing appearance discrimination as a form of unlawful discrimination, the law would “...provide a forum to air injustice [that] can be a powerful catalyst for social change”.⁶⁰ It may take time for legislation to translate into changing attitudes, but formally prohibiting appearance discrimination is a first crucial step in starting the process. Additionally, by allowing employees

⁵⁴ See Rhode, *supra* note 6, at 1070.

⁵⁵ See *id.* (citing Marilyn B. Brewer & Rupert J. Brown, INTERGROUP RELATIONS in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 554 (Daniel T. Gilbert et al. eds., 4th ed. 1998), who state that the preferences individuals have regarding race, sex and ethnicity are also “deep rooted”).

⁵⁶ See Rhode, *supra* note 6, at 1071 (giving examples of legal intervention which resulted in changes in attitudes and practices towards African Americans through *Plessy v. Ferguson* and *Brown v. Board of Education*, attitudes towards the disabled through the Americans Disabilities Act and attitudes towards gay and lesbian relationships through statutes authorizing civil unions and domestic partnerships).

⁵⁷ See *id.*

⁵⁸ See Rhode, *supra* note 6, at 1071 and 1088-1089 (from claims of appearance discrimination lodged in Santa Cruz, San Francisco, Madison, District of Columbia and Michigan).

⁵⁹ See *id.* (citing figures based on complaints lodged under MICH. COMP. LAWS. ANN. § 37.2202(1)(A) (West 2008)).

⁶⁰ See Rhode, *supra* note 6, at 1071.

to bring claims against employers for discriminatory grooming and appearance policies, the idea of litigation and negative media coverage will move employers to settle and end such policies.⁶¹

In sum, appearance is a viable category through which discrimination persists in the workplace. While it influences and informs preferences in the private sphere, when it enters into the public sphere it is subject to legal scrutiny. The lack of regulation enables employers to use appearance based policies to guide workplace values on professionalism. This fuels invidious forms of discrimination and helps create new manifestations of discrimination which do not neatly fall within the Title VII proscribed categories. Most apparently, appearance policies and standards of grooming have been influenced by a preference towards Anglo-American appearance. Individuals who do not conform to such standards are susceptible to biases and preconceived notions because they possess a different look, making the lack of regulation of appearance based policies dangerous.

Part III: Using Intersectionality Theory as a Tool by which to Broaden Title VII to Recognize Appearance Discrimination in the Post 9/11 U.S.:

After 9/11, the backlash against Muslims in the workplace significantly increased as employers policed and regulated the images of their employees in order to protect an all American non-Muslim corporate image.⁶² When employees filed claims with the Equal Employment Opportunity Commission, EEOC, alleging discrimination based on religion and national origin, employers defended their new policies on the grounds of legitimate business

⁶¹ See Rhode, *supra* note 6, at 1073 (noting the changes to both Harrah's grooming policies and other establishments due to pending litigation).

⁶² See McCandless & Ngo, *supra* note 9, at 3-8 (referencing statistics showing a sharp increase in workplace discrimination Muslims after 9/11).

concerns.⁶³ Broadly, employers defended their policies, stating that post 9/11, without such policies, their businesses would suffer due to a decline in customer satisfaction, confidence and overall professionalism.⁶⁴

In response to complaints filed by individuals alleging discrimination against them for being Muslims, the EEOC added a chapter to their Compliance Manual in an attempt to prevent employers from discriminating on the basis of national origins in a post 9/11 world.⁶⁵ The EEOC reiterated the prohibition of discrimination against individuals based upon their religion and national origin, stating that aside from reasonably accommodating the religious practices of employees, employers are prohibited from discriminating against employees based on their “[p]hysical, linguistic or cultural traits [such as] their dress.”⁶⁶ However, regardless of the attempts made by EEOC to prevent invidious discrimination against particularly Muslim employees or those perceived to be Muslim,⁶⁷ most of the time such complaints have failed to meet the requisite level of proof in order to constitute Title VII discrimination.

Claims brought by Plaintiffs under Title VII After 9/11:

Many cases alleging unlawful employment discrimination under Title VII after 9/11 have been brought under religious discrimination. However, a majority of these are resolved at the district level on summary judgment, finding for the employer.⁶⁸ From the cases which were dismissed on summary judgment, the ones which were appealed and moved to the Appellate

⁶³ See Shirin Sinnar, Trends in Post 9/11 Backlash Employment Discrimination, Address Before the Equal Employment Opportunity Law Panel (Mar. 23, 2005), *available at* <http://www.bnabooks.com/ababna/eoo/2006/sinnar.pdf>. (stating legitimate business concerns included the adverse impact on a company’s public image and adverse impact to customer relations).

⁶⁴ See *id.*

⁶⁵ See McCandless & Ngo, *supra* note 9, at 8-9.

⁶⁶ See *id.* at 9.

⁶⁷ See Sinnar, *supra* note 66 (generally indicating that in the post 9/11 era, discrimination, harassment and violence against Sikhs have risen, because their beards and turbans were associated are being “Muslim”).

⁶⁸ See McCandless & Ngo, *supra* note 9, at 12.

level, the Courts overwhelmingly held that most of them involved “[n]ormal ‘workplace’ behavior and the alleged discriminatory events lacked a ‘direct nexus with religion.’”⁶⁹ Even in cases where Courts have determined that the plaintiffs did demonstrate that they suffered the requisite level of severity or pervasiveness, they still have “...remanded cases for further consideration [in order to determine whether or not] the evidence indicated that the plaintiff suffered “religious harassment that was persistent, demeaning, unrelenting, and widespread.”⁷⁰ This is particularly apparent in cases brought by Muslim women, alleging unlawful employment discrimination based on their wearing of head coverings (hijabs) in the workplace.⁷¹

In *Ali v. Alamo Rent-A-Car Inc.*, the District Court dismissed the plaintiff’s complaint where she alleged religious discrimination under Title VII based upon defendant-employer’s policy which prohibited her from wearing a headscarf to work, on the grounds that a transfer to a position which did not require contact with customers did not constitute an adverse employment action.⁷² On appeal, plaintiff argued that discrimination based on religion is treated differently because of Title VII’s definition of religion and therefore does not require a showing of adverse employment action taken by the employer.⁷³ However, the Court rejected plaintiff’s argument. Instead, the Court viewed the burden on employees to show discrimination on the basis of religion as similar to their burden for showing discrimination based on sex, color, race or

⁶⁹ See *McCandless & Ngo*, *supra* note 9, at 12 (citing *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311-315 (4th Cir. 2008), where the Court held that constant remarks directed against an employee by co-workers and supervisors such as calling him “Taliban” or “towel-head”, actions such as holding metal detectors to his head, stealing his head covering and making fun of his overall appearance did not show religious motivated discrimination under Title VII).

⁷⁰ See *id.* at 12-14 (citing *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311-318 (4th Cir. 2008); *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393 (5th Cir. 2007)).

⁷¹ See *e.g. Ali v. Alamo Rent-A-Car Inc.*, 8 Fed. Appx. 156, 157-158 (4th Cir. 2001); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F.Supp. 1272 (U.S. Dist. Ct. N.D.Okla. 2011).

⁷² See *id.*

⁷³ See *Ali*, 8 Fed. Appx. at 158 (quoting 42 U.S.C. §2000e(j), which defines religion as including “all aspects of religious observance and practice, as well as belief”).

national origin.⁷⁴ Therefore, the Court ruled that in simply failing to accommodate an employee's religious practice does not constitute religious discrimination under Title VII.⁷⁵

However, the Court did not give adequate weight to the fact that plaintiff, a management trainee who was hired to manage the front of the business, was transferred to a position where she would not have to interact with customers, even though that was a main requirement of her job and one of the main qualifications of her degree.⁷⁶ Instead, since the employer did not terminate plaintiff from her position, the Court held the adverse impact she experienced, did not rise to the level of adverse employment action, as generally viewed in Title VII cases.⁷⁷ The Court failed to give credence to the idea that the employer discriminated against plaintiff based on her appearance, because but for her head covering, according to the Court transcript, no other reason was indicated for transferring plaintiff to a different position. The direct nexus between the discriminatory conduct and religion would have been established, had the Court recognized the existence of appearance based discrimination. The link would indicate the assumption that a Muslim employee in a post 9/11 era, who is in a front desk position, should not "appear" differently than the Anglo-American ideal preferred by society. Additionally, by appearing with religious apparel, her religious identity became apparent which some customers found unpalatable as they connected it with 9/11. In this case, assumptions based upon the employee's religion and sex become combined because she was publicly aligning herself with her religion, by wearing the hijab and therefore her identity as a woman and Muslim both become open to perceptions as a whole.

⁷⁴ See *Ali*, 8 Fed. Appx. at 158, at 159 (stating that "Title VII only prohibits employer practices where the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action").

⁷⁵ See *id.* at 158.

⁷⁶ See *Ali*, 8 Fed. Appx. at 159.

⁷⁷ See, e.g. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-762 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-787 (1998).

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the District Court for the Northern District of Oklahoma the defendant, Abercrombie & Fitch Stores, Inc. brought forth a motion for summary judgment, to dismiss a religious discrimination claim brought by a Muslim teenager who applied for a job at an Abercrombie store in Woodland Hills Mall but was not hired.⁷⁸ Plaintiff alleged she was not hired because she wore a head scarf, which was explicitly prohibited “[b]y the Abercrombie ‘Look Policy, [which does not permit] sales models from wearing head wear.”⁷⁹ Ultimately, the District Court denied Abercrombie’s motion for summary judgment, finding that they had not rebutted the plaintiff’s prima facie case and therefore allowing plaintiff’s case to continue.⁸⁰

However, even as the Court took a broad view of what constituted a deeply held religious belief, the Court avoided setting such a precedent for treating religious- based discrimination based on appearance in this manner. The Court’s analysis accomplished this in two ways. First, footnote 12 of the decision cautioned that despite its decision, “Abercrombie may be able to show undue hardship in other hijab cases.”⁸¹ In conjunction with the first point, in criticizing Abercrombie’s “look policy,” the Court did not question the viability of Abercrombie’s “look policy”. The decision was not so revolutionary because the Court failed to recognize the validity of discrimination based on appearance as it did not view the “look policy” as setting forth a particular standard of appearance to which exceptions, while permitted, are mostly not granted.⁸²

By failing to recognize the inherently discriminatory policy put in place by Abercrombie, the Court focused on the plaintiff’s head dress as a symbol of her religious beliefs, setting the

⁷⁸ See *EEOC*, 798 F.Supp, at 1275-1276.

⁷⁹ See *id.* at 1275-1276.

⁸⁰ See *EEOC*, 798 F.Supp, at 1287.

⁸¹ See *id.*

⁸² See *EEOC*, 798 F.Supp, at 1280-1281.

stage for the ultimate dismissal of the action.⁸³ This occurred because plaintiff could not demonstrate that wearing a head dress is a “bona fide religious belief” within the definition set forth under Title VII,⁸⁴ as neither Islamic teachings nor religious observance directly require women to cover their heads, which Courts focus on in deciding religious discrimination cases.⁸⁵ In addition, plaintiff was unable to defeat claims of undue hardship asserted by her employer, as Courts since 2001 have accepted most reasons as legitimate and leading to “...more than a *de minimus* cost” thereby exempting the employer from accommodating the religious belief of an employee.⁸⁶ The only way to recognize and ultimately allow a plaintiff to prevail against an appearance or look policy such as Abercrombie & Fitch’s, would be to recognize: (i) the pervasiveness of appearance discrimination and (ii) its ability to become intertwined with traditional forms of discrimination, creating a new hybrid form of discrimination which cannot be remedied by traditional methods.

Using Intersectionality Theory to Identify New Hybrid Forms of Discrimination:

In order to curtail new forms of discrimination, which manifest themselves through appearance-based policies in an employment context, new hybrid forms of discrimination need to gain recognition as viable forms through which employers discriminate against employees. Legal recognition is a precursor to providing legal remedies for such forms of discrimination. A method which recognizes the existence and problems posed to the legal rights of employees

⁸³ See, e.g., *Ali*, 8 Fed. Appx. 156, 157-158 (4th Cir. 2001); *EEOC v. Geo Group, Inc.*, 616 F.3d 265, 291-292 (3rd Cir. 2010); *Webb v. City of Phila.*, 562 F.3d 256, 263-264 (3rd Cir. 2009) (indicating that the Federal Court of Appeals in different circuits have overwhelmingly dismissed Title VII religious discrimination claims brought on the basis of discrimination of appearance, on the grounds that plaintiff did not adequately state a prima facie case for discrimination under Title VII).

⁸⁴ See *EEOC*, 798 F. Supp at 1283, *supra* note 74 (where a “bona fide religious belief” is one that (1) is religious within the plaintiff’s own scheme of things and (2) is sincerely held”).

⁸⁵ See *id* at 1284 (asserting that Courts can interpret “bona fide religious belief” objectively or subjectively).

⁸⁶ See *EEOC*, 798 F. Supp at 1287 (citing *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994) and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

through hybrid forms of discrimination is Intersectionality Theory, espoused by Professor Kimberle Crenshaw.⁸⁷

Professor Crenshaw suggests that there is a “problematic consequence [with treating] race and gender and mutually exclusive categories of experience and analysis,”⁸⁸ in anti-discrimination studies. By viewing “race” and “sex” as separate categories and therefore separate modes through which discrimination is perpetrated, the analytical framework only accepts that individuals experience discrimination because of one aspect of identity, i.e. race or sex. Framing discrimination through, as Professor Crenshaw terms, a “single-axis framework,”⁸⁹ precludes individuals from obtaining relief for discrimination claims which do not fall within the aforementioned neatly structured categories. Working within a one-dimensional view of discrimination “marginalizes [individuals] who are multiply-burdened and obscured claims that cannot be understood as resulting from discrete sources of discrimination.”⁹⁰

To illustrate the problems which arise by not recognizing the intersection between race and sex in the legal sphere, Professor Crenshaw focuses on judicial treatment of Black women plaintiffs by the Courts in Title VII cases.⁹¹ Professor Crenshaw’s discussion of three cases⁹² highlights the inability of Courts to recognize hybrid forms of discrimination, because plaintiffs “cannot combine statutory remedies to create a new ‘super-remedy’ which would give them

⁸⁷ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 139 U. CHI. LEGAL F. 57-80 (1989).

⁸⁸ See *id.* at 57.

⁸⁹ See Kimberle Crenshaw, *supra* note 88, at 57-58.

⁹⁰ See *id.* at 58 (arguing that focus on a single-axis framework excludes Black women in antiracist policy and discussion because it does not take into account the total experiences and discrimination faced by Black women based upon both their race and their gender).

⁹¹ See Kimberle Crenshaw, *supra* note 88, at 58-63 (highlighting the inadequate remedies available for Black women plaintiffs because of a lack of judicial recognition of the double discrimination faced by the plaintiffs because of their race and sex in Title VII cases).

⁹² See *id.* (citing *DeGraffenreid v. General Motors*, 413 F. Supp 142, 142-145 (E.D. Mo. 1976), *Moore v., Hughes Helicopters*, 708 F.2d 475, 475-486 (9th Cir. 1983) and *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 789-842 (5th Cir. 1982)).

relief beyond what the drafters of the relevant statutes intended,”⁹³ The Court declined to accept that a combination of both sex and race discrimination can be brought by a group of plaintiffs whose discrimination claim is only viable because of the intersection and resulting experiences which stem from race and sex.⁹⁴ The Court interpreted the plaintiffs’ bringing sex and race discrimination as a single cause of action, as creating “new classes of protected minorities [created only through the] mathematical principles of permutation and combination”, for the sole purpose of increasing their standing.⁹⁵ This perspective misses the point entirely. Plaintiffs did not push to bring a discrimination claim on the basis of sex and race in order to obtain greater standing. Instead, they pushed, because independently, their status as women and status as Blacks, did not entitle them protection under Title VII since General Motors employed both white women and black men.⁹⁶ Therefore, while there would be no independent grounds to prove it, the employer logically could not discriminate against Black women because both of their “identities” independently were not discriminated against by General Motors.

The Court’s failure to conceptualize discrimination in a multi-dimensional way is also problematic because it assumes a white-centric notion towards different types of discrimination.⁹⁷ While Moore, a Black female plaintiff was unable to bring forth her discrimination claim as a black woman because her race would not allow her to represent white women employees, Professor Crenshaw argues that white women employees are not thought to be prohibited from bringing forward sex discrimination claims, because their race prevents them

⁹³ See *DeGraffenreid*, 413 F. Supp 142 at 143.

⁹⁴ See *id.* at 145 (asserting that “the goal of [Title VII] was [not] to create a new classification of ‘black women’ who would have greater standing than, for example, a black male”).

⁹⁵ See *DeGraffenreid*, 413 F. Supp 142 at 145.

⁹⁶ See Kimberle Crenshaw, *supra* note 93, at 59.

⁹⁷ See *Moore*, 708 F.2d at 480 (where, because plaintiff asserted a cause of action under Title VII as a Black female, because of her reliance on both sex and race, her claim was dismissed because her race would not allow her to ‘adequately represent’ white women employees).

from understanding the experiences of women of other races.⁹⁸ Therefore, Courts pegged standards for demonstrating discrimination in sex and race discrimination cases based on the discrimination and experiences felt by white individuals.⁹⁹ Presenting this as the general norm or standard through which discrimination claims under Title VII are assessed, disadvantages minorities. By failing to recognize their particular experiences stemming from the intersection of their race and sex, plaintiffs are doubly disadvantaged, since they are prevented from presenting their claims in an effective manner.¹⁰⁰ In *Moore*, unable to bring a claim on the behalf of all women and all Blacks, in order to demonstrate unlawful discrimination on the grounds that the employer would not promote African women employees, she could only rely on statistical evidence relating to the promotions given to Blacks and not Black women, of which there were little to none promoted.¹⁰¹ Limiting the plaintiff from the relevant evidence in order to state her Title VII claim, the Court essentially “erased”¹⁰² her unique experiences and right to raise a complaint.

A one-dimensional view of discrimination presents contradictions in the law.¹⁰³ In reviewing the Courts decisions in *DeGraffenreid* and *Moore*, she notes that Black women are viewed inconsistently by the law, as the former decision “refused to acknowledge that the employment of Black women can be distinct from that of white women, while [in the latter],

⁹⁸ See Kimberle Crenshaw, *supra* note 93, at 60.

⁹⁹ See *id.* (asserting that “discrimination against a white female [has become] the standard sex discrimination claim”).

¹⁰⁰ See Kimberle Crenshaw, *supra* note 93, at 61.

¹⁰¹ See *Moore*, 708 F.2d at 484-486 (demonstrating that the limitations placed by the Court on plaintiff’s claim and thus admissible evidence because of their failure to recognize her unique claim of discrimination rendered her without redress. Due to the limitations, she was unable to use relevant statistical evidence to show that a qualified Black woman not given a supervisory role by an employer, who permitted Black men and white women similar supervisory roles, constituted unlawful employment discrimination because offering roles to individuals on the basis of race or sex does not relieve the employer from discriminating against the individuals who constitute both the race and sex).

¹⁰² See Kimberle Crenshaw, *supra* note 102, at 61-62.

¹⁰³ See *id.* at 63 (highlighting the contradictions which arise when the Courts decisions in *DeGraffenreid* and *Moore* are viewed together).

Black women were harmed because [their] claims were...so distinct from the claims of white women.”¹⁰⁴ Such contradictions towards Black women, Professor Crenshaw stipulates, are somewhat resolved by viewing discrimination as multi-dimensional, where an individual can experience discrimination from a single or many different directions.¹⁰⁵ Only recognizing one single form through which discrimination can occur, disables the relief available to Black women and limits their legal identity. While they share experiences with both white women and Black men, they experience a unique, hybrid form of discrimination stemming from “the combined effects of practices which discriminate on the basis of race and on the basis of sex.”¹⁰⁶ Since Black women are able to experience discrimination on the basis of two types of invidious classifications (their race and their sex), their ability claim discrimination on both of their legal identities, should logically be recognized.

In sum, Professor Crenshaw advocates that in order to recognize discrimination against Black women based on the intersection of their sex and race-based identities, discrimination needs to be viewed as multi-dimensional. Rather than recognizing new classes of minorities, legally accepting hybrid forms of discrimination based on dual classifications such as sex and race, which have historically been intertwined, is the most viable way to protect individuals who fall outside of the purview and thus protections offered by Title VII. While primarily used in race studies, I propose an extension to this theory towards two other historically intertwined categories: sex and religion.

¹⁰⁴ See Kimberle Crenshaw, *supra* note 102, at 63.

¹⁰⁵ See *id.* (comparing discrimination to traffic flowing from all directions, where discrimination can be reached by travelling in one direction, or alternatively, from several directions, all of which merge and produce a cumulative affect).

¹⁰⁶ See Kimberle Crenshaw, *supra* note 102, at 63-64.

Critiques of Intersectionality Theory:

Contrary to Professor Crenshaw's proposal to remedy the approach to discrimination, many scholars doubt the viability of intersectionality theory.¹⁰⁷ The main critique which scholars articulate is the lack of a clearly defined intersectional methodology affecting the theory's viability. This is so because in accepting the existence of the interaction of multiple individual identities without recognizing a way to understand these intersections, remedies for intersectional based discrimination are severely limited.¹⁰⁸ As Nash asserts, "[w]hile intersectionality has worked to disrupt [historical] approaches to identity...and problematize social processes of categorization through [a focus on] marginalized subjects' experiences, intersectional projects often replicate precisely the approaches that they critique."¹⁰⁹ Focusing on Professor Crenshaw's discussion of the intersection of race and sex in discrimination claims, Nash questions the limiting of black women's identities solely to race and gender.¹¹⁰

While a relevant critique, Professor Crenshaw's use of the Black woman as a type of doubly-discriminated against subject while potentially unifying the experiences of all black women, must be regarded in a contextual basis. Owing to her focus on race-based politics and identity, she focused on the intersection between race and sex. However, she does not indicate that additional burdens do not play a role in disadvantaging black women. Within the context of anti-discrimination law under Title VII however, the intersection between race and sex serve as

¹⁰⁷ See Jennifer C. Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1, 2 (2008).

¹⁰⁸ See Robert S. Chang & Jerome M. Culp, *After Intersectionality*, 71 U. MO.-KAN. CITY. L. REV. 485, 485-486 (2002).

¹⁰⁹ See Jennifer C. Nash, *supra* note 108, at 6 (discussing the inconsistency in intersectionality theory with a focus on Professor Kimberle Crenshaw's discussion of the treatment of sex and race based claims in anti-discrimination law).

¹¹⁰ See *id.* at 7 (arguing that while Professor Crenshaw argues for the law to recognize black women and doubly-burdened in discrimination claims, she does not examine the other ways in which they are disadvantaged, such as through sexuality, nationality, or class).

the two most important indicators and precursors of the biases and attitudes leading to discrimination, which is why both of the aforementioned categories are Professor Crenshaw's main focus. In addition, for a black woman, the legal basis upon which unlawful discrimination in the workplace occurs would be mainly geared towards her identity as a woman and her identity as African-American.¹¹¹

Another critique leveled at Professor Crenshaw's discussion on intersectionality theory is her focus on the black woman, as a "unitary and monolithic entity."¹¹² However, in the narrow context of anti-discrimination law, the "black woman" is a prototype. It serves as a medium for understanding intersectionality theory. While intersectionality may be problematic if viewed solely as a means to advance black feminism,¹¹³ as a broader notion, it allow for the law to take into account the cultural, social, religious, race and other identities which make-up individuals. This in theory should permit discriminations claims to be broadly tailored to reach all types of plaintiffs.

Recognizing the Intersection between Sex and Religion to Address a new hybrid form of discrimination

As with race and sex, the religious and sex based identities of women allow for shared experiences which develop as a result of both of their identities. In evaluating post 9/11 discrimination claims against Muslim women, the combination of religion and sex serves as a dual basis for employment discrimination. As the law does not recognize this intersection, Title VII provides no legal recourse and thus such plaintiffs are doubly-discriminated against and

¹¹¹ See Jennifer C. Nash, *supra* note 111, at 7-8 (recognizing that despite the absence of other bases through which black women are burdened, in discrimination claims, black women primarily receive injuries based on their sex and race).

¹¹² See *id.* at 8.

¹¹³ See Jennifer C. Nash, *supra* note 108, at 9 (highlighting the general use of intersectionality theory to shed further light and advance black feminism).

marginalized. Recognition of this link is crucial in increasing Title VII's effectiveness against discrimination perpetuated against minorities.¹¹⁴

Applying the principles of Intersectionality, there is an intersection between sex and religion in appearance based policies implemented by employers. Accepting that an intersection exists between sex and religion presents a viable alternative to achieving a two-fold goal. It aids in analyzing hybrid forms of discrimination in the workplace and simultaneously legitimizes the need for remedying these new hybrid forms of discrimination. The intersection demonstrates that women with deeply held religious beliefs, which manifest themselves through appearance, experience discrimination which is not “[w]ithin the traditional boundaries of [religion] or gender discrimination as these boundaries are currently understood and [the] intersection... factors into the lives of [religious] women in ways that cannot be captured wholly by looking at [religion] or gender dimensions of those experiences separately.”¹¹⁵

As with the Court's assessment of discrimination claims brought by plaintiffs on the grounds of sex and race, without giving credence to the idea that the discrimination on the grounds of religion and sex has a different impact compared to discrimination on either category, Title VII does not provide adequate grounds through which plaintiffs can seek redress.¹¹⁶

¹¹⁴ See Kimberle Crenshaw, *supra* note 106.

¹¹⁵ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1993).

¹¹⁶ See Kimberle Crenshaw, *supra* note 93 (reflecting upon the Courts narrow interpretation of the scope of discrimination present in Title VII, discounting the viability of discrimination claims brought on the basis of race and sex).

Part IV: Amending Title VII to Remedy Discrimination Claims based on a Combination of Religion and Sex

Recognizing the existence of appearance discrimination and its ability to be used as a vehicle through which to effectuate employment discrimination, it is necessary to amend Title VII to reflect such changes. Prohibitions on appearance discrimination can and have taken shape through statutory ordinances in different states. However, due to a lack of enforcement, their impact is smaller than anticipated.¹¹⁷ In order for such prohibitions to be more effective, Title VII itself should be amended to include appearance discrimination based on religious stereotypes, as unlawful discrimination in an employment context.

Examining the language of the various ordinances banning appearance discrimination in an employment context, serves as a tool to determine how to fashion an effective amendment to Title VII. Most jurisdictions which have prohibited some form of appearance discrimination in the workplace through ordinances, focus on discrimination based on height and weight.¹¹⁸ The remedies available to employees who face discrimination based on their height and weight differs, depending upon the severity of the discrimination and whether or not jurisdictions have only civil or criminal penalties available.¹¹⁹ However, as Rhode asserts, while cities such as San Francisco and states such as the District of Columbia included in their human rights law,¹²⁰ discrimination in the workplace based on personal appearance, “[t]hey have reported relatively little enforcement activity despite . . . broad remedial provisions.”¹²¹

¹¹⁷ See Rhode, *supra* note 6, at 1095.

¹¹⁸ See *id.* (referencing statutes from Michigan, District of Columbia, Santa Cruz, Madison and San Francisco, out of which Michigan’s is the most restrictive).

¹¹⁹ See Rhode, *supra* note 6, at 1082-1083 (showing that remedies vary greatly, awarding fines for discrimination based on height and weight as low as \$500.00 to a possible recovery of \$50,000, and even criminal penalties if such prohibitions constitute a violation of a jurisdictions human rights law); see e.g. S.F., CAL., ADMIN. CODE § 12A.1 (2008).

¹²⁰ See D.C. CODE ANN. § 2-1401.01 (LexisNexis 2008).

¹²¹ See Rhode, *supra* note 6, at 1084.

The language used in the District of Columbia’s ordinance prohibiting discrimination, including those based on appearance, would be useful if placed instead in Title VII. While Title VII bars unlawful employment discrimination based on sex, race, color, religion and national origin¹²², in order to prohibit appearance-based discrimination, additional language such as “[d]iscrimination by reason of . . . personal appearance” is required.¹²³ Personal appearance, as defined in the statute includes “the outward appearance of any person . . . with regard to bodily condition or characteristics, manner or style of dress and manner or style of personal grooming, including, but not limited to hair style and beards,”¹²⁴

However, the broad scope of the ordinance’s definition of personal appearance could prove overly burdensome on employers who would be faced with the prospect of litigation over anything termed personal appearance.¹²⁵ This is one of the main reasons, arguably, why the violations for discrimination based on personal appearance are not as strictly enforced despite the broad remedial powers granted in the ordinance and do not survive motions to dismiss.¹²⁶ There is a need to effectively amend Title VII, using a narrowly tailored definition of what constitutes religious apparel and symbols. In doing so, the interests of employees who adorn religious outerwear would be protected, without unduly burdening employers by subjecting them to frivolous lawsuits and ambiguous legislation.

Alternatively, personal appearance could be defined in a manner similar to the local ordinance in Howard County, Maryland, which included within personal appearance to

¹²² See Title VII, *supra* note 1.

¹²³ See D.C. CODE ANN. § 2-1401.01.

¹²⁴ See *id.* § 2-1401.02(22).

¹²⁵ See, e.g., *McManus v. MCI Commc’ns Corp.*, 748 A.2d 949, 952-954 (D.C. 2000).

¹²⁶ See, e.g., *Underwood v. Archer Management Servs., Inc.*, 857 F. Supp. 96 (D.D.C. 1994); *Turcois v. U.S. Serv. Indus.*, 680 A.2d 1023 (D.C. 1996); *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994); *Kennedy v. Barry*, 516 A.2d 176 (D.C. 1986); *Honig v. D.C. Office of Human Rights*, 388 A.2d 887 (D.C. 1978).

“[e]ncompass ‘outward appearance of a person with regard to hair style, facial hair, physical characteristics or manner of dress.’”¹²⁷ The ordinance further stipulated exceptions to prohibiting discrimination in the workplace based on personal appearance should be cleanliness of an individual as well as their work attire.¹²⁸

However, it is espoused that an amendment to Title VII should include language stipulating that discrimination based on personal appearance, which reflects on religious stereotyping should be prohibited. Adding such a caveat to a definition of personal appearance will target policies which discriminate based on appearance in the workplace, and will allow employers to set reasonable appearance policies without impinging on the religious and other deeply held beliefs of their workers. Grooming policies and professional codes of conduct should not include the following categories as reflecting “clean cut” appearances: braided hair, weaves, hair extensions, head coverings, yarmulkes, corn rolls, turbans and beards. This will allow the amendment to achieve the maximum benefit for plaintiff-employees without unduly burdening employers. While the aforementioned list is not exhaustive, it demonstrates that essentially, an amendment to Title VII prohibiting discrimination based on religious apparel should contain within it a list of recognized religious apparel and symbols.

Listing the particular religious apparel which cannot be used in job evaluations, employee assessments or in creating professional codes of conduct would put employers on notice as to what would constitute discrimination. Additionally, a list of religious symbols aids in discrimination causes of action because the presence or absence of such religious apparel would allow a plaintiff to establish a presumption of religious and sex based discrimination by way of

¹²⁷ See COUNTY OF HOWARD, MD., CODE §§12.200(II) (1992).

¹²⁸ See *id.* §§12.201(XVI) (1992).

appearance. Conversely, employers would be required to show a business necessity limited to the health and safety of its other employees, to rebut this presumption and therefore, in theory, only viable claims of discrimination would proceed through the judicial system. Referencing the loss of sales and dissatisfaction of customers without additional evidence should not be considered credible by the Courts. A list of religious symbols which employers should not be able to consider in employment policies should be limited to those used “[w]ith regard to hair style, facial hair, physical characteristics or manner of dress.”¹²⁹

In sum, an amendment to Title VII which would enable plaintiffs to have standing to pursue hybrid discriminatory claims based on the overall experiences that stem from their religion and sex, would be extremely beneficial. It would improve their ability to pursue a cause of action tailored to their specific discrimination without being barred from accessing relevant statistics and other evidence. Additionally, it would allow for some form of appearance based discrimination to be recognized as discrimination within the scope of discrimination discourse as being invidious in nature. The most obvious and invidious form of religious and sex based discrimination occurs through stereotypes stemming from society’s perception of appearance. Outward manifestations of religious belief aid in influencing perceptions and the formation of such stereotypes. Stereotypes and perceptions which lead to discrimination based upon the religious appearance of individuals in an employment context and cannot be tolerated. In order to best protect the rights of female employees with deeply held religious beliefs in the workplace, an amendment to Title VII is required.

¹²⁹ See COUNTY OF HOWARD, MD., CODE §§ 12.200(II), 12.201(XIV) (1992) (describing Howard County’s definition of “personal appearance” in their statute prohibiting forms of appearance discrimination in an employment context).