UNCOVERED: TITLE VI & TITLE IX'S LIMITED PROTECTIONS FOR MUSLIM STUDENTS WHO VEIL

Nimra H. Azmi[1]

Title IX of the Education Amendments of 1972 aims to prevent discrimination on the basis of sex in federally funded education programs; in its goal to foster equal access to education, Title IX operates in tandem with Title VI of the Civil Rights Act of 1964, which bars discrimination on the basis of race, color, or national origin in federally funded programs, including schools. Nonetheless, the operative antidiscrimination regime at work between Title IX and Title VI is imperfect. This Article will explore the gaps in protection that remain between these two statutes that leave already marginalized populations, like Muslim women who wear the hijab, vulnerable to discrimination. I argue that Title IX case law's cramped interpretation of sex and gender expression, when combined with Title VI's essentialist religious discrimination paradigm, can expose women and girls who wear the hijab or other religious clothing that is inherently tied to their faith as well as their sex and gender expression, to sex discrimination in schools. The real threat of this discrimination and its limited recourse under the law is exemplified in this Article through the experience of one of my former clients. This Article will also discuss how these gaps are reflected how Title VII of the Civil Rights Act of 1964 cognizes discrimination in employment against traditionally Black hairstyles. I argue that American civil rights law suffers from the same purposeful blindness to the realities of discrimination and how certain attributes—like the hijab, gender presentation, or hairstyles—are tied intrinsically to protected characteristics but are still too often not recognized by the law as such. In turn, this failure disproportionately harms women and people of color. In addition to certain legislative fixes, I propose that interpretations of Title IX and Title VI, as related to the examples outlined above, adopt a more clear-eyed stance on the reality of discrimination and move away from how discrimination is constructed in the imaginary confines of the law.

---

[1] Staff Attorney at Muslim Advocates. I would like to thank the stellar team with which I worked on Linde's case, whose feedback and advice helped develop the legal memorandum that forms the backbone of this Article: Juvaria Khan, Johnathan J. Smith, Luna Droubi, and Sirine Shebaya. I am also grateful to Priyanka Gupta who provided essential feedback on an early draft of this Article. Finally, the case underlying this Article and thus the Article itself would not have been possible without the courage and steadfastness of my client, Linde McAvoy, who, in the face of discrimination and humiliation was not cowed, but instead, sought justice for herself and women like her.

Contents

I. Introduction 282
II. Title VI's Limited Protections for Students from Religious Discrimination 284
III. Gender Expression, the Hijab & Title IX 288
IV. Traditionally Black Hairstyles under Title VII as a Lens for Anti-Discrimination Protections for Hijabi Students 294
V. Ways Forward: Creating Coverage for Hijabi Students 297
VI. Conclusion 299

I. Introduction

In March 2018, my client, Linde McAvoy, a native Tennessean and a young, white, Muslim woman, was expelled from her private, for-profit cosmetology school in Murfreesboro, Tennessee for wearing a hijab, a religious head-covering worn by Muslim women.[2] The school alleged that Ms. McAvoy's hijab, which Ms. McAvoy began wearing after converting to Islam in January 2018, did not comport with its dress code, even as the school permitted students to wear secular head coverings without reprimand.

For Ms. McAvoy, wearing the hijab was an expression, condition, and extension of her womanhood and a simultaneous manifestation of her gender and religion. Her belief was not anomalous—while not all Muslim women wear a headscarf,[3] it is popularly seen, especially in the West, as uniquely symbolizing Muslim womanhood.[4] Many, although not all, Muslim women believe that they are required to veil by virtue of their gender and faith.[5] In this way, the hijab occupies a dual modality of expression, at once gendered and religious, each intrinsically and necessarily tied to the other. Because the hijab so clearly identifies Muslim women, Muslim women who veil are particularly vulnerable to discrimination and harassment based on heir religion and gender in public spaces, including schools.[6] Incidents of Muslim Ameri-

---

[2] While in common parlance, the "hijab" has become synonymous with the headscarf worn by Muslim women (and, for the sake of convenience, it will be used as such throughout this Article), the "hijab" is a broader concept of modesty that extends to both Muslim men and women. *See, e.g.*, Nadia B. Ahmed & Asifa Quresihi-Landis, *Five Myths About the Hijab*, Wash. Post (Mar. 15, 2019), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-hijab/2019/03/15/d1f1ea52-45f6-11e9-8aab-95b8d80a1e4f_story.html [perma.cc/S6DM-Z8MH].

[3] Eman Abdelhadi suggests that approximately 40% of Muslim women in the United States wear the hijab. *See* Eman Abdelhadi, *Religiosity and Muslim Women's Employment in the United States*, 3 Socius: Soc. Res. for a Dynamic World 1, 8 (2017), https://journals.sagepub.com/doi/pdf/10.1177/2378023117729969 [perma.cc/JF4D-384X].

[4] *See Veiling and the Hijab*, The Feminist Sexual Ethics Project, https://www.brandeis.edu/projects/fse/muslim/veil.html [perma.cc/C3XB-4AR9].

[5] *See, e.g.*, *id.* ("No symbol is so linked to Muslim women as that of 'the veil.'").

[6] *See* Jim A.C. Everett, et al., *Covered in Stigma? The Impact of Differing Levels of Islamic Head-Covering on Explicit and Implicit Biases Toward Muslim Women*, 45 J.

can girls being harassed or excluded from school or school activities because they wear the hijab are commonplace.[7]

Ms. McAvoy's first two months at her cosmetology school, prior to her conversion to Islam, passed without issue. She was a regular participant in class, was never disciplined by her teachers or the administration, and maintained a good relationship with the school and her peers. However, after she began wearing a hijab to her classes in late February of 2018, school administrators began subjecting her to repeated demands to remove her hijab. When she refused, they ejected her from class, reprimanded her, and sent her home for continuing to wear the hijab, shaming her in front of her peers. Even though Ms. McAvoy had told administration officials that she wore the hijab for religious reasons, she was informed that the hijab did not comply with the school's dress code and she could not wear it on campus. When Ms. McAvoy refused to unveil, the administration's demands culminated in her expulsion.

Ms. McAvoy was expelled from her school because she was a Muslim woman who wore the hijab. While what happened to Ms. McAvoy seems impermissibly discriminatory, in reality, there is no clear-cut consensus that the school's conduct constituted actionable sex discrimination or religious discrimination under federal law. This Article will explore how the laws that should have covered the sex and religion-based discrimination that Ms. McAvoy faced at her school—i.e., Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972—did not clearly protect her right to attend school free of discrimination.[8] Ms. McAvoy's case illustrates gaps between the statutes and the narrow, essentialist paradigms that they (and cases interpreting them) have advanced, leaving female students who wear religious clothing like the hijab vulnerable to discrimination in school. This Article will also examine judicial treatment of Title VII cases arising from discrimination related to traditionally Black hairstyles as a lens

---

APPLIED SOC. PSYCH. 90, 90 (2015), https://ora.ox.ac.uk/objects/uuid:f648028a-9221-4dd5-95c6-c03d04da66ed/download_file?file_format=pdf&safe_filename=everett%2Bet%2Bal.%2B%25282014%2529%2BCovered%2Bin%2BStigma%2BJASP%2B.pdf&type_of_work=journal+article [perma.cc/TTZ4-G2PL].

[7] *See, e.g.*, Liam Stack, *Muslim Student Athlete Disqualified From Race for Wearing Hijab*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/us/Ohio-hijab-runner.html [perma.cc/P4TQ-SVLR]; Courtney Tanner, *An 11-year-old Girl Had Her Hijab Pulled off at School. This Utah Group Is Now Asking Districts to Update Their Bullying Policies*, SALT LAKE TRIB. (Nov. 15, 2018), https://www.sltrib.com/news/2018/11/15/an-year-old-girl-had-her/ [perma.cc/B28U-QK6A].

[8] Because the school Ms. McAvoy attended was a private, for-profit educational institution, the school was not bound by the First or Fourteenth Amendments. However, Title VI and Title IX apply to all educational institutions that receive federal funding—including through their participation in student loan programs like FAFSA. *See* 20 U.S.C. § 1687 (2016); 42 U.S.C. § 2000d-4a (2016). Ms. McAvoy's school did participate in student loan programs. Unlike Title IV, both Title IX and Title VI offer private rights of action. *See* 1964 42 U.S.C. § 2000D *et seq.*; Barnes v. Gorman, 536 U.S. 181, 185 (2002) (noting that a private right of action exists under Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 689 (1979) (finding that a private right of action exists under Title IX).

into how courts may assess the viability of potential claims of hijab-based discrimination under Title IX. In particular, these cases reveal how, when adjudicating discrimination claims, courts often fail to account for not just the fact of race (or religion or gender) but its *implications*—meaning the history, situation in culture, and the real-world effect of these protected characteristics.

II. Title VI's Limited Protections for Students from Religious Discrimination

My co-counsel and I first considered whether the discrimination Ms. McAvoy experienced for wearing a hijab could support a claim under Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, and national origin in educational institutions that receive federal funding.[9] Because Title VI only covers race, color, and national origin-based discrimination, it leaves educational spaces vulnerable to religious discrimination. In that way, Title VI differs from the other sections of the Civil Rights Act of 1964, including Title II,[10] Title IV,[11] and Title VII[12],[13] all of which count "religion" as a specifically enumerated protected class.[14] A few cases, all in the employment context, have been brought in federal courts on behalf of women claiming that they experienced religious—not sex—discrimination under Title VII because of their hijabs.[15] Moreover, even religious discrimination cases under Title VII have been vulnerable to what can be characterized as a lack of judicial sympathy for or understanding of the experience—and necessity—of wearing the hijab, indicating yet another potential hurdle to surmount for an individual bringing a hijab-related discrimination claim under any civil rights statute, whether it be Title VII, Title VI, or Title IX.[16]

---

[9] 42 U.S.C. § 2000(d) (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[10] 42 U.S.C. § 2000(a) (2012).

[11] 42 U.S.C. § 2000(c) (2012).

[12] 42 U.S.C. § 2000(e) (2012).

[13] Title VII case law makes clear that its coverage of religious discrimination in the workplace extends to women who wear the hijab as part of their religious expression. *See, e.g.*, E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015).

[14] Title VI also does not prevent discrimination on the basis of sex, although Title IX has since remedied that gap.

[15] *See, e.g.,* Parker v. Arkansas Dept. of Correction, No. 4:05CV00850 GH, 2006 WL 8445187 (E.D. Ark. 2006); Camara v. Epps Air Service Inc., 292 F. Supp. 3d 1314 (N.D. Ga. 2017); Wiley v. Pless Security, Inc., No. 1:05-C V-332-TWT, 2006 WL 1982886 (N.D. Ga. 2006).

[16] Certain judges, when assessing Title VII religious discrimination have been exceptionally open-minded to and uncritical of the arguments advanced by employers in defense of their anti-hijab stances. For example, in *Parker v. Arkansas Dept. of Correction*, the Court denied Plaintiff, a former employee of Defendant, summary judgment on her

Case law reflects the constraints on Title VI's reach into religious discrimination, with challenges to pure religious discrimination repeatedly tossed out by courts.[17] Accordingly, an individual like Ms. McAvoy, who experiences discrimination in school because of her religion, is not shielded by Title VI unless a nexus between religious discrimination and race, color, or national origin—the traits Title VI protects—can be established.[18] The necessity of providing this nexus means that not all claims of religious discrimination—no matter how real, damaging, or virulent—are viable under Title VI. Thus, this nexus requirement leaves a critical zone in which religious discrimination against certain students is possible with virtual impunity. In

religious discrimination claim in uncritical favor of the prison defendant's argument that a "misappropriated hijab" could be used to "conceal the identity of an inmate, conceal contraband, or weapons, or could even be sued [sic] as a weapon itself" and that the hijab was a "job hazard threatening the safety of other members of the correctional staff as well as members of the inmate population." *Parker*, 2006 WL 8445187 at *8. The prison defendant was thus able to leverage the judge's unfamiliarity with the hijab into sympathy for sensationalist, race-baiting arguments that cast the hijab not only as a religious garment but a potential threat. *Id.* In *Camara*, the Court found for the Defendant when Plaintiff alleged that she had been fired for wearing a hijab based on her manager's negative stereotypes about Muslims. Camara, 292 F. Supp. 3d at 1332. The Court found that, rather, the negative stereotypes that had led to Plaintiff's termination were not held by the manager himself, but that the manager had based his decision on the negative stereotypes purportedly held by potential customers. *Id.* ("[P]laintiff misconstrues the record when she claims that [Defendant] admitted that negative stereotypes that *he* held about Muslims led him to forbid plaintiff to wear a hijab as a CSR. Instead, he was concerned about what his customers might think. . ..") (emphasis added). Thus, the Court determined that Plaintiff had not actually experienced religious discrimination. *Id.* at 1335. Similarly, in *Wiley*, the trial judge rejected the magistrate judge's finding that an employer stating that a woman's hijab "disturbed the people at [the Georgia Department of Revenue]" constituted religious animus. Wiley, 2006 WL 1982886 at *1. Diverging from the magistrate judge's finding, the trial judge determined that there was no religious animus because Defendant's assertion that people found the hijab disturbing informed Defendant's transfer of Plaintiff as part of her religious accommodation. *Id.* In doing so, the judge noted that it seemed "that the Defendant makes a good point that this statement must be considered in the context in which it was made." *Id.* In essence, the judge allowed a supposed act of non-discrimination to cancel out an act of discrimination, and found that Defendant's "efforts" to find a reasonable accommodation (particularly one informed by anti-Muslim bias) could serve as a "get-out-of-jail-free card" for other instances of religious discrimination. *Id.*

[17] *See, e.g.*, Pollard v. Georgetown Sch. Dist., 132 F. Supp. 3d 208, 231 (D. Mass. 2015) (citing Stevens v. Skenandore, No. 99–cv–02611, 2000 WL 1069404, at *2 (7th Cir. 2000)) (dismissing Title VI claim because allegations of bullying based on students' Jewish heritage did not show that the harassment was "severe and pervasive"); Edelstein v. Single Room Occupancy Hous. Corp., No. CV1706042BROAFM, 2017 WL 3668939, at *3 (C.D. Cal. Aug. 23, 2017) (finding that allegations of anti-Semitism could not state a claim under Title VI since Title VI did not protect against religious discrimination). *But see* Exec. Order on Combating Anti-Semitism (Dec. 11, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism [perma.cc/E39R-T5N3] (noting that "[i]t shall be the policy of the Executive Branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.").

[18] If a student faces discrimination for wearing a hijab that meets the nexus requirement, presenting a link to race, color, or national origin, that discrimination may be covered by Title VI. However, as of this writing, no court has had the opportunity to rule on any such case.

Ms. McAvoy's case this meant that because she was a white American and there was no stereotypical nexus between whiteness and Americanness and Islam, Title VI did not contemplate the discrimination she experienced as a female Muslim student.

This difference between Title VI and the other pieces of the Civil Rights Act of 1964 was neither accident nor oversight. Religion was explicitly omitted from Title VI, in part because lawmakers at the time of its passage did not believe religious discrimination in schools to be a real problem.[19] In an earlier version of the bill, the Department of Justice had recommended including religion in Title VI as a protected class.[20] However, the subcommittee of the House Judiciary Committee, before which the draft legislation was presented, advised the elimination of religion from Title VI's coverage.[21] This recommendation was apparently due, at least in part, to a concern that including religion in Title VI would create conflict with the First Amendment.[22]

The Congressional Record reveals that the omission of religion from Title VI inspired extensive debate in both the House of Representatives and the Senate. In the Senate, Sen. Albert Gore Sr. (D-TN) passionately advocated for the inclusion of religion as a protected class under Title VI, warning presciently that its omission "opened the door" to legalizing religious discrimination.[23] Other representatives maintained that religious discrimination in federally funded programs was not a significant problem. In the House, Rep. Emanuel Celler (D-NY) argued that "[t]here was no need shown and there was no evidence of any religious discrimination in Federal programs."[24] Sen. Clark echoed that sentiment in the Senate: "Religious dis-

---

[19] While it is hard to credit the claim that there was no religious discrimination in schools at that time, religious diversity, and the visibility of such diversity, has grown significantly since 1964. In 1964, 93% of Americans identified as Christian, either Protestant or Catholic. *See* Gallup, *Religion,* In Depth Topics A To Z (2018), https://news.gallup.com/poll/1690/religion.aspx [perma.cc/4R6Y-85ZX]. By 2018, 67% of Americans identified as Christian. *Id.* While still constituting a majority of Americans, the decrease speaks to a rise in religious diversity, which Congress in 1964 did not predict. *See id.*

[20] 110 Cong. Rec. 2462 (1964) (statement of Rep. Basil Whitner).

[21] *See id.*

[22] *Id.* (statement of Rep. Byron Rogers).

[23] *Id.* at 9084 (statement of Sen. Albert Gore, Sr.). *Accord id.* at 9087–88 ("I am not in any sense dealing lightly with the title to which reference is made or with this particular subject. I am deadly serious. Religion was omitted from title VI and omitted only from title VI. There must have been a purpose. Title VI deals with Federal aid for many purposes other than the school lunch program, to which the Senator has referred. . . . Surely there is a reason for omitting religion. . . . . It was not merely a happenstance. I think it was a significant omission-and I speak as sincerely as I know how-and has implications of far greater importance than the senior Senator from Pennsylvania attaches to it. I am not speaking facetiously or lightly in so stating."). This was also observed in less passionate terms by Sen. Byrd (D-WV) in the same session, who noted that Title VI contained ". . .[N]o prohibition against discrimination on the basis of religion." *Id.* at 13166.

[24] *Id.* at 2462.

crimination does not appear to have been a significant problem in connection with Federal-aid programs."[25] In addition to denying the existence of religious discrimination in federally funded programs, Congress seemed wary of potential hurdles that the inclusion of religious discrimination would create for the operation of sectarian schools. Senators warned that including religion in Title VI could impact religious schools that received school lunches, participated in other state welfare programs, or received grants under federal acts or from federal agencies.[26] Because of these concerns, Congress feared that including religious discrimination under Title VI would transform public supporters of the statute into opponents.[27]

Despite Congress' assessment in 1964 that religious discrimination in federally funded programs was not a problem, the reality has since proven contrary. Ms. McAvoy's case is but one example of an educational institution engaging in religious discrimination. In recent years, the Department of Education ("DOE") has had to square with the reality of religious discrimination in schools. Both Democratic and Republican administrations have sought to address faith-based discrimination. As an end-run around Title VI's refusal to cover religious discrimination, the Bush DOE's Office of Civil Rights advised in 2004 that sex and national origin/race discrimination can "commingle" with religious discrimination in a manner that implicates Title VI and Title IX.[28] A 2010 DOE Dear Colleague letter sent during the Obama Administration expounds that Title VI protects students perceived to be members of a religious group on the basis of characteristics relating to color, race, or national origin.[29] Under the letter's reading of Title VI, if a student or her family originate from a predominantly Muslim country like Pakistan and she is targeted by her peers or teachers for wearing the hijab or for otherwise being Muslim, such discrimination, even if rooted in religion, would likely be covered by Title VI. This is because being Muslim would be considered

---

[25] *Id.* at 9086. However, in the same breath, Sen. Clark recognized that Jewish students may face discrimination, but maintained that such discrimination was not religious in nature but racial. *Id.*

[26] *Id.* at 9086, 9088.

[27] This framing suggests that although many religious actors felt that religious discrimination was necessary in some way to their operations, they did not perceive themselves or their constituents as potential victims of religious discrimination. This contrasts with the growing modern trend of certain religious Christian actors seeing themselves as victims of religious discrimination despite their place as the nation's majority faith. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719 (2018). This modern shift in perception indicates that if Title VI were to be proposed today and *did not* include religious discrimination, analogous actors, who would have rescinded their support of Title VI in 1964 if it had included religion, would likely lobby against it today if it *failed* to include religion.

[28] Dep't of Education, Office of Civil Rights, Office of the Assistant Secretary, *Title VI and Title IX Religious Discrimination in Schools and Colleges* (Sept. 13, 2004), https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html [perma.cc/DD74-2MGZ].

[29] Letter from Dep't of Education, Office of Civil Rights (Oct. 26, 2019), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [perma.cc/R5F2-LDMK].

related to her identity as a person of Pakistani origin or person of color, thereby creating the requisite nexus to national origin, color, or race to support a claim under Title VI. This interpretation submits that, to create religious coverage from Title VI, government agencies and plaintiffs should look to reinforce and leverage essentialist paradigms of *who* looks like a Muslim, or Christian, or Buddhist, or Sikh, etc. This interpretation traffics in stereotypes and inherently fails to capture the real diversity of people of each faith. It also risks leaving practitioners of those faiths who do not conform to stereotypes of their religion vulnerable to religious discrimination. DOE's cross-administration efforts to shoehorn religious discrimination into the race, national origin, and color prongs of Title VI run directly counter to Congress' explicit intentions behind Title VI.[30]

Ms. McAvoy's case highlights that even the federal government's efforts to create coverage for religious discrimination via race, color, or national origin are not a wholly functional remedy. Ms. McAvoy, a white convert to Islam who began wearing the hijab in the middle of her school year, fell squarely into that Congressionally devised vacuum of Title VI's coverage. Because Ms. McAvoy does not conform to a confined, stereotyped conception of the ethnic origins of Muslims, the race/national origin/color bases that offer possible hooks for a religious discrimination claim under Title VI disintegrated. As a result, although Ms. McAvoy was Muslim, her whiteness removed her from Title VI coverage and into a legal space where her expulsion did not run afoul of Title VI. Because Congress in 1964 rejected a threat of religious discrimination in federally funded programs, Title VI does not provide clear and effective protection to students from religious discrimination.

III. Gender Expression, the Hijab & Title IX

After it became clear that Title VI, by both interpretation and design, did not protect Ms. McAvoy from faith-based discrimination, my co-counsel and I assessed whether we could state a plausible claim that Ms. McAvoy had been a victim of sex discrimination under Title IX. Title IX protects

---

[30] More recently, the Trump Administration issued an executive order, stating that instances of anti-Semitism in schools that could be linked to an individual's race, color, or national origin "may give rise to a Title VI violation." Exec. Order on Combating Anti-Semitism (Dec. 11, 2019), *supra* note 17. While the Order found support in some quarters, others expressed concern that the Order itself trafficked in problematic tropes of Jewish national origin and loyalty. *See, e.g.*, Judith Butler, *Trump Elevates an Anti-Semitic Slur Into Law*, Foreign Pol. (Dec. 21, 2019), https://foreignpolicy.com/2019/12/21/trump-elevates-an-anti-semitic-slur-into-law/ [perma.cc/F2G7-PCDZ]. Others still viewed the Order as a tool to quell on-campus, pro-Palestine movements. *See*, *e.g.*, Eric Cortellessa, *The Scholar Who Wrote the Definition of Anti-Semitism Says It's Been Subverted*, The Times of Israel (Jan. 9, 2020), https://www.timesofisrael.com/the-scholar-who-wrote-the-definition-of-anti-semitism-says-its-been-subverted/ [perma.cc/DW5U-66RZ].

individuals from exclusion from or denial of benefits from any federally assisted education program or activity on the basis of sex.[31] The prohibition on sex discrimination covers not only discrimination because of biological sex, but encompasses discrimination due to sex stereotyping.[32] We believed that we could contend that the hijab operated as a proxy for Ms. McAvoy's sex and a key aspect of her gender performance and that therefore, any discrimination against her on its basis was sex-based. But once more, it was not an easy argument. At the time of this Article's publication, only a handful of cases have been filed that have advanced similar arguments and none have been decided by a federal court.[33]

Nonetheless, there were some indicia that discrimination against women who wear the hijab may constitute sex discrimination. As noted above, the DOE's Office of Civil Rights September 2004 Dear Colleague Letter observes that sex discrimination can be "commingled" with religious discrimination, implicating Title VI and Title IX.[34] Moreover, there is at least one case framing discrimination against female students who wear the hijab in schools as a Title IX violation (and pleading concurrent allegations under Title VI). In a complaint filed in 2004 by the ACLU of Nevada, plaintiff Jana Elhifny alleged that she was verbally harassed and physically assaulted by her public school classmates partially due to her hijab.[35] The students' verbal harassment included gendered insults like "bitch," "nasty whore," "gay," and "slut."[36] However, before the Court could rule on whether a Title IX claim had been plausibly alleged by such discrimination, the parties settled the matter.[37]

Absent precedent precisely on point, there are no obvious guardrails for applying Title IX to protect female students who wear the hijab from discrimination. However, there may be two viable paths to state a plausible claim. The first is through sex stereotyping. The second is by linking the hijab to a condition of sex that is experienced only by women, echoing how pregnancy discrimination is cognized. As the law currently stands, each angle presents real challenges and neither offers an easy path to protection or victory for Muslim female students.

In *Price Waterhouse v. Hopkins*, the Supreme Court established that sex discrimination in the workplace encompassed claims based in sex stereotyp-

[31] 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .").

[32] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989).

[33] *See, e.g.,* Barns v. Gifford, No. CV-N-04-0583-ECR-VPC (D. Nev. filed Oct. 19, 2004).

[34] *See* Dep't of Education, *supra* note 28.

[35] Complaint at ¶ 26, Barns v. Gifford, No. CV-N-04-0583-ECR-VPC (D. Nev. filed Oct. 19, 2004).

[36] *Id.*

[37] Settlement, Barns v. Gifford, No. 00-583-LRH-PAL (D. Nev. filed Jan. 2009) (on file with author).

ing.[38] The Court found that barring a woman from promotion because she did not conform to feminine stereotypes—because she was seen as "macho" and needing "a course at charm school"—was sex discrimination.[39] The Court held that that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[40] The Court further observed that an employer could not "evaluate employees by assuming or insisting that they matched the stereotype associated with their group," because "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[41] In the last decade, circuit and district courts around the country have expanded the sex stereotype paradigm to encompass Title IX, an expansion that is especially clear as courts assess sex discrimination actions brought on behalf of LGBTQ students.[42]

Higgins v. Saavedra, which applies sex stereotyping to a Title IX claim outside of the LGBTQ context, is a helpful guidepost to a possible Title IX hijab claim.[43] It constructs sex discrimination through the lens of stereotype, and particularly, stereotyped expectations of attractiveness. In *Higgins*, the District of New Mexico explicitly leveraged Title VII case law to guide its evaluation of a Title IX sex stereotyping claim.[44] The *Higgins* Court found that the harassment the plaintiff experienced from other students was based on notions of "attractive femininity," which can be understood as the idea that in part, the performance of womanhood is predicated on maintaining a conventionally attractive appearance.[45] The Court noted that "gender stereotyping occurs where a victim fails to meet his or her peers' stereotyped expectations of masculinity or femininity."[46] It then held that certain gendered statements evinced Plaintiff's teammates' belief that she "did not conform to their ideas of the stereotypical feminine appearance."[47] Articulating how women and girls can be penalized for non-stereotypical appearance,

---

[38] *Price Waterhouse*, 490 U.S. at 250–51.

[39] *Id.* at 235.

[40] *Id.* at 250.

[41] *Id.* at 251.

[42] *See, e.g.*, Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017) (finding that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth"); Dodds v. United States Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (discussing precedent establishing that to be transgender is to engage in gender-nonconforming behavior). The transgender line of sex stereotyping cases evinces a promising judicial openness to understanding the complexities of sex and gender and advancing the applicability of these subtleties to anti-discrimination law. In October 2019, the Supreme Court heard *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107 through which it will assess whether Title VII's prohibition against sex discrimination does indeed cover transgender individuals.

[43] No. CIV 17-0234 RB/LF, 2018 WL 327241 (D.N.M. Jan. 8, 2018).

[44] *Id.* at *6–7.

[45] *Id.* at *8.

[46] *Id.*

[47] *Id.* at *7 (finding that students' statements such as "she doesn't shave," "who would want to have sex with her," "her body ain't shit," and "didn't know girls still had

and specifically, for failing to manifest femininity attractively, the *Higgins* court recognized the associated sex discrimination embedded therein.

The analysis from *Higgins* is revealing. Ultimately, a Muslim woman who wears the hijab in the United States is explicitly refusing to conform to the stereotypical appearance of an American girl. Nor is she abiding by stereotypes of "attractive femininity," which are at least partially predicated on the display of women's hair as a signifier of femininity and beauty, a symbolism communicated via everything from medieval stories like Lady Godiva's to shampoo commercials—although, despite the intrinsic connection between sex expression and hair length, federal courts have not fully cognized hair length into the sex discrimination paradigm.[48] Nonetheless, "[i]rrefutably feminine," long hair has long been recognized in Western society as both a "gender sign and a sex symbol."[49] Because it requires covered hair, a hijabi woman's presentation can be understood as non-traditionally feminine. It can also be conceived of as resistance, whether purposeful or not, to societal demands on women's attractiveness and how a woman performs that expectation. On the other hand, even as the hijab does not conform to prevailing norms of attractive femininity in the West,[50] it is also its own feminine stereotype, one particular to the presentation of Muslim women. Extending that view, it could be argued that Ms. McAvoy was

hair on their vaginas," evidenced that Plaintiff's teammates believed that she did not conform to their ideas of "stereotypical feminine appearance").

[48] Despite the obvious ties between long hair and stereotypes of sex, in *Willingham v. Macon Tel. Publ'g Co.*, the Fifth Circuit found that discrimination on hair length was not sex discrimination. 507 F.2d 1084, 1088 (5th Cir. 1975). In *Willingham*, a male job applicant brought a Title VII sex discrimination claim, arguing sex stereotyping because he had been denied a position due to the length of his hair. *Id.* at 1086. Defendant employer interpreted its dress policy as prohibiting only men from having long hair (while allowing women to wear their hair long), *id.* at 1087—perhaps a holdover of anti-hippie sentiment from the 1960s or anti-women's liberation sentiment of the 1970s. The Fifth Circuit found a hiring policy that distinguished between the sexes with regard to grooming or hair length was related to an employer's choice of how to run their business and was not a bar to equality of opportunity. *Id.* at 1091. Examining the legislative history of Title VII, the Fifth Circuit questioned whether sex stereotyping was even intended to be covered by the statute. *Id.* at 1090. Notably, this case was decided 14 years before *Price Waterhouse*, which affirmed sex stereotyping under Title VII. Nonetheless, even after *Price Waterhouse*, *Willingham* has continued to be cited as the relevant authority on the issue of whether hair length discrimination is in fact sex discrimination. More recently, the Eastern District of New York found that hair length policies that differentiate between men and women are permissible under Title VII, although selective enforcement of such policies is not. *See* Viscecchia v. Alrose Allegria LLC, 117 F. Supp. 3d 243, 254 (E.D.N.Y. 2015). To my knowledge, *Willingham* has not been directly challenged in light of *Price Waterhouse* although is it clear that the Fifth Circuit's uncertainty as to the applicability of sex stereotyping under Title VII led at least, in part to its holding.

[49] Anthony Synott, *Shame and Glory: A Sociology of Hair*, 38 British J. of Soc. 381, 384 (1987).

[50] In a British study conducted in 2010, both Muslim and non-Muslim men rated hijabi women as less attractive and less intelligent than their unveiled counterparts. Yusr Mahmud & Viren Swami, *The Influence of the Hijab (Islamic Head-Cover) on Perceptions of Women's Attractiveness and Intelligence*, 7 Body Image 90, 90 (2010).

discriminated against because she was *too* overtly feminine.[51] It bears note that one of the reasons Ms. McAvoy's school proffered for forbidding her from wearing the hijab was that the hijab did not comport with the school's expectations of professional dress for its students. This explanation intimates a perception that, whether considered insufficiently feminine or overly so, covered hair does not correspond with the expected professional appearance for women.[52]

Discrimination against women who wear the hijab under Title IX can also be analyzed as discrimination on a *condition* of womanhood, similar to discrimination against pregnant women. Both are circumstances that not all women experience and both men and women can fall outside of the impacted group. Yet, at the same time, both pregnancy and the hijab are exclusively experienced by women.[53] However, when the question of pregnancy discrimination came before the Supreme Court in 1974, it found that pregnancy discrimination was not sex discrimination under the Equal Protection Clause.[54] The Court reasoned that although only women can become pregnant, "nonpregnant persons" could include both men and women and as such, pregnancy-based discrimination was not sex discrimination.[55] Accordingly, the sex-based exclusivity of the experience was *not* dispositive, and the fact that both men and women could be non-pregnant offset any potential discrimination in the Court's view. In *Gen. Elec. Co. v. Gilbert*, the Supreme Court extended *Geduldig* to nullify sex discrimination claims relating to pregnancy under Title VII, finding that while "pregnancy-related disabilities constitute an *additional* risk, unique to women," the failure to compensate for pregnancy's risk did not destroy "the presumed parity of the benefits, accruing to men and women alike."[56] *Geduldig*'s (flawed) reasoning could likewise be applied to a Title IX hijab claim. Although only Muslim *women* veil, both men and women can be unveiled. Thus, despite the inherent tie between gender and the hijab, a court may determine that anti-hijab policies or actions do not constitute sex discrimination because women can be in both the in-group and out-group. Recognizing that the Supreme Court had

---

[51] *See, e.g.*, Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 355 (3d Cir. 1999) (finding that a Title VII sex stereotyping claim could be stated if a woman was fired for being perceived as "too feminine").

[52] The intersection between professional appearance policies and racialized and gendered expectations of such is discussed more fully in Part IV, *infra*.

[53] It bears note that the seemingly inherent tie between pregnancy and sex is complicated by the experience of transgender men or otherwise nonbinary individuals who may also become pregnant. The definition of "woman" is increasingly fluid and less subject to the sweeping generalizations that undergird much of the American legal system.

[54] Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

[55] *Id.* at 496–97 n.20 (1974) ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

[56] 429 U.S. 125, 139 (1976).

missed the mark on the sex-based nature of pregnancy discrimination, Congress superseded *Gen. Elec. Co.* with the Pregnancy Discrimination Act.[57] The Act specified that Title VII's use of "because of sex" included "because of or on the basis of pregnancy, childbirth, or related medical conditions."[58]

While both pregnancy and wearing the hijab can be viewed as female performance of the exclusively feminine, there is an immense and obvious distinction between pregnancy and the hijab: pregnancy is a naturally occurring, biological fact and the hijab, no matter how central some Muslim women may consider it to their identity and religious practice, is not. Courts have used the biological fact of pregnancy to support a determination that pregnancy discrimination is sex discrimination under Title IX.[59] More to the point, Title IX regulations explicitly prohibit pregnancy discrimination.[60] Nonetheless, through the PDA and Title IX guidelines, Congress and DOE acknowledge that discrimination affecting even a subset of women that is tied to their sex can constitute sex discrimination.

It is apparent that none of these analyses offer a straightforward solution to bringing a hijab-based Title IX claim. This dearth of clarity underscores the complexities and challenges that exist to any potential plaintiff seeking to state a plausible Title IX claim for sex discrimination on the basis of being discriminated against for wearing the hijab. On a gut level, describing such discrimination as sex discrimination makes sense—only women wear the hijab, for many Muslim women, it is an obligation of their womanhood. The hijab also runs counter to stereotypes of "attractive femininity" and how American women present themselves. However, the law does not offer easy recognition of a hijabi victim's sex discrimination experience. *Geduldig* is illustrative of how federal courts have shied away from a more encompassing reading of sex discrimination that recognizes that an experience does not have to be universally applicable to women to be tied to sex. Less charitably, narrower understandings may be a manifestation of judicial reluctance to move the needle in favor of individuals in a way that would force institutions to reckon with the increased liability that would necessarily follow from adopting a more encompassing reading of sex discrimination. Nonetheless, even as the law currently stands, there do appear to be potential pathways to articulating a sex discrimination claim predicated on the hijab.

---

[57] 42 U.S.C. § 2000e(k) (2012).

[58] *Id.*

[59] Conley v. Nw. Fla. State Coll., 145 F. Supp. 3d 1073, 1077 (N.D. Fla. 2015) ("The common thread running through these definitions is a focus on reproduction, including the 'structural' and 'functional' differences between typical male and female bodies. Thus, at least by virtue of common usage, the meaning of the term 'sex' in § 1681 includes pregnancy.").

[60] 34 C.F.R. § 106.40 ("A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."). *See also* Chipman v. Grant Cty. Sch. Dist., 30 F. Supp. 2d 975, 977 (E.D. Ky. 1998).

IV. Traditionally Black Hairstyles under Title VII as a Lens for Anti-Discrimination Protections for Hijabi Students

The question of whether women who wear the hijab are protected by Title IX is a unique one, featuring an interplay between sex and religion that is rarely, if ever, analyzed in the American educational context. While not an exact analogue, how courts have analyzed policies pertaining to Black hairstyles in the workplace under Title VII can offer a glimpse into how a Title IX hijab claim like Ms. McAvoy's would potentially be addressed by courts.[61] Both the hairstyles and hijab have some connection to the protected characteristic (race and sex respectively) but are not a *necessary* outgrowth of that characteristic. Both also implicate questions of stereotype. As with the hijab, there can be an almost instinctual grasp that if a Black person is not hired because her employer has a policy against braids, afros, or dreadlocks that is an act of discrimination. Such discrimination is rooted in centuries of American anti-Blackness and manifested in part through biases against Black hair texture and traditionally Black hairstyles, seeping into professional dress codes.[62]

As will be discussed below, uniformly, the federal courts before whom the Black hairstyle question has arisen have failed to find discriminatory policies banning traditionally Black hairstyles from the workplace.[63] Courts' failure to do so evinces an unwillingness to grapple with the history undergirding such policies. This failure also implicates a judicial inability to recognize the lived realities of discrimination for vulnerable populations. Thus, these cases reveal the tangle of law that courts are willing to create to obfuscate discrimination, particularly when some aspect of appearance is perceived as "non-white" or otherwise "foreign."

Rogers v. American Airlines was one of the earliest cases to evaluate the legality of policies banning Black hairstyles under Title VII. Plaintiff Rogers, an employee of American Airlines, had been forbidden from wearing her hair in braided cornrows by a grooming policy purportedly designed to help American Airlines project a "conservative and business-like image."[64] Rogers contended that the grooming policy discriminated against her

---

[61] *See, e.g.*, Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (collecting cases).

[62] *See, e.g.*, Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR Daily (Jul. 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/ [perma.cc/78Z3-Q622]; Ginia Bellafante, *The Decriminalization of Black Hair*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/nyregion/black-hair-decriminalization-ny.html [perma.cc/GPE9-2SHD]; Imani Gandy, *Black Hair Discrimination Is Real, But Is It Against the Law*, Rewire News (Apr. 17, 2017), https://rewire.news/ablc/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/ [perma.cc/25WZ-CRWN].

[63] *See, e.g.*, Rogers v. American Airlines, 527 F. Supp. 229, 233 (S.D.N.Y. 1981); Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032 (11th Cir. 2016) (collecting cases).

[64] *Rogers*, 527 F. Supp. at 233.

on the basis of race, alleging that braided hair was central to the culture and history of Black American women.[65] The district court rejected the claim, determining that the policy did not discriminate on the basis of an "immutable characteristic" and dismissing out of hand that the hairstyle was "socioculturally associated with a particular race or nationality."[66] Rather, the Court found that the style was an "easily change[able] characteristic" and thus "not an impermissible basis for distinction in the application of employment practices by an employer."[67] At the same time, the Court conjectured that a policy forbidding *natural* hair *could* violate Title VII, because it would implicate immutable characteristics.[68] Thus, *Rogers* found that, while employers' biases about professional dress were not to be questioned or changed, Black employees' hairstyles were sufficiently mutable to be pressed or covered into compliance to conform with employers' racialized standards of professionalism.

Rogers reveals a few facets relevant to how hijab claims may be considered in the context of sex or gender. First, the Court's dismissiveness to the "sociocultural[ ] associat[ion of braided hair] with a particular race or nationality" may predict a similar judicial unwillingness to recognize the sociocultural association of the hijab with a particular gender expression. Such an unwillingness may be rooted either in a lack of deep understanding of what these symbols mean or simply not according that symbolism the importance it is due. Second, the *Rogers* decision demonstrates how the notion of professionalism in dress, which also arose in Ms. McAvoy's case, can, on a conscious or subconscious level, incorporate anti-Blackness and advance race-based stereotypes for professionalism and highlight the extent to which courts defer to that assessment by institutions.[69] Like braided hair, the hijab is popularly perceived as non-white and non-male. As such, it contrasts with the professional norm set by and in service of white men.[70] Therefore, the hijab, like Black hairstyles, is not accredited with the presumption of de facto professionalism. Unless a court is willing to interrogate the sources of professional appearance ideals, dress-code related explanations,

---

[65] *Id.* at 231–232.
[66] *Id.* at 232.
[67] *Id.*
[68] *Id.*
[69] *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134, 1207 (2004).
[70] *See* Aysa Gray, *The Bias of 'Professionalism' Standards*, Stanford School of Innovation Review (Jun. 4, 2019), https://ssir.org/articles/entry/the_bias_of_professionalism_standards# [perma.cc/M678-X82G]. *See also* SB-188, Cal. State Sen., Reg. Sess. (Cal. 2019) ("Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional.").

like American Airlines', are likely to continue to be accepted without question, allowing discrimination to persist.[71]

Federal courts' thinking on this issue has not advanced in the last thirty years—if anything, courts have confirmed their regression. In 2016, in *Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, the Eleventh Circuit rejected an argument that a prohibition on dreadlocks constituted racial discrimination after an employer rescinded an offer of employment to an applicant that had been conditioned on the applicant agreeing to cut his dreadlocks.[72] To connect the dots between "immutable" natural hair and ensuing traditionally Black hairstyles, the EEOC contended that dreadlocks were a racial characteristic because wearing hair in that manner was "physiologically and culturally associated with people of African descent."[73] The Eleventh Circuit, however, was not persuaded and declined to go against other courts that had rejected Title VII protection for "hairstyles culturally associated with race."[74] Despite allegations in the complaint explaining the history of Black hair and biases experienced by individuals who wear their hair naturally, the Eleventh Circuit found that no Title VII claim could be stated because the EEOC had not alleged that dreadlocks were an "immutable characteristic of Black persons."[75] Nor was the Eleventh Circuit persuaded by historical, physiological, and cultural association of dreadlocks with race.[76] As in *Rogers*, the Eleventh Circuit found the mutability distinction was key and explicitly rejected the argument that Black hairstyles like dreadlocks were immutable characteristics even though they had developed out of the natural texture of Black hair.[77] Accordingly, the Eleventh Circuit determined that while discrimination on the basis of natural Black hair texture, an immutable characteristic, was prohibited by Title VII, discrimination on the basis of Black hairstyles, regardless of whether they were an outgrowth of that natural hairstyle, was not prohibited by Title VII because the hairstyles themselves were mutable.[78]

Rogers and *Catastrophe Mgm't* offer narrow visions of antidiscrimination, divorced from history and plausible only by blinding oneself to how

[71] To wit, in *Camara*, the Court rejected a Title VII religious discrimination claim brought by a Muslim woman who wore the hijab and was terminated because her employer had determined that her hijab did not comport with the dress code. *Camara,* 292 F. Supp. 3d at 1333–34. The Court found that the termination was due to Ms. Camara's "intransigence" and that the employer had been "left [with] no choice" but to terminate her. *Id.*

[72] 852 F.3d 1018, 1035 (11th Cir. 2016) (affirming dismissal of complaint).

[73] *Id.* at 1031 (noting the EEOC's argument was partially grounded in its compliance manual, which stated that "Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as . . . cultural dress and grooming practices . . . .").

[74] *Id.* at 1032 (collecting cases).

[75] *Id.* at 1030.

[76] *See id.*

[77] *Id.*

[78] *Id.*

racism is intertwined with seemingly neutral standards like professionalism. These decisions, that refuse to recognize policies deeming traditionally Black hairstyles unprofessional and, therefore, inappropriate in the workplace extending from race discrimination emerge from an impossible space in which Black hair texture is protected but the unique ways of wearing Black hair due to its texture is not.[79]

Taken in sum, these cases reveal a broader judicial failure to engage in a full analysis to investigate a claim of discrimination, by assessing a challenged practice against a historic and practical backdrop. While courts are able to cognize that discrimination against natural Black hair is race-based discrimination, the analysis disintegrates at the second step where courts should examine a) why Black hair is often worn in certain hairstyles and b) why those certain hairstyles are designated unprofessional. And because the hijab—even more so than traditionally Black hairstyles—is a step or two away from what can be conceptualized as a "physical core" or a phenotypic manifestation of a protected characteristic, it is not the type of manifestation of sex that courts are accustomed to recognizing or protecting. It is unlikely that a court will look at a Title IX claim pursuant to hijab-based discrimination and analyze the hijab and its perception in a broader context that comprehends its ties to womanhood and the animus and vulnerability experienced by Muslim women vis à vis this gender expression. Simply, American jurisprudence has not been constructed or operated to reflect the lived experiences and the accompanying subtleties for women, people of color, or other vulnerable minorities.

V. Ways Forward: Creating Coverage for Hijabi Students

As this Article has emphasized, the current state of antidiscrimination law does not offer a ready solution for full coverage against hijab-based discrimination in schools. Title VI does not cover religion; Title IX may not fully cognize the hijab as a manifestation of gender; and as the Title VII Black hairstyle cases show, courts often lack the tools, perspective, and willingness to engage in the necessary, rigorous analysis that fully captures the reality of discrimination. But it is also true that with increasing diversity and

[79] *But see* NYC Comm'n on Hum. Rts., *Legal Enforcement Guidance on Race Discrimination on the Basis of Hair* (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [perma.cc/AZ3B-6RPU]. A few months later, in July 2019, California became the first state to ban discrimination on the basis of natural hair, recognizing it as a proxy for race. *See* Liam Stack, *California Is First State to Ban Discrimination Based on Natural* Hair, N.Y. Times (June 28, 2019), https://www.nytimes.com/2019/06/28/us/natural-hair-discrimination-ban.html [perma.cc/RCE6-5YFB]. In the same year, both New York and New Jersey also passed legislation banning on discrimination based on hairstyles associated with race, with other states, like Florida, Illinois, Virginia, and Massachusetts considering similar laws. Mariel Padilla, *New Jersey Is Third State to Ban Discrimination Based on Hair*, N.Y. Times (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/us/nj-hair-discrimination.html [perma.cc/3EB8-995M].

the associated increase in bigotry,[80] such broad gaps in the law cannot and should not exist, particularly as they impact individuals, like Muslim women and girls who cover, at an intersectionality of vulnerabilities.

The first, and perhaps in some ways, cleanest solution is to legislatively expand Title VI to encompass religious discrimination. Title VI would then come into accord with its counterpart sections of the Civil Rights Act, like Title II, Title IV, and Title VII. It would also avoid the problematic, essentialist tangle of attempting to tie religion to race, color, or national origin, which, among other problems, inevitably leaves individuals who do not look like a stereotype of their faith, like Ms. McAvoy, uncovered. And whereas, in 1964, religious groups may have balked at the inclusion of religion in the ambit of Title VI, leading Congress to shy away from adding it, it is hard to imagine that such a proposal now would fail to gain bipartisan support. In addition to making religion a protected class, Title VI should offer a religious accommodation framework, like that already in operation under Title VII, which provides that an employer should accommodate an employee's religious practice unless the employer can establish that the accommodation would impose undue hardship.[81] Currently, anything more than a *de minimis* cost to the employer is considered an undue hardship.[82] But educational institutions are not corporations and amending Title VI to include robust religious accommodation practices would assure that educational opportunities are available to all. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.,* ("ADA") provides a model for a heightened standard for undue hardship that a potential Title VI religious accommodation framework could adopt. The ADA defines an undue hardship as one that imposes "significant difficulty or expense" on the accommodator.[83] A standard like the ADA's that gives weight to the importance of religious accommodation, while nonetheless balancing the realities of an educational institution's resources and operations, is a better bulwark against religious discrimination in schools. The amending of Title VI, therefore, can provide a relatively straightforward means of guaranteeing protections for female students who wear the hijab.

A slower, but nonetheless potential, solution to the dearth of protections for women who wear the hijab in schools is an expansion of judicial under-

---

[80] *See, e.g.*, Maureen A. Craig, Julian M. Rucker & Jennifer A. Richeson, *Pitfalls and Promise of Increasing Racial Diversity: Threat, Contact, and Race Relations in the 21st Century*, 27(3) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 188, 189 (2018) (noting that in the results of a study "White Americans for whom the changing national racial demographics were salient expressed more exclusionary attitudes—for example, greater preferences for racial homophily in their social lives, and more pro-White, antiminority bias on both self-report and more automatic assessments of racial attitudes").

[81] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 66 (1977).

[82] *Id.* at 84. That standard has come under criticism, and the has Supreme Court declined to decide the issue at this time. *See* Patterson v. Walgreen Co., 727 F. App'x 581, 583 (11th Cir. 2018), cert. denied, 589 U. S. ____ (Feb. 24, 2020) (No. 18–349).

[83] 42 U.S.C. § 12111(10) (2012).

standing of gender and sex under Title IX. In some ways, certain cases contemplating transgender rights offer a good example by taking a broader, elastic lens on gender identity and expression that encompasses the reality of gender experience. In expanding the judicial understanding of gender and sex under Title IX, courts should look at the purpose of Title IX to ensure access to education regardless of sex or gender and apply that thoroughly, working to understand the myriad ways that sex and gender manifest themselves, particularly as they intersect with other issues of identity. This would be able to capture the sex-rooted natures of stereotypes about or particularized animus against women and girls from different backgrounds, not erasing the fact that sex is a key part of why these women and girls are experiencing discrimination. Further, the development of such a paradigm would advance the law in a way that is necessary to building a robust antidiscrimination framework for Muslim women and other vulnerable groups.

VI. Conclusion

The United States is a nation of increasing diversity and because of that, when discrimination occurs, it may not be readily addressed under operative law, either because those who crafted the law did not imagine such discrimination or because those charged with analyzing the law now cannot recognize such discrimination when it occurs. Both are failures. And for Ms. McAvoy, these failures resulted in a legal no (wo)man's land where a young woman was shamed and excluded from her school because of how her faith practice affected her gender presentation and she was not clearly or definitively protected by the law. Ms. McAvoy's case is but one such that underscores the stakes of this issue. Thus, antidiscrimination laws that take a broader and deeper perspective are necessary to ensure recognition and thus consequences for discrimination against Muslim women who wear the veil in educational settings. In this context, broadening the perspective on discrimination can be accomplished through expanding Title VI legislatively to cover religion and create a mechanism for religious accommodations. Deepening the perspective, both in this context and in others, can be realized through jurisprudential developments that seek to understand discriminatory behavior in its real-world context that contemplates history and culture, that examines hijabs and braids not simply as accessories or hairstyles but as fundamentally associated with how identities are not only manifested but perceived and therefore acted against. The best, most comprehensive solution, of course, is one that incorporates the legislative fix along with a more developed and finely attuned judicial understanding of discrimination to tackle questions of discrimination from both angles and offer a living lens on individuals' rights and dignities. So long as the law treads a narrow path on actionable discrimination, it guarantees that some individuals—likely the most vulnerable—will be made victims of discrimination that the law is not designed to perceive let alone reach and prevent.