Volume 61, Issue 5 Page 1033

Stanford Law Review

THE INJUSTICE OF APPEARANCE

Deborah L. Rhode

THE INJUSTICE OF APPEARANCE

Deborah L. Rhode*

* Ernest W. McFarland Professor of Law, Director of the Center on the Legal Profession, Stanford University. The comments of Richard Ford and Laura Rosenbury, and the research assistance of Mariko Hirose, Foster Johnson, Mary Tye, Rachel Velcoff, and the Robert Crown Law Library reference staff is gratefully acknowledged. This Article will be incorporated into my forthcoming book. DEBORAH L. RHODE, THE INJUSTICE OF APPEARANCE (forthcoming 2010).

INTRODUCTION

"It hurts to be beautiful" is a cliché I grew up with. "It hurts not to be beautiful" is a truth I acquired on my own. But not until finishing the research that led to this Article did I begin to grasp the cumulative cost of our cultural preoccupation with appearance. Over a century ago, Charles Darwin concluded that when it came to beauty, "[n]o excuse is needed for treating the subject in some detail."[1] That is even truer today; our global investment in appearance totals over $200 billion a year.[2] Yet when it comes to discrimination based on appearance, an excuse for discussion does seem necessary, particularly for a legal scholar. Given all the serious problems confronting women—rape, domestic violence, poverty, child care, unequal pay, violations of international human rights—why focus on looks? Most people believe that bias based on beauty is inconsequential, inevitable, or unobjectionable.[3]

They are wrong. Conventional wisdom understates the advantages that attractiveness confers, the costs of its pursuit, and the injustices that result. Many individuals pay a substantial price in time, money, and physical health. Although discrimination based on appearance is by no means our most serious form of bias, its impact is often far more invidious than we suppose. That is not to discount the positive aspects of beauty, including the pleasure that comes from self-expression. Nor is it to underestimate the biological role of sex appeal or the health and fitness benefits that can result from actions prompted by aesthetic concerns. Rather, the goal is to expose the price we pay for undue emphasis on appearance and the strategies we need to address it.

What makes this issue so important is both our failure to address it and the unwillingness of so many legal scholars and policy makers to take that failure seriously. Of all the problems that the contemporary women's movement has targeted, those related to appearance have shown among the least improvement. In fact, by some measures, such as the rise in cosmetic surgery and eating disorders, our preoccupation with attractiveness is getting worse. Yet many

1. CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX 578 (Robert Maynard Hutchins ed., Encyclopaedia Britannica 1952) (1871).

2. *See infra* Part I.D.

3. *See* GORDON L. PATZER, THE PHYSICAL ATTRACTIVENESS PHENOMENA 5 (1985) (discussing popular misconceptions).

commentators see discrimination based on appearance as inevitable and inappropriate for legal prohibition.

This Article, by contrast, argues that discrimination based on appearance is a significant form of injustice, and one that the law should remedy. Part I explores the importance of appearance and the costs of discrimination on that basis. Part II develops the rationale for prohibiting such discrimination. Part III reviews the limitations of prevailing civil rights laws concerning appearance and provides the first systematic research on the small number of state, local, and international laws that explicitly prohibit some forms of discrimination based on appearance. Part IV concludes with legal, policy, and cultural strategies to reduce the price of prejudice.

I. THE IMPORTANCE OF APPEARANCE AND THE COSTS OF CONFORMITY

> I'm tired of all this nonsense about beauty being only skin deep. That's deep enough. What do you want, an adorable pancreas? —Jean Kerr

Beauty may be only skin deep, but that is deep enough to confer an unsettling array of advantages. Although most of us learn at early ages that physical attractiveness matters, few of us realize how much. Nor do we generally recognize the extent to which our biases conflict with meritocratic principles. In a recent national survey, only a third of employees believed that, in their workplaces, physically attractive individuals were more likely to be hired or promoted.[4] Yet a cottage industry of studies indicates that such bias is more pervasive, and that individuals underestimate the extent to which attractiveness skews their evaluations.[5] Appearance imposes penalties that far exceed what most of us assume or would consider defensible.

A. *Definitions of Attractiveness and Forms of Discrimination*

A threshold question is what exactly do we mean by "attractive." Is its influence something that researchers can adequately measure? Although conventional wisdom holds that beauty is in the eye of the beholder, in fact most beholders agree about the appeal of certain characteristics. Sociobiologists see an evolutionary basis for these preferred features. Facial symmetry, unblemished skin, and firm breasts have been widely viewed as evidence of health and fertility.[6] To be sure, some preferences, particularly

4. Employment Law Alliance, *National Poll Shows Public Opinion Sharply Divided On Regulating Appearance—From Weight to Tattoos—In the Workplace*, Mar. 22, 2005, http://www.employmentlawalliance.com/en/node/1321.

5. PATZER, *supra* note 3, at 10-13.

6. April Fallon, *Culture in the Mirror: Sociocultural Determinants of Body Image*, *in* BODY IMAGES: DEVELOPMENT, DEVIANCE, AND CHANGE 80, 82 (Thomas F. Cash & Thomas Pruzinsky eds., 1990) [hereinafter BODY IMAGES].

those regarding grooming and body shape, have varied across time and culture. But the globalization of mass media and information technology has brought an increasing convergence in standards of attractiveness.[7]

Researchers on appearance have achieved a substantial measure of reliability through a "truth in consensus" method.[8] In essence, subjects rate a photograph or an individual on a scale of attractiveness, and those ratings are then averaged to produce an overall assessment. Such methods yield a strikingly high degree of consensus even among individuals of different sex, race, age, socioeconomic status, and cultural backgrounds.[9]

Research on weight discrimination also relies on widely shared measures, although some terminology is controversial. The Centers for Disease Control and Prevention (CDC) defines overweight and obesity based on a Body Mass Index (BMI), a ratio of height to weight; clinicians define obesity as 20% over ideal body weight. By CDC standards, about two-thirds of American adults are overweight or obese.[10] The National Association to Advance Fat Acceptance (NAAFA) prefers the term "fat," which its members believe carries less stigma and fewer contested connotations of abnormality.[11] However, in conventional usage, "fat" is generally taken as more offensive than "overweight." And for many researchers, "fat" appears less precise and less consistent with social science and legal terminology. This Article follows the preferences of these different constituencies in describing their work. "Obesity" and "overweight" are used to discuss social science findings and legal rulings, and "fat" is used to discuss the efforts of activists.

A related issue is what we mean by "discrimination based on appearance." Such bias falls along a continuum. At one end is discrimination based on characteristics that are difficult or impossible to change, such as height and

---

7. PATZER, *supra* note 3, at 16-17.

8. *See, e.g.*, LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES 4 (1992); PATZER, *supra* note 3, at 17; Vicki Ritts, Miles Patterson & Mark E. Tubbs, *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RES. 413, 414 (1992).

9. *See* sources cited *supra* note 8.

10. CTRS. FOR DISEASE CONTROL AND PREVENTION, PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 2003-2004 (2006), http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm. BMI is calculated by dividing weight by the square of height in inches and then multiplying the result by 703. The CDC defines overweight as having a BMI between 25 and 29.9 and a BMI of above 30 as obese. CTRS. FOR DISEASE CONTROL AND PREVENTION, ABOUT BMI FOR ADULTS (2008), http://www.cdc.gov/nccdphp/dnpa/healthyweight/assessing/bmi/adult_BMI/about_adult_BMI.htm#Interpreted; *see also* AM. OBESITY ASS'N, FACT SHEETS: WHAT IS OBESITY?, http://obesity1.tempdomainname.com/subs/fastfacts/obesity_what2.shtml (last visited Mar. 30, 2009) (defining obesity and BMI). For clinical definitions, see sources cited in Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997).

11. NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, CONSTITUTION FOR THE NATIONAL ASSOCIATION TO ADVANCE FAT ACCEPTANCE, INC. 2 (2008), http://www.naafaonline.com/dev2/about/byLaws/Constitution-VER08.pdf; SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION 29 n.4 (2000).

facial features. Although sex, race, and ethnicity affect appearance, they implicate identity in a more fundamental sense than other traits and are generally considered separately in legal and theoretical discussions of discrimination. At the other end of the continuum are purely voluntary characteristics, such as fashion and grooming. In between are mixed traits, such as obesity, which have both biological and behavioral foundations. Social science research on appearance generally does not distinguish among these forms of bias; what makes a given individual attractive often reflects both innate features and voluntary grooming choices. However, as subsequent discussion suggests, discrimination based on factors beyond personal control generally raises the most significant ethical concerns and may sometimes justify different legal and policy treatment than other forms of appearance-related bias.[12]

B. *Interpersonal Relationships and Economic Opportunities*

The significance of appearance begins early. Parents and teachers give less attention to less attractive infants and children, and they are less likely to be viewed as good, smart, cheerful, likeable, and academically gifted than their more attractive counterparts.[13] Children themselves quickly internalize these judgments. They ascribe better personality traits to good-looking individuals and prefer them as friends.[14] The teasing and ostracism that unattractive and overweight children experience can lead to significant mental health problems and less extracurricular involvement, which further compound such psychological difficulties.[15]

The importance of appearance persists throughout adult life. The preference for attractiveness comes as no surprise, but the extent of the advantages is less obvious. A wide array of research documents a phenomenon that psychologists describe as "what is beautiful is good." Less attractive individuals are less likely to be viewed as smart, happy, interesting, likeable,

---

12. *See infra* Part II.

13. For parents, see STEVE JEFFES, APPEARANCE IS EVERYTHING: THE HIDDEN TRUTH REGARDING YOUR APPEARANCE AND APPEARANCE DISCRIMINATION 91 (1998); PATZER, *supra* note 3, at 9. For teachers, see Gerald R. Adams, *Racial Membership and Physical Attractiveness Effects on Preschool Teachers' Expectations*, 8 CHILD STUDY J. 29 (1978). *But see* Gerald R. Adams & Joseph C. LaVoie, *The Effect of Student's Sex, Conduct, and Facial Attractiveness on Teacher Expectancy*, 95 EDUCATION 76 (1974) (finding that facial attractiveness of students had little effect on teacher assessment of students' peer relations, attitudes, and work habits).

14. *See* PATZER, *supra* note 3, at 12; SOLOVAY, *supra* note 11, at 33-35; Karen K. Dion & Ellen Berscheid, *Physical Attractiveness and Peer Perception Among Children*, 37 SOCIOMETRY 1 (1974).

15. *See* Janet D. Latner & Marlene B. Schwartz, *Weight Bias in a Child's World*, *in* WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES 54, 57-62 (Kelly D. Brownell et al. eds., 2005) [hereinafter WEIGHT BIAS]; Dianne Neumark-Sztainer & Marla Eisenberg, *Weight Bias in a Teen's World*, *in* WEIGHT BIAS, *supra*, at 68, 69-71.

successful, and well-adjusted.[16] They are less likely to marry and to marry someone well off; and surveyed college students would prefer a spouse who is an embezzler, drug user, or shoplifter than someone who is obese.[17] Unattractive litigants receive higher sentences and lower damage awards in simulated legal proceedings, while attractive litigants have an advantage.[18] Not only are the less attractive treated worse, their unfavorable treatment can erode self-esteem, self-confidence, and social skills, which compounds their disadvantages.[19]

Appearance also skews judgments about competence and job performance. In studies where subjects evaluate written essays, the same material receives lower ratings for ideas, style, and creativity when an accompanying photograph shows a less attractive author.[20] Resumes get a more favorable assessment when they are thought to belong to more attractive individuals.[21] Overweight people are subject to similar bias; they are seen as less likeable and as having less self-control, self-discipline, effective work habits, and ability to get along with others.[22] Good-looking faculty receive better course evaluations from

16. Karen Dion, Ellen Berscheid & Elaine Walster, *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285 (1972); *see* Ellen Berscheid, *An Overview of the Psychological Effects of Physical Attractiveness*, *in* PSYCHOLOGICAL ASPECTS OF FACIAL FORM 1, 9-10 (G. William Lucker et al. eds., 1981); Thomas F. Cash, *The Psychology of Physical Appearance: Aesthetics, Attributes, and Images*, *in* BODY IMAGES, *supra* note 6, at 51, 53.

17. *See* NANCY ETCOFF, SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY 85 (1999) (noting that unattractive women are less likely to marry); PATZER, *supra* note 3, at 89-93, 119 (analyzing the effects of attractiveness on marriages); Cash, *supra* note 16, at 51, 55 (describing the relationship between attractiveness and intimacy levels); Arthur M. Vener, Lawrence R. Krupka & Roy J. Gerard, *Overweight/Obese Patients: An Overview*, 226 PRACTITIONER 1102, 1103 (1982) (documenting students' preference for marrying members of stigmatized groups over obese individuals).

18. David B. Gray & Richard D. Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOL. REP. 727 (1976); Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994); Cookie Stephan & Judy Corder Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOL. 149 (1977).

19. *See* JEFFES, *supra* note 13, at 56-57; *see also* Cash, *supra* note 16, at 53, 57 (noting the benefits attractive people receive); Judith H. Langlois et al., *Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review*, 126 PSYCHOL. BULL. 390, 404-05 (2000) (describing the advantages of attractiveness to adults and children and the impact of attractiveness on behavior).

20. 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).

21. M.Y. Quereshi & Janet P. Kay, *Physical Attractiveness, Age, and Sex as Determinants of Reactions to Resumes*, 14 SOC. BEHAV. & PERSONALITY 103 (1986).

22. SOLOVAY, *supra* note 11, at 101-05; Janna Fikkan & Esther Rothblum, *Weight Bias in Employment*, *in* WEIGHT BIAS, *supra* note 15, at 15, 16-18; *see also* Janet D. Latner, Albert J. Stunkard & G. Terence Wilson, *Stigmatized Students: Age, Sex, and Ethnicity Effects in the Stigmatization of Obesity*, 13 OBESITY RES. 1226 (2005) (finding that

students, and good-looking students receive higher ratings on intelligence from teachers.[23]

Unsurprisingly, the importance of looks varies across occupations and geographic locations.[24] On the whole, however, less attractive individuals are less likely to be hired and promoted, and they earn lower salaries despite the absence of any differences in cognitive ability.[25] The penalty holds even in fields like law, where appearance bears no demonstrable relationship to job performance.[26] Weight and age play a similar role. About 60% of overweight women and 40% of overweight men report experiences of employment discrimination.[27] Researchers consistently find a significant income penalty for being overweight, particularly among women, and a bonus for attractiveness in both sexes.[28] Well-documented bias against older workers has imposed increasing pressures to pass for young.[29]

---

stigmatization of obese people was greater than stigmatization of those with physical disabilities).

23. Daniel S. Hamermesh & Amy Parker, *Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369 (2005); Vicki Ritts, Miles L. Patterson & Mark E. Tubbs, *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RES. 413 (1992).

24. JEFFES, *supra* note 13, at 87.

25. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174 (1994); Megumi Hosoda, Eugene F. Stone-Romero & Gwen Coats, *The Effects of Physical Attractiveness on Job-Related Outcomes: A Meta-Analysis of Experimental Studies*, 56 PERSONNEL PSYCHOL. 431 (2003); Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 96 AM. ECON. REV. 222, 233-34 (2006); Stephanie Armour, *Your Appearance, Good or Bad, Can Affect Size of Your Paycheck*, USA TODAY, July 20, 2005, at 1B.

26. Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172 (1998). Even on tasks like completing a computer maze, where appearance is demonstrably irrelevant, attractive individuals are erroneously predicted to perform better. Mobius & Rosenblat, *supra* note 25, at 229, 234.

27. SOLOVAY, *supra* note 11, at 103 (describing survey by the National Association to Advance Fat Acceptance).

28. J. ERIC OLIVER, FAT POLITICS: THE REAL STORY BEHIND AMERICA'S OBESITY EPIDEMIC 80 (2006) (discussing studies finding a wage penalty for white women); SOLOVAY, *supra* note 11, at 106 (citing a study finding an income penalty for overweight male MBAs); Charles L. Baum II & William F. Ford, *The Wage Effects of Obesity: A Longitudinal Study*, 13 HEALTH ECON. 885, 896-98 (2004) (finding wage penalty for both sexes that cannot be explained by socioeconomic status and other variables); John H. Cawley, *The Labor Market Impact of Obesity*, *in* OBESITY, BUSINESS AND PUBLIC POLICY 76 (Zoltan J. Acs & Alan Lyles eds., 2007) (summarizing research finding wage penalties for obese white women and women of color, and for overweight white women); Sidney Katz, *The Importance of Being Beautiful*, *in* DOWN TO EARTH SOCIOLOGY: INTRODUCTORY READINGS 310, 311 (James M. Henslin ed., 1997); Kate Sablosky, *Probative 'Weight': Rethinking Evidentiary Standards in Title VII Sex Discrimination Cases*, 30 N.Y.U. REV. L. & SOC. CHANGE 325, 334-35 (2006) (citing studies finding higher poverty rates and income penalties ranging from 6% to 24% among obese women, irrespective of socioeconomic status and aptitude test scores); Eric Nagourney, *Vital Signs: Patterns; When Obesity Comes With a Price Tag*, N.Y. TIMES, Nov. 28, 2000, at F9 (finding a net worth differential of $136,000 for obese women ages 57-67 as compared to nonobese women); David Lempert, *Women's Increasing Wage Penalties from*

C. *Self-Esteem and Quality of Life*

Given these consequences, it makes sense for individuals to be concerned about their appearance. Still, the extent of that concern is striking. In one representative survey, three-quarters of women ranked appearance as one of the top five qualities affecting their self-image, and a third ranked it as the most important quality, above job performance and intelligence.[30] Almost 90% consider how they look either "very important" or "somewhat important" to "feelings about who they are."[31] Over half of young women report that they would prefer to be hit by a truck than be fat, and two-thirds would rather be mean or stupid.[32] Most research suggests that obese individuals are at greater risk for depression, anxiety, low self-esteem, and other psychological and mental health problems.[33] Women are less satisfied with their appearance than with any other important life dimension but financial success.[34] As subsequent discussion suggests, much of the reason lies in the ridicule, shame, guilt, and discrimination that social pressures impose.

How much influence appearance has on overall quality of life is subject to debate. In general, however, most people overstate the importance of appearance in contributing to overall life satisfaction. Other factors, such as

---

Being Overweight and Obese (U.S. Bureau of Labor Statistics, Working Paper No. 414, 2007), *available at* http://www.bls.gov/osmr/pdf/ec070130.pdf (finding a significant and continual increase in the wage penalty for overweight and obese white women over the course of twenty years).

29. MARGARET MORGANROTH GULLETTE, AGED BY CULTURE (2004) (describing the fears men and women face in growing older); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 91 (2003) (arguing that stereotypes about older people lead to ageism in employment contexts).

30. NANCY FRIDAY, THE POWER OF BEAUTY 368 (1996).

31. PRINCETON SURVEY RESEARCH ASSOCIATES, POSSIBILITIES AND PERILS: HOW GENDER ISSUES UNITE AND DIVIDE WOMEN 66 (2001). By contrast, only 42% of men consider looks very important and 45% consider looks very important. *Id.*

32. MARGO MAINE, BODY WARS: MAKING PEACE WITH WOMEN'S BODIES 19 (2000). In one survey, women rated losing between ten and fifteen pounds as more desirable than success in work or love. NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 185-86 (1991); *see also* SOLOVAY, *supra* note 11, at 34 ("[I]n one study, almost 30,000 women identified weight loss as so important they would choose losing weight above the achievement of any other goal . . . .").

33. For a summary of the evidence and a finding of poorer satisfaction, see KYLIE BALL, DAVID CRAWFORD & JUSTIN KENARDY, *Longitudinal Relationships Among Overweight, Life Satisfaction, and Aspirations in Young Women*, 12 OBESITY RES. 1019 (2004). However, not all research finds lower satisfaction. GINA KOLATA, RETHINKING THIN: THE NEW SCIENCE OF WEIGHT LOSS—AND THE MYTHS AND REALITIES OF DIETING 93 (2007). Much may depend on whether individuals blame themselves for the bias they experience or attribute it to prejudice in others. Jennifer Crocker & Julie A. Garcia, *Self-Esteem and the Stigma of Obesity*, *in* WEIGHT BIAS, *supra* note 15, at 165, 166-68.

34. NANCY ETCOFF, *Foreword* to THE REAL TRUTH ABOUT BEAUTY: A GLOBAL REPORT: FINDINGS OF THE GLOBAL STUDY ON WOMEN, BEAUTY AND WELL-BEING (2004), *available at* http://www.campaignforrealbeauty.com/uploadedfiles/dove_white_paper_final.pdf.

control, optimism, and interpersonal relationships, are more important.[35] Much of the effort and concern that individuals now invest in their appearance would be better spent on family, friends, and activities that contribute to their personal growth and sense of social responsibility.[36]

D. *Time and Money*

The costs of our cultural preoccupation with appearance are substantial. In financial terms, the annual global investment in grooming totals at least $115 billion: an estimated $38 billion for hair, $24 billion for skin care, $20 billion for cosmetic surgery, $18 billion for cosmetics, and $15 billion for perfume.[37] Americans also spend some $40 billion on diets, and slightly more on fitness, much of which is driven by concern about weight.[38] Investments in time are similarly substantial; although impossible to quantify with precision, American women spend an average of three-quarters of an hour a day just on basic grooming, and significant additional time on shopping, exercising, and consuming services ranging from pedicures to cosmetic surgery.[39]

Whether the scale of such expenditures makes sense is a matter of controversy.[40] From an individual standpoint, their rationality depends both on what consumers are hoping to achieve, and how well informed they are about their investments. Most appearance-related expenditures deliver some benefits in terms of how people feel about themselves and how they are perceived by

---

35. ETCOFF, *supra* note 17, at 85-87; RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 62-63 (2005).

36. DAVID G. MYERS, THE PURSUIT OF HAPPINESS: WHO IS HAPPY—AND WHY 31-46 (1992) (describing the things other than money that make him happy); David G. Myers & Ed Diener, *Who Is Happy?*, 6 PSYCHOL. SCI. 10 (1995). For evidence on the contribution of volunteer activity to well-being, see studies reviewed in ALLAN LUKS WITH PEGGY PAYNE, THE HEALING POWER OF DOING GOOD: THE HEALTH AND SPIRITUAL BENEFITS OF HELPING OTHERS, at xi-xii, 17-18, 45-54, 60 (2d ed. 2001); DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 58-59 (2005).

37. ALEX KUCZYNSKI, BEAUTY JUNKIES: INSIDE OUR $15 BILLION OBSESSION WITH COSMETIC SURGERY 7-8 (2006).

38. For diets, see Gina Kolata, *Health and Money Issues Arise over Who Pays for Weight Loss*, N.Y. TIMES, Sep. 30, 2004, at A1; NATIONAL EATING DISORDERS ASSOCIATION, STATISTICS: EATING DISORDERS AND THEIR PRECURSORS (2006), http://www.nationaleatingdisorders.org/p.asp?WebPage_ID=286&Profile_ID=41138. For fitness, see SHARLENE HESSE-BIBER, AM I THIN ENOUGH YET?: THE CULT OF THINNESS AND THE COMMERCIALIZATION OF IDENTITY 47 (1997).

39. *How We Spend Time*, TIME, Oct. 30, 2006, at 52, 53.

40. *See* SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 42 (1990); LYNN S. CHANCER, RECONCILABLE DIFFERENCES: CONFRONTING BEAUTY, PORNOGRAPHY, AND THE FUTURE OF FEMINISM (1990); DEBORAH L. RHODE, THE INJUSTICE OF APPEARANCE (forthcoming 2010) (manuscript at ch. 2, on file with author); *see also* KATHY DAVIS, RESHAPING THE FEMALE BODY: THE DILEMMA OF COSMETIC SURGERY 85 (1995) (reporting that cosmetic surgery offers some women "a degree of solace" from body shame).

others. But much of the investment falls short of its intended effect or is induced by fraudulent or misleading claims.

The weight loss industry offers a case in point. Ninety-five percent of dieters regain their weight within one to five years.[41] Yet in the fantasy land of diet marketers, miracle products abound. Product claims the Federal Trade Commission (FTC) has targeted in consumer protection actions include:

- gel•ä•thin™ topical gel reduces fat and cellulite deposits on contact;
- Ultra LipoLean diet pill results in as much as four pounds of weight loss a week without the need to diet;
- Siluette Patch, made from seaweed, eliminates fat deposits and causes rapid weight loss without dietary changes;
- Xena RX diet pill with green tea extract blocks up to 40% of the absorption of fat;
- Fat Seltzer Reduce dietary supplement eliminates fat without diets or exercise;
- Hanmeilin Cellulite Cream with Chinese herbs causes up to ninety-five pounds of weight loss and eliminates fat and cellulite with "No Will Power Required";
- Himalayan Diet Breakthrough, a pill containing Nepalese Mineral Pitch, causes as much as thirty-seven pounds of weight loss in eight weeks without diets or exercise.[42]

Equally inventive are the ads for "cosmeceuticals," cosmetic products that include chemicals and drug-like ingredients that aren't regulated by the Federal Food and Drug Administration. As the discussion below notes, some have undisclosed medical risks, and many carry pseudoscientific names and pedigrees. Consider StriVectin wrinkle cream, marketed as "Better than Botox?," selling at $135 a tube, and endorsed by Dr. Daniel B. Mowrey, director of the manufacturer's scientific affairs. Dr. Mowrey's degree is in experimental psychology, not medicine, a fact that the company says it is not obligated to disclose because its ad does not state otherwise.[43] Such claims are

41. Francine Grodstein et al., *Three-Year Follow-up of Participants in a Commercial Weight Loss Program: Can You Keep It Off?*, 156 ARCHIVES OF INTERNAL MED. 1302, 1306; *see also* KOLATA, *supra* note 33.

42. *See* FTC v. AVS Marketing, Inc., No. 04-C-6915 (N.D. Ill. June 13, 2005), *available at* http://www.ftc.gov/os/caselist/0423042/0423042.shtm (Himalayan Diet Breakthrough); FTC v. CHK Trading Corp., No. 04-CV-8686 (S.D.N.Y. June 8, 2005), *available at* http://www.ftc.gov/os/caselist/0423093/0423093.shtm (Hanmeilin Cellulite Cream); FTC v. Iworx, No. 2:04-CV-00241-GZS (D. Me. May 24, 2005), *available at* http://www.ftc.gov/os/caselist/0423151/0423151.shtm (gel•ä•thin and LipoLean); FTC v. Femina, Inc., No. 04-61467 (S.D. Fla. May 17, 2005), *available at* http://www.ftc.gov/os/caselist/0423114/0423114.shtm (Siluette Patch, Fat Seltzer Reduce, and Xena RX).

43. Pallavi Gogoi, *An Ugly Truth About Cosmetics*, BUS. WK. ONLINE, Nov. 30, 2004, http://www.businessweek.com/bwdaily/dnflash/nov2004/nf20041130_2214_ db042.htm.

particularly problematic because a majority of Americans believe, incorrectly, that they cannot be made without "solid scientific evidence to support them."[44]

Even when advertising is not misleading, its expense often inflates the price of products well beyond what their contents justify. A *Consumer Reports* study found no correlation between the price and effectiveness of antiwrinkle creams.[45] Spending on cosmetics goes mainly to glitzy packaging and marketing; only seven cents out of every dollar goes for ingredients.[46]

Although consumer-protection law in theory provides remedies for fraudulent claims, in practice it is highly ineffective.[47] Traditionally, resource constraints have prevented the FTC and state consumer protection agencies from keeping up with the barrage of false or misleading advertisements involving beauty and diet products. As one FTC official explained, "[G]eneral appearance-enhancement claims . . . are not high in our prosecution list."[48] Only when marketers also emphasize health benefits has the Commission begun to take a closer look.[49] And although consumers might have fraud claims, they seldom have sufficient damages to make challenges worthwhile. "Wrinkle-reducing creams are expensive," notes one expert, "but to litigate against companies is even more expensive."[50]

---

44. *Widespread Ignorance of Regulation and Labeling of Vitamins, Minerals and Food Supplements*, 2 HEALTH CARE NEWS 1 (2002).

45. Roseann B. Termini & Leah Tressler, *American Beauty: An Analytical View of the Past and Current Effectiveness of Cosmetic Safety Regulations and Future Direction*, 63 FOOD & DRUG L.J. 257, 271 (2008); Natasha Singer, *The Cosmetics Restriction Diet*, N.Y. TIMES, Jan. 4, 2007, at G1 (discussing the *Consumer Reports* study and experts' responses).

46. WENDY CHAPKIS, BEAUTY SECRETS: WOMEN AND THE POLITICS OF APPEARANCE 93 (1986).

47. For an overview, see Jodie Sopher, *Weight Loss Advertising Too Good To Be True: Are Manufacturers or the Media to Blame?*, 22 CARDOZO ARTS & ENT. L.J. 933 (2005); *see also* Termini & Tressler, *supra* note 45, at 265-74 (discussing gaps in safety regulations and misleading claims).

48. Gogoi, *supra* note 43 (quoting Heather Hippsley, assistant director for the FTC's advertising-practices division); *see also* Michael Specter, *Miracle in a Bottle: Dietary Supplements Are Unregulated, Some Are Unsafe—and Americans Can't Get Enough of Them*, NEW YORKER, Feb. 2, 2004, at 64 (citing an FTC review finding that half of weight loss ads had false or misleading statements and noting the Commission's inability to keep pace).

49. In recent years, an increasing volume of bogus promises, together with research on the medical risks of ineffectual dieting, have prompted at least some new initiatives. One involves the FTC's Red Flag campaign, which urges media to adopt standards that screen out false weight loss claims and notifies outlets that have run such advertisements. FED. TRADE COMM'N, RED FLAG: BOGUS WEIGHT LOSS CLAIMS, A REFERENCE GUIDE FOR MEDIA ON BOGUS WEIGHT LOSS CLAIM DETECTION, *available at* http://ftc.gov/bcp/online/edcams/redflag/index.html. The "Big Fat Lie" initiative also targets companies that make false statements in national marketing campaigns. *See* Press Release, Fed. Trade Comm'n, FTC Launches "Big Fat Lie" Initiative Targeting Bogus Weight-loss Claims (Nov. 9, 2004), *available at* http://www.ftc.gov/opa/2004/11/bigfatliesweep.shtm. Fraudulent cosmetic claims, however, seldom result in FTC actions, because they do not raise health concerns.

50. Gogoi, *supra* note 43 (quoting Scott Bass, the partner heading the international food and drug practice at the law firm Sidley Austin Brown & Wood).

From a societal standpoint, the scale of investment in "cosmetic hoo ha" also raises concerns.[51] This nation spends more money on beauty than on reading material.[52] Although almost a fifth of the United States population lacks a usual source of health care, nonessential aesthetic procedures are the fastest growing area of medical expenditures.[53]

E. *Health Risks*

Although federal legislation provides some protection from risky appearance-related practices, it is by no means adequate to safeguard consumers. One problem is the absence of any requirement of governmental approval of cosmetics before marketing.[54] As a consequence, 80% of the 10,000 ingredients used in cosmetics and personal care products have never been assessed by the Federal Food and Drug Administration.[55] Moreover, enforcement of safety standards has been inadequate. An Environmental Working Group survey found that nearly 400 products sold in the United States contained chemicals that are prohibited in other countries, and that over 400 had contents considered unsafe by American industry standards; one in thirty failed to meet industry or federal requirements.[56] Many products that are too risky for sale in the United States can still be exported to countries with less rigorous regulatory structures. So, for example, skin bleaches that can lead to disease and disfigurement are marketed in many parts of Africa and the Caribbean.[57]

Humans are not the only victims of toxic cosmetics. Unlike the European Union, which in 2009 began barring products tested on animals, the U.S. permits such testing, and procedures for some products, such as Botox, result in the death of half of animals tested.[58]

---

51. WOLF, *supra* note 32, at 113 (quoting dermatologist Ronald Marks).

52. ETCOFF, *supra* note 17, at 95.

53. For health care, see MICHELLE ROBERTS, AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, RACIAL AND ETHNIC DIFFERENCES IN HEALTH INSURANCE COVERAGE AND USUAL SOURCE OF HEALTH CARE, 2002, at 18 (2006), http://www.meps.ahrq.gov/mepsweb/data_files/publications/cb14/cb14.pdf. For the increase in cosmetic surgery, see DAVIS, *supra* note 40, at 21; KUCZYNSKI, *supra* note 37, at 10.

54. *See* Federal Food, Drug, and Cosmetic Act §§ 601-603, 21 U.S.C. §§ 361-363 (2006).

55. Mitchell Clute, *European Union Regs Make Cosmetic Ingredients Safer*, NAT. FOODS MERCHANDISER, Mar. 2005, at 20.

56. Russell Mokhiber, *Toxic Beauty*, MULTINAT'L MONITOR, Sept./Oct. 2007, at 48.

57. Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579, 593 (2006).

58. Humane Society of the United States, *Dark Side of Beauty: BOTOX Kills Animals*, May 5, 2008, http://www.hsus.org/animals_in_research/animal_testing/the_beauty_myth_botox_kills_animals; *see also* Termini & Tressler, *supra* note 45, at 270-71 (discussing inhumane treatment). For the European Union ban, see Directive 2003/15/EC of the European Parliament and of the Council of 27, February 2003, OFFICIAL J. OF THE EUR. UNION, Nov. 3, 2003, *available at* http://ec.eupropa.eu/enterprise/cosmetics/dco/200315/200315en.pdf. For discussion, see the statement on cosmetics and animal tests on

Cosmetic surgical procedures pose other risks. Almost half are performed in office facilities that are not subject to the same state and federal regulations as hospitals and freestanding outpatient surgical centers.[59] Nor are these offices prepared to deal with complications such as those resulting from general anesthesia.[60] In many states, doctors who practice in offices rather than surgical facilities need not be board certified.[61] Few patients are aware of what certification means; many are misled by their physician's membership in associations with names similar to the official certifying association, the American Board of Plastic Surgery.[62] The problem is compounded by the absence of data concerning the risks of procedures in various settings, consumers' tendency to understate risks, and the lack of ethical standards by the American Medical Association and the American Academy of Cosmetic Surgery about when doctors should decline assistance.[63] Individuals suffering from Body Dysmorphic Disorder, a preoccupation with slight or imagined imperfections, can often undergo multiple procedures carrying substantial expense and risk with little objective benefit.[64]

Dieting also raises serious health concerns for many of the 29% of American adults and 59% of female adolescents who are attempting weight reduction.[65] Eating disorders carry the greatest risks. An estimated 0.9% of

---

the European Commission website, http//ec.europea.eu/enterprise/cosmetics/html.cosm animal test.htm.

59. AM. SOC'Y FOR AESTHETIC PLASTIC SURGERY, 2006 COSMETIC SURGERY NATIONAL DATA BANK STATISTICS 3 (2007), *available at* http://www.surgery.org/download/2006stats.pdf.

60. *See, e.g.*, Darlene Ghavimi, *Cosmetic Surgery in the Doctor's Office: Is State Regulation Improving Patient Safety?*, 12 WIDENER L. REV. 249, 250-51 (2005).

61. Ghavimi, *supra* note 60, at 255.

62. ELIZABETH HAIKEN, VENUS ENVY: A HISTORY OF COSMETIC SURGERY 295 (1997); Tanya Darisi, Sarah Thorne & Carolyn Iacobelli, *Influences on Decision-Making for Undergoing Plastic Surgery: A Mental Models and Quantitative Assessment*, 116 PLASTIC & RECONSTRUCTIVE SURGERY 907, 913 (2005).

63. *See* Rajesh Balkrishnan et al., *No Smoking Gun: Findings from a National Survey of Office-Based Cosmetic Surgery Adverse Event Reporting*, 29 DERMATOLOGIC SURGERY 1093, 1098 (2003) (discussing inadequacy of data concerning office-based cosmetic surgery); Darisi, *supra* note 62, at 912-13 (finding that patients believe that risks are minimal if they pick the right doctor). For the actual risks posed by practicing surgeons, see KUCZYNSKI, *supra* note 37, at 94-95; Elayne A. Saltzberg & Joan C. Chrisler, *Beauty Is the Beast: Psychological Effects of the Pursuit of the Perfect Female Body*, *in* WOMEN: A FEMINIST PERSPECTIVE 306, 308 (Jo Freeman ed., 5th ed. 1995). For ethical standards, see Theresamarie Mantese, Christine Pfeiffer & Jacquelyn McClinton, *Cosmetic Surgery and Informed Consent: Legal and Ethical Considerations*, 85 MICH. B.J. 26, 28 (2006).

64. *See, e.g.*, Lynn G. v. Hugo, 752 N.E.2d 250 (N.Y. 2001) (involving a patient alleging that her plastic surgeon should have ascertained her Body Dysmorphic Disorder before performing elective cosmetic surgeries).

65. *See* Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance—United States, 2003*, MORBIDITY & MORTALITY WKLY. REP., May 21, 2004, at 25, *available at* http://www.cdc.gov/mmwr/PDF/ss/ss5302.pdf (adolescent girls); Press Release, Calorie Control Council, New Survey Reveals Dieting a Constant Concern (Aug. 9, 2007), *available at* http://www.caloriecontrol.org/pr_08092007-b.html (adults).

female Americans suffer from anorexia nervosa, which results in severe weight reduction and distorted body image.[66] Another 1.5% suffer from bulimia, which involves binging and purging, and 3.5% of women and 2% of men exhibit binge eating disorders.[67] Anorexia can result in organ compromise and heart and kidney failure; 90% of sufferers end up with bone loss.[68] Bulimia can lead to heart and gastrointestinal problems, and damage to the teeth, throat, and esophagus.[69] Binge eaters can suffer cardiovascular problems as well as an increased incidence of diabetes and gallbladder disease.[70] Treatment is costly and often ineffective or inaccessible, and many who lack adequate care have associated mental health difficulties.[71]

Concerns about appearance and eating disorders are often linked to depression, anxiety, or low self-esteem.[72] Anorexia has the highest rate of death among psychiatric disorders, approximately 10%, and a suicide rate fifty-seven times higher than for women of the same age in the general population.[73]

Many weight reduction techniques, whether or not associated with eating disorders, also carry risks. A recent *New Yorker* cartoon parodies the extent to which dieters are often prepared to go: an oarsman on a galley slave ship boasts to another: "I dropped twelve pounds the first week and kept it off!"[74] For some women, smoking is the functional equivalent. Three-quarters of surveyed female smokers are unwilling to gain more than five pounds after quitting; nearly half will not tolerate any increase.[75] Bariatric surgery, which involves

66. EATING DISORDERS COALITION, EATING DISORDER STATISTICS: 9 MILLION AMERICANS, THOUSANDS DYING EACH YEAR (2007), http://www.eatingdisorderscoalition.org/documents/Statistics_000.pdf; *see also* ROBERTA POLLACK SEID, NEVER TOO THIN 21 (1989).

67. EATING DISORDERS COALITION, *supra* note 66.

68. Steven Grinspoon et al., *Prevalence and Predictive Factors for Regional Osteopenia in Women with Anorexia Nervosa*, 133 ANNALS INTERNAL MED. 790, 793 (2000).

69. JOEL YAGER ET AL., AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH EATING DISORDERS 32-33 (3d ed. 2006).

70. *See* University of Virginia Health System, Binge Eating Disorder, http://www.healthsystem.virginia.edu/UVAHealth/adult_mentalhealth/edbinge.cfm (last visited Mar. 7, 2009); *see also* P.H. Robinson, *Recognition and Treatment of Eating Disorders in Primary and Secondary Care*, 14 ALIMENTARY PHARMACOLOGY & THERAPEUTICS 367, 369-71 (2000), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/120708845/PDFSTART?CRETRY=1&SRETRY=0.

71. For the need for psychiatric treatment, see YAGER ET AL., *supra* note 69, at 74-87.

72. Latner, Stunkard & Wilson, *supra* note 22, at 1226; Thomas Pruzinsky, *Psychopathology of Body Experience: Expanded Perspectives*, *in* BODY IMAGES, *supra* note 6, at 170, 181-82; Rebecca M. Puhl & Kelly D. Brownell, *Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults*, 14 OBESITY 1802, 1812 (2006). For shame and anxiety linked to decisions to have cosmetic surgery, see DEBRA L. GIMLIN, BODY WORK 93-94 (2002).

73. David Herzog, *Eating Disorders: Truth and Consequences*, *in* LAUREN GREENFIELD, THIN 85 (2006).

74. Lee Lorenz, Cartoon, NEW YORKER, Apr. 10, 2006, at 60.

75. *See* Cynthia S. Pomerleau & Candace L. Kurth, *Willingness of Female Smokers to*

reducing the stomach's capacity in order to control appetite, is one of the more effective procedures for the morbidly obese, but it poses significant risks of complications.[76] Moreover, patients sometimes replace compulsive eating with other addictive behavior such as smoking or alcohol abuse.[77] Yo-yo dieting, the pattern of losing and regaining weight, is by far the most common experience of dieters, and a growing body of evidence suggests that it may impose even more risks than remaining moderately overweight. Such weight cycling is linked to clogged arteries, loss in bone density, congestive heart failure, and other serious health problems.[78] Over fifteen studies associate yo-yo dieting with increased rates of mortality.[79] Many "miracle" diet drugs like Olestra and fen-phen also have created more problems than solutions.[80]

Indeed, from a health perspective, the current obsession with weight is misdirected. Except at extreme levels, body mass is less important than fitness in preventing disease and prolonging life.[81] Some recent research finds that moderately overweight individuals have the lowest mortality rates of any weight group; thin individuals who match cultural ideals have the highest rates.[82] Low body weight compromises reproductive and work capacity, and predicts a greater frequency of sickness.[83]

This is not to deny the health benefits in preventing obesity, a condition now shared by almost a third of Americans.[84] Nor is it to undervalue the importance of weight reduction for individuals with certain conditions such as hypertension, osteoarthritis, and diabetes.[85] But it is to suggest that our culture

---

Tolerate Postcessation Weight Gain, 8 J. SUBSTANCE ABUSE 371, 374; Press Release, Kara Gavin, Univ. of Mich. Dep't of Psychiatry, Is Fear of Gaining Weight Keeping Many Women from Trying to Quit Smoking? U-M Research Suggests So (Nov. 5, 2007), *available at* http://www.psych.med.umich.edu/newsroom/smoking.asp.

76. *See* MAINE, *supra* note 32, at 47; OLIVER, *supra* note 28, at 54-55; Stephen J. Dubner & Steven D. Levitt, *The Stomach-Surgery Conundrum*, N.Y. TIMES, Nov. 18, 2007, § 6 (Magazine), at 26.

77. Dubner & Levitt, *supra* note 76, at 28.

78. PAUL CAMPOS, THE OBESITY MYTH: WHY AMERICA'S OBSESSION WITH WEIGHT IS HAZARDOUS TO YOUR HEALTH 32-33 (2004); GLENN A. GAESSER, BIG FAT LIES: THE TRUTH ABOUT YOUR WEIGHT AND YOUR HEALTH 35, 155-56 (2002).

79. Kathleen Kingsbury, *Fit at Any Size*, TIME, June 23, 2008, at 106.

80. GAESSER, *supra* note 78, at 157-59; MAINE, *supra* note 32, at 48-50; OLIVER, *supra* note 28, at 113-15; Jerome P. Kassirer & Marcia Angell, *Losing Weight—An Ill-Fated New Year's Resolution*, 338 NEW ENG. J. MED. 52, 52 (1998).

81. *See* CAMPOS, *supra* note 78; LAURA FRASER, LOSING IT: AMERICA'S OBSESSION WITH WEIGHT AND THE INDUSTRY THAT FEEDS ON IT 176 (1997); Tara Parker-Pope, *Better to Be Fat and Fit Than Skinny and Unfit*, N.Y. TIMES, Aug. 19, 2008, at F5.

82. *See* CAMPOS, *supra* note 78, at 140-41; OLIVER, *supra* note 28, at 25; Gina Kolata, *Chubby Gets a Second Look*, N.Y. TIMES, Nov. 11, 2007, at D4.

83. See studies discussed in Patricia R. Owen & Erika Laurel-Seller, *Weight Shape and Ideals: Thin Is Dangerously In*, 30 J. APPLIED PSYCHOL. 979, 980 (2000).

84. AM. OBESITY ASS'N, OBESITY IN THE U.S. FACT SHEET, *available at* http://obesity1.tempdomainname.com/subs/fastfacts/obesity_US.shtml.

85. *See, e.g.*, Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 843-44 (2005); *see also* WEIGHT-

would be healthier if the focus were less on "thunder thighs" and more on nutrition and fitness.

II. THE INJUSTICE OF DISCRIMINATION

The costs and disadvantages associated with appearance raise two fundamental questions. Are any of these consequences unjust? If so, do they call for some legal remedy or other societal response? In considering these questions, it often makes sense to consider both the nature of the characteristic and the context of discrimination. As a general matter, our concern is likely to be greatest with bias in the public sphere that is based on factors that are at least partly beyond an individual's control and that are not critical to performance.

In general, American law prohibits discrimination on the basis of race, sex, ethnicity, religion, age, and disability, but not appearance. Only one state and six cities or counties prohibit some form of appearance discrimination.[86] In the rest of the United States, such bias is unlawful only if it is linked with characteristics that other antidiscrimination laws cover, such as race, sex, or disability. So, for example, weight and grooming standards are impermissible if they impose unreasonable, disproportionate burdens on only one sex.[87] Disability law prohibits weight discrimination in a very limited number of cases involving extreme obesity that impairs normal functioning.[88] For the most part, however, bias based on appearance is lawful in the United States, and the same is true in other nations.[89] Whether it should be is a question demanding closer scrutiny.

A. *The Rationale for Banning Discrimination Based on Appearance*

1. *Equal opportunity: bias, stereotypes, and stigma*

The clearest argument for banning discrimination based on appearance is that it offends principles of equal opportunity and individual dignity. Many of

---

CONTROL INFO. NETWORK, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, STATISTICS RELATED TO OVERWEIGHT AND OBESITY (2007), http://www.win.niddk.nih.gov/statistics/.

86. See text *infra* Parts III.C.1-2.

87. See text *infra* Part II.B.2.

88. See text *infra* Part III.B.3.

89. A review of Lexis, the main legal search engine, the Europa Case Law Index, the official database for European nations, and several treatises, including SUSAN MAYNE & SUSAN MALYON, EMPLOYMENT LAW IN EUROPE (2001) and JEFF KENNER, EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND (2003), revealed only one case on appearance discrimination. *See* Smith v. Safeway Plc, [1996] I.C.R. 868 (upholding the dismissal of a male delicatessen worker for unconventionally long hair, where no similar rule applied to women because their long hair was not unconventional).

the costs associated with appearance are the product of widespread prejudice. Beginning at early ages, children develop an aversion to individuals who are overweight or unattractive, and those individuals are teased, ridiculed, and ostracized.[90] Such disadvantages persist throughout the life cycle.

Educational and employment settings reveal frequent examples of bias. A National Education Association report on size discrimination found that for overweight students, the "school experience is one of ongoing prejudice, unnoticed discrimination, and almost constant harassment."[91] The lower grades and college enrollments of obese female students are at least partly attributable to stigmatization and the resulting disengagement and loss of self-esteem.[92] In several surveys, close to 90% of obese individuals reported humiliating comments from friends, family, or coworkers.[93] Obesity carries as much stigma as AIDS, drug addiction, and criminal behavior.[94] Overweight workers lose job opportunities and endure offensive jokes, cartoons, and nicknames.[95] In controlled experiments, these individuals are seen as less desirable colleagues and supervisors, and stereotyped as lazy, sloppy, and lacking in competence, self-discipline, and emotional stability.[96] Employers express concern about customer, client, and coworker responses to overweight employees; particularly for upper-level positions, fat is a "sure-fire career-killer. If you can't control your own contours, goes the logic, how can you control a budget and staff?"[97]

---

90. *See, e.g.*, SOLOVAY, *supra* note 11, at 35; Janet D. Latner & Albert J. Stunkard, *Getting Worse: The Stigmatization of Obese Children*, 11 OBESITY RES. 452, 452 (2003); Latner, Stunkard & Wilson, *supra* note 22, at 1226-27; Carey Goldberg, *Fat People Say an Intolerant World Condemns Them on First Sight*, N.Y. TIMES, Nov. 5, 2000, at 36.

91. NAT'L EDUC. ASS'N, REPORT ON SIZE DISCRIMINATION (1994), *available at* http://www.lectlaw.com/files/con28.htm; *see also* Gina Kolata, *For a World of Woes, We Blame Cookie Monsters*, N.Y. TIMES, Oct. 29, 2006, at E14.

92. *See* Robert Crosnoe, *Gender, Obesity, and Education*, 80 SOC. EDUC. 241, 242-43, 254-57 (2007).

93. *See* KOLATA, *supra* note 33, at 69 (citing a study conducted by Esther Rothblum); Rebecca M. Puhl, *Coping with Weight Stigma*, *in* WEIGHT BIAS, *supra* note 15, at 275, 280; *see also* SOLOVAY, *supra* note 11, at 40-41, 58-59.

94. *See* Latner, Stunkard & Wilson, *supra* note 22, at 1226. For general research on stigma, see Esther D. Rothblum, *The Stigma of Women's Weight: Social and Economic Realities*, 2 FEMINISM & PSYCHOL. 61 (1992).

95. *See, e.g.*, Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1011 (1993); Korn, *supra* note 10, at 25. For examples of cases involving nicknames, see *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) ("fat boy"); *Butterfield v. New York State*, No. 96Civ.5144(BDP)LMS, 1998 WL 401533, at *6 (S.D.N.Y. July 15, 1998) ("butterball"); *see also* Greene v. Seminole Elec. Coop., Inc., 701 So. 2d 646, 648 (Fla. Dist. Ct. App. 1997) (involving an employee who was ridiculed and forced to purchase "diet cookies" from supervisor).

96. *See* Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 789-90 (2001).

97. CAMPOS, *supra* note 78, at 65; *see also* SOLOVAY, *supra* note 11, at 106 (citing a *New York Times* finding that fewer than 10% of "top male executives were fat"). For

Although about two-thirds of surveyed Americans believe that people are fat because they lack self-control, experts generally agree that weight is not simply a matter of willpower.[98] Weight reflects a complex interaction of physiological, psychological, socioeconomic, and cultural factors.[99] Genetically determined set-points work to keep bodies within a predetermined range; furthermore, when dieters reduce their caloric intake and increase their exercise, their metabolism slows down to compensate and makes any weight loss difficult to sustain.[100] The problems are compounded by sedentary occupations and "toxic environments" that lack recreational opportunities and encourage unhealthy food choices.[101]

A related and equally unfounded assumption is that the stigma associated with being overweight serves a legitimate function by shaming individuals into shedding unhealthy pounds. In fact, such bias is counterproductive; around 80% of those enrolled in weight loss programs respond to stigma by eating more or giving up their diets.[102]

Discrimination on the basis of these stereotypes carries both individual and social costs. It undermines self-esteem, diminishes job aspirations, and compromises merit principles. As Princeton political philosopher Anthony Appiah notes, "[e]quality as a social ideal is a matter of not taking irrelevant distinctions into account."[103] In many contexts, appearance bears no relationship to competence, and discrimination on that basis undermines values of both efficiency and equity.[104] Philosopher Michael Walzer's concept of spheres of justice illustrates the point.[105] Characteristics like attractiveness that

---

employer attitudes, see generally *id.* at 99-121.

98. OLIVER, *supra* note 28, at 102 (discussing survey); *see also*, KOLATA, *supra* note 33, at 116-25 (expert opinion); Laura Blue, *The Myth of Moderate Exercise*, TIME, July 28, 2008, http://www.time.com/time/health/article/0,8599,1827342,00.html (same).

99. *See* KOLATA, *supra* note 33, at 116-25; NAT'L INSTS. OF HEALTH ET AL., THE PRACTICAL GUIDE: IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS 5 (2000).

100. *See* Kassirer & Angell, *supra* note 80, at 53; *see also* GAESSER, *supra* note 80, at 33; KOLATA, *supra* note 33, at 117-25; OLIVER, *supra* note 28, at 107-08.

101. *See* KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT 7-10 (2004); Elizabeth A. Baker et al., *The Role of Race and Poverty in Access to Foods That Enable Individuals to Adhere to Dietary Guidelines*, 3 PREVENTING CHRONIC DISEASE 1 (2006), *available at* http://www.cdc.gov/pcd/issues/2006/jul/05_0217.htm; Marsha Katz & Helen Lavan, *Legality of Employer Control of Obesity*, 13 J. WORKPLACE RTS. 59, 61 (2008).

102. *See* Puhl & Brownell, *supra* note 72, at 1808 (2006); *see also* Kolata, *supra* note 91.

103. K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 55, 57 (2001).

104. One study found that weight was irrelevant to 90% of workplace jobs. *See* Kara Swisher, *Overweight Workers Battle Bias on the Job: Looks Discrimination Called Common, but Hard to Prove*, WASH. POST, Jan. 24, 1994, at A1.

105. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

may justify decisions in one sphere, such as intimate personal relationships, are unjust when they spill over to other spheres, such as education or employment. An attorney for an obese man denied a job as a fast food cook made exactly that claim: "The only thing that should matter to McDonald's . . . [is] how he cooks, not how he looks."[106] Advocates of a Santa Cruz, California ordinance banning appearance discrimination similarly argued that it would force employers to judge workers "on the basis of real criteria," namely, "their ability to perform the job."[107] "What this ordinance is really saying," one city council member explained, is "hire the best-qualified person."[108]

Of course, as subsequent discussion notes, whether attractiveness is a relevant qualification is sometimes subject to debate.[109] But in many contexts, discrimination based on appearance, like other forms of bias, rests on inaccurate stereotypes. Assumptions that overweight individuals are lazy, undisciplined, or unfit are a case in point. In one all-too-typical example, an obese woman failed to receive a job as an airport bus driver because a company doctor concluded that her weight would prevent her from effectively protecting passengers in an accident.[110] The doctor subsequently acknowledged that the woman had no health problems and that he had performed no agility tests; he simply assumed that she was unfit because he had watched her "waddling down the hall" to her exam.[111] What makes such stereotypes objectionable is not only that they reflect overbroad or inaccurate generalizations; it is also that they can be self-perpetuating. Denying obese women jobs as bus drivers also denies them opportunities to challenge the assumptions of incompetence on which such bias rests.

In short, discrimination based on appearance unfairly stigmatizes individuals based on factors that often are at least partly beyond their control.[112] That stigma imposes substantial financial and psychological costs, undermines individuals' self-esteem, and often pressures them into the burdensome and unsafe practices described earlier.

---

106. Steven Greenhouse, *Overweight, but Ready to Fight: Obese People Are Taking Their Bias Claims to Court*, N.Y. TIMES, Aug. 4, 2003, at B1.

107. Richard C. Paddock, *California Album: Santa Cruz Grants Anti-Bias Protection to the Ugly*, L.A. TIMES, May 25, 1992, at A3 (quoting City Councilman Neil Coonerty).

108. Martha Groves, *Looks Won't Mean a Lot if Anti-Bias Law Is Approved*, L.A. TIMES, Jan. 24, 1992, at A3 (quoting City Councilman Neil Coonerty).

109. *See* discussion *infra* Part II.B.2.

110. EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 967-68 (S.D. Tex. 1996).

111. *Id.* at 977-78.

112. To advocates of the Santa Cruz ordinance, stigmatizing the unattractive reflected "simple bigotry." Groves, *supra* note 108 (quoting Body Image Task Force member Dawn Atkins).

2. *Subordination: compounding inequalities based on class, race, ethnicity, gender, disability, and sexual orientation*

A second reason for prohibiting discrimination based on appearance is that it reinforces group disadvantages. As constitutional scholars including Cass Sunstein and J.M. Balkin have argued, practices that systematically stigmatize and subordinate groups prevent members from developing their full capacities.[113] The perpetuation of hierarchies also jeopardizes perceptions of fairness and legitimacy on which well-functioning democracies depend.[114] Like many other forms of discrimination, prejudice based on appearance compounds the disadvantages of already disadvantaged groups, particularly those based on class, gender, race, ethnicity, disability, and sexual orientation.

In *The Case Against Perfection*, Harvard philosopher Michael Sandel notes that one byproduct of the contemporary fixation on physical attractiveness is the exacerbation of economic inequality.[115] Appearance both reflects and reinforces class privilege. Prevailing beauty standards advantage individuals with the time and money to invest in their appearance. Fashion, makeup, health clubs, weight-loss products, and cosmetic procedures all come at a cost. Yet for many consumers, these are not "luxury goods." In a culture where appearance is so often linked to status and self-esteem, low-income individuals pay a substantial psychological price when they cannot afford to meet conventional standards.

Discrimination based on obesity is particularly problematic from a class standpoint. As one expert puts it, there is some "evidence that poverty is fattening," and an even "stronger case . . . [that] fatness is impoverishing."[116] Many urban and rural poor people live in food deserts—areas with no readily accessible grocery stores that sell fresh fruits and vegetables.[117] These areas also tend to lack public recreational facilities and schools with adequate physical education.[118] The bias that overweight individuals face then compromises their educational and employment opportunities. Those living

---

113. *See, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2359-60 (1997); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-29 (1994).

114. *See, e.g.*, Balkin, *supra* note 113, at 2359-60; Sunstein, *supra* note 113, at 2428-29.

115. *See* MICHAEL SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 91 (2007).

116. Paul Ernsberger, *Does Social Class Explain the Connection Between Weight and Health?*, *in* THE FAT STUDIES READER (Sondra Solovy & Esther Rothblum eds., forthcoming Sept. 2009).

117. *See* Baker et al., *supra* note 101, at 7-8.

118. *See generally* Jeffrey Kluger, *How America's Children Packed on the Pounds*, TIME, June 23, 2008, at 66, 69 (discussing decline in physical education classes due to budget constraints). For an overview of the factors contributing to obesity among lower income minority communities, see Lenneal J. Henderson, *Obesity, Poverty, and Diversity: Theoretical and Strategic Challenges*, *in* OBESITY, BUSINESS, AND PUBLIC POLICY *supra* note 28, at 57, 59-68.

below the poverty line are nearly 15% more likely to be obese than the general population.[119]

Minorities also experience disproportionate obesity rates, with their corresponding disadvantages, as well as other forms of appearance-related discrimination. Nearly one in four Latinos and one in three African Americans is obese, compared to one in five non-Latino whites.[120] Although images of beauty are growing more diverse, they still reflect a legacy of racial privilege. Light skin, straight hair, and Anglo-European features have long defined the ideal to which many minorities have aspired.[121] These preferences are evident in survey research, media images, and product sales.[122]

Minorities are also held to idealized standards that favor Anglo-American features and to grooming standards that are unevenly applied. A classic illustration involved an African American machine operator working in a company requiring a "neat and well groomed hairstyle." Her preference for "finger waves" was unacceptable to white supervisors, who found it too "eye-catching." They required her to submit new hairstyle choices for approval, and sanctioned her for wearing an unapproved pony tail above her head, even though it was "neat" and identical to styles worn without objection by white female workers.[123]

Cosmetic surgery has reflected similar racial and ethnic biases.[124] Minorities now account for around 20% of American cosmetic surgery, much of it oriented toward obtaining a more Anglo-European appearance.[125] Yet even actresses and models of color who most resemble their white counterparts face significant prejudice. For example, diversity has been notable for its absence on fashion runways. As the headline for one *Washington Post* story put

---

119. *See* OLIVER, *supra* note 28, at 75.

120. *See* Ali H. Mokdad et al., *Prevalence of Obesity, Diabetes, and Obesity-Related Health Risk Factors, 2001*, 289 J. AM. MED. ASS'N 76, 77 (2003).

121. *See, e.g.*, MAXINE LEEDS CRAIG, AIN'T I A BEAUTY QUEEN?: BLACK WOMEN, BEAUTY, AND THE POLITICS OF RACE 6 (2002); CHARISSE JONES & KUMEA SHORTER-GOODEN, SHIFTING: THE DOUBLE LIVES OF BLACK WOMEN IN AMERICA 177 (2003); 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); Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579 (2006); Saltzberg & Chrisler, *supra* note 63, at 307, 311.

122. *See* Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER, RACE & JUST. 483, 498 (2004); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity?*, 14 DUKE J. GENDER L. & POL'Y 407, 411 (2007).

123. *See* Hollins v. Atlantic Co., 188 F.3d 652, 655-57 (6th Cir. 1999).

124. The first Americans to seek such surgery in significant numbers were Jews who wanted less distinctive noses. *See* CARL ELLIOTT, BETTER THAN WELL: AMERICAN MEDICINE MEETS THE AMERICAN DREAM 190 (2003). After World War II, Japanese women had transformer coolant injected into their breasts to please American GIs. *See* Ellen Goodman, *Stacked Against Us*, BOSTON GLOBE, Apr. 17, 2005, at C11.

125. AM. SOC'Y FOR AESTHETIC PLASTIC SURGERY, *supra* note 59, at 3.

it, "Once Again, White is the New White."[126] Despite the progress made since the "black is beautiful" and analogous social movements, dark skin color is still associated with discrimination both within and among races.[127]

Appearance discrimination also compounds gender inequality by reinforcing a double standard and double bind for women. They face greater pressure to be attractive and greater penalties for falling short; as a consequence, women's self-worth is more dependent on physical attractiveness.[128] Overweight women are judged more harshly than overweight men.[129] Yet even as the culture expects women to conform, it disdains the narcissism in their efforts.[130]

In employment contexts, women can suffer discrimination for being either too attractive or not attractive enough. Unattractive women are disadvantaged in female-dominated occupations, such as receptionist or secretary. But in upper-level management or partnership positions that traditionally have been male-dominated, a beautiful or "sexy" appearance may suggest less competence and intellectual ability.[131] Women with exceptionally large breasts are judged lower in intelligence and effectiveness.[132] The preoccupation with female appearance reinforces gender stereotypes and encourages evaluation of women in terms of sexual attractiveness rather than character, competence, hard work, or achievement.[133] Although some women benefit from their beauty, it is not a stable form of self-esteem.[134] Nor does it generally produce the same social benefits as qualities related to merit.

These sex-based double standards impose disproportionate burdens on female consumers. American women spend about a third more time than men on daily grooming, and vastly more time and money on appearance-related goods and services.[135] About nine out of ten cosmetic surgery patients are

---

126. Robin Givhan, *Once Again, White Is the New White*, WASH. POST, Sept. 30, 2007, at M1.

127. *See, e.g.*, Fallon, *supra* note 6, at 80, 92; Perry, *supra* note 57, at 590.

128. Fallon, *supra* note 6, at 81.

129. SOLOVAY, *supra* note 11, at 105; Fikkan & Rothblum, *supra* note 22, at 16; Sablosky, *supra* note 28, at 333-35. For racial comparisons, see Latner et al., *supra* note 22, at 1229.

130. *See* SUSAN BROWNMILLER, FEMININITY 101 (1984) (discussing incompatibility of feminine dressing with credibility and competence).

131. Peter Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 PSYCHOL. OF WOMEN Q. 389 (2005). For findings concerning upper-level positions, see Hosoda et al., *supra* note 25, at 451-53.

132. PATZER, *supra* note 3, at 145.

133. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 32-33 (2007).

134. DAVIS, *supra* note 40, at 42.

135. *How We Spend Time*, *supra* note 39, at 53. For women's disproportionate financial expenditures , see sources cited in DEBORAH L. RHODE, SPEAKING OF SEX 76 (1998) [hereinafter RHODE, SPEAKING OF SEX]. Men's share of the skin care market is, however, growing. *See* KUCZYNSKI, *supra* note 37, at 91.

women, and they experience the disproportionate health risks that accompany these procedures.[136] The only aspect of appearance for which men suffer greater disadvantage involves height; short men in western cultures are penalized in hiring, advancement, earnings, and leadership positions.[137] But in general, as feminist theorist Susan Brownmiller has noted, "plumage" matters less for men, and too much attention to looks can appear "foppish."[138] The public ridicule that greeted presidential candidate John Edwards's $400 haircuts is a case in point. Yet many Republican National Committee officials and industry experts found it perfectly reasonable to spend over $40,000 (about $750 a day) for a traveling hair stylist for Sarah Palin, and another $68,000 for her makeup artist.[139]

Female employees also disproportionately suffer from grooming standards that sexualize the workplace and focus attention on their looks rather than their competence. Some requirements of alluring apparel are of particular concern because they expose women to humiliation, harassment, or, in the case of high heels, physical injury.[140] But even less burdensome standards can reinforce demeaning stereotypes. Examples include the Midwest television station that wanted its anchor to feminize her clothing by wearing bows and ruffles; the Bikini Espresso, a drive-through espresso bar with waitresses in sheer babydoll negligees and matching panties; the Heart Attack Grill, featuring women in

---

136. *See* AM. SOC'Y FOR AESTHETIC PLASTIC SURGERY, *supra* note 59, at 3; Daniel DeNoon, *Latest Plastic Surgery Trends and Stats*, WEBMD HEALTH NEWS, June 5, 2003, http://www.webmd.com (noting that nine out of ten cosmetic surgery patients are women); Frederick M. Grazer & Rudolph H. de Jong, Fatal Outcomes from Liposuction: Census Survey of Cosmetic Surgeons (June 11, 1999) (unpublished survey, Penn State University School of Medicine and Thomas Jefferson Medical College) (on file with author) (noting the health risks women undergo); Karen Wells et al., The Health Status of Women Following Cosmetic Surgery (Apr, 26, 1993) (unpublished study, University of South Florida College of Medicine and College of Public Health) at 907, 912 (on file with author) (noting health risks for breast augmentation surgery compared with other types of plastic surgery).

137. *See* KATZ, *supra* note 28, at 312; PATZER, *supra* note 3, at 164-65.

138. BROWNMILLER, *supra* note 130, at 98; *see also* Susan Sontag, *The Double Standard of Aging*, *in* THE OTHER WITHIN US: FEMINIST EXPLORATIONS OF WOMEN AND AGING 22 (Marilyn Pearsall ed., 1997).

139. Michael Luo & Cathy Horyn, *Three Palin Stylists Cost Campaign More than $165,000*, N.Y. TIMES, Dec. 6, 2008, A9, at A11.

140. *See* EEOC v. Sage Realty Corp., 87 F.R.D. 365 (S.D.N.Y. 1980) (finding legal liability based on employer's requirement of a sexually provocative uniform that exposed employee to harassment); Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 17, 104 (2007); Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 298 (1997). For a recent law firm grooming policy that advised women to wear high heels and provoked considerable objection from the legal community, see Dan Slater, *Firm to Female Lawyers: Wear High Heels, Embrace Your Femininity*, WALL ST. J. LAW BLOG, Dec. 23, 2008, http://blogs.wsj.com/law/2008/12/23/firm-to-female-lawyers-wear-high-heels-embracy-your-femininity/.

"naughty nurses" costumes; the casino that wanted "Barbie doll" dealers, and the "Valet of the Dolls" valet parking service with a "wild" and "sexy" all-female staff.[141] As a parking competitor noted, "When people say that it's cute, I tell them to buy a puppy . . . . When you are dealing with people's cars, it's about your professional standards."[142]

Two widely publicized examples of sex-based double standards in appearance have involved casino grooming policies. One was a sex discrimination suit by two former "Borgata Babes," cocktail waitresses at the Atlantic City's Borgata Hotel and Casino. As part of their employment contract, the women agreed to keep a "clean smile, an hourglass figure and be height- and weight-appropriate," which the casino subsequently specified as preventing more than a 7% weight gain.[143] One of the "Babes" wore a dress size four when hired, but had a thyroid condition that caused weight fluctuations. When she asked for a size six dress, she was told "Borgata Babes don't go up in size."[144] The only exception was for women who got breast implants, who were entitled to a paid recovery period and a bigger bustier.[145] The policy contributed to problems of eating disorders and related mental and physical health difficulties.[146] The case gained substantial and universally sympathetic media coverage. After interviews with the waitresses appeared on *Good Morning America* and in leading newspapers and magazines, the casino settled their seventy million dollar lawsuit.[147] The terms were confidential, but the public impact was not.

Similar litigation involved Reno's Harrah's Casino. It required female beverage servers to wear makeup and nail polish, and to have their hair "teased, curled, or styled." Male servers needed only short haircuts and fingernails that were "neatly trimmed."[148] A federal court of appeals rejected a female

---

141. Alam v. Reno Hilton Corp., 819 F. Supp. 905, 913 (D. Nev. 1993) (casino policy); Craft v. Metromedia, 572 F. Supp. 868 (W.D. Mo. 1983), *rev'd in part*, 766 F.2d 1205, 1214-15 (8th Cir. 1985) (media station); CHRISTINE CRAFT, TOO OLD, TOO UGLY, AND NOT DEFERENTIAL TO MEN (1988) (media station); Janelle Brown, *Baby, You Can Park My Car*, N.Y. TIMES, Mar. 27, 2005, at E1 (valet parking service); Amy Roe, *Some Coffee Stands Get Steamier*, SEATTLE TIMES, Jan. 22, 2007, at A1 (espresso bar); *Waitresses Dressed as Naughty Nurses Rile RNs*, MSNBC.COM, Dec. 8, 2006, http://www.msnbc.msn.com/id/16112393/print/1/displaymode/1098/ (naughty nurse waitresses).

142. Brown, *supra* note 141, at E1.

143. Sam Wood, *"Borgata Babes" Settle Discrimination Suit*, PHILA. INQUIRER, July 31, 2008, at 28; *accord* Jennifer Friedlin, *Gaining Weight Cost Me My Job*, MARIE CLAIRE, Oct. 1, 2005, at 153.

144. John Curran, *Casino Weight Rule Faces New Attacks*, PHILA. INQUIRER, Apr. 28, 2005; *see also* Friedlin, *supra* note 143.

145. Dan Gross, *Ex-Servers Sue Borgata*, PHILA. DAILY NEWS, Jan. 31, 2006, at 25; *see also* Friedlin, *supra* note 143.

146. *See* Freidlin, *supra* note 143.

147. *Id.*; *Good Morning America: High Stakes Weight Discrimination?* (ABC News television broadcast May 3, 2005) (on file with author).

148. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107 (9th Cir. 2006) (en

bartender's claim that the policy unlawfully discriminated on the basis of sex.[149] According to the appellate panel, the complainant had not introduced proof that the standards imposed disproportionate burdens of time and expense, a fact that presumably would be obvious to reasonable jurors.[150] Does anyone, except apparently some federal judges, really need expert testimony comparing the average time required for cleaning fingernails with applying makeup and styling hair? And, as one dissenting judge pointed out, cosmetics "don't grow on trees."[151]

Makeup and manicure requirements may be trivial, but the broader principle is not. Holding only women to standards of sexual attractiveness perpetuates gender roles that are separate and by no means equal. As another dissenting judge in the Harrah's Casino case noted, the assumption underlying the employer's grooming policy was that women's "undoctored faces compare unfavorably to men's."[152] Such double standards demean and devalue the female workforce.[153] They divert attention from character and capabilities, which for the vast majority of positions, should be the basis for employer decision making.

Sexualized grooming standards also penalize gays and lesbians who reject conventional gender norms. A case in point involved Nikki Youngblood, a Florida high school senior who challenged a school board requirement that female students sit for yearbook portraits in a scoop neck dress. Youngblood was a lesbian who had never worn skirts or dresses while a student, and wanted to pose in a suit comparable to those worn by male classmates. As her lawyer noted, she was not "a rebellious kid trying to destroy the sanctity of the school yearbook. She simply wanted to appear in her yearbook as herself, not a fluffed-up stereotype of what school administrators thought she should look like."[154]

Sexualized appearance standards reinforce gender stereotypes and gender subordination. In commenting on such prejudices, Victorian novelist Edith Wharton once observed: "Genius is of small use to a woman who does not know how to do her hair."[155] All too often, the legacy of those attitudes underpins contemporary grooming policies.

---

banc), *aff'g* 392 F.3d 1076 (9th Cir. 2005).

149. *Id.* at 1106.

150. *Id.* at 1110-11.

151. *Id.* at 1117 (Kozinski, J., dissenting).

152. *Id.* at 1116 (Pregerson, J., dissenting).

153. *See* DEBORAH HELMAN, WHEN IS DISCRIMINATION WRONG? 34, 43-47 (2008) (arguing that demeaning conduct is the central moral injury of discrimination and criticizing grooming codes like Harrah's on that ground).

154. Marilyn Brown, *Gay Teen Sues School over Yearbook Photo*, TAMPA TRIB., June 20, 2002, at M1 (quoting Karen Doering).

155. BROWNMILLER, *supra* note 130, at 76 (quoting Edith Wharton).

3. *Self-expression: personal liberty and cultural identity*

A final objection to discrimination based on appearance is that it restricts individuals' right to self-expression. If, as cultural critic Susan Sontag once put it, our "manner of appearing *is* our manner of being," then requiring conformity to conventional norms may significantly infringe individual autonomy.[156] The way individuals present themselves to the world often implicates core values and cultural identity. Although most courts regard matters of grooming as relatively insignificant concerns, many individuals see them as central to their personal beliefs and religious, racial, and gender affiliations. Examples that employers and courts have sometimes failed to accommodate involve Muslim men who refuse to shave, Muslim women who wear headscarves, Jewish men who wear yarmulkes, and African American women who braid their hair.[157] Grooming codes that require women to wear makeup or skirts, prevent men from wearing earrings, and restrict transsexuals' ability to alter their gender identity also reinforce the stereotypes that contribute to inequality and homophobia.[158] Darlene Jespersen, the female bartender who sued Harrah's Casino, had principled reasons for refusing to wear makeup. She felt that being dolled up like a sexual object was "degrad[ing]," "took away [her] credibility," and limited her effectiveness in dealing with unruly, intoxicated guests.[159]

Prohibitions on grooming styles associated with particular racial groups, such as Afros, cornrows, or dreadlocks pose special concerns; at issue may be core values of cultural identity.[160] A prominent example is *Rogers v. American*

156. SUSAN SONTAG, AGAINST INTERPRETATION 18 (1966).

157. *See, e.g.*, Anita L. Allen, *Undressing Difference: The Hijab in the West*, 23 BERKELEY J. GENDER L. & JUST. 208, 211-16 (2008) (reviewing JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL (THE PUBLIC SQUARE) (2007)); Gil Grantmore, *Lex and the City*, 91 GEO. L.J. 913, 917 (2002); *see also* Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 205 (2000).

158. Smith v. City of Salem, 378 F.3d. 566, 568, 574 (6th Cir. 2004) (reversing a dismissal of a transsexual's challenge to dress and grooming requirements); De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 332 (9th Cir. 1979) (holding that barring men from wearing earrings would be permissible); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) (upholding an employer's skirt requirement for all female employees); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 804 (Iowa 2003). *See generally* Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992) (discussing the content and meaning of appearance regulation laws).

159. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108 (9th Cir. 2006). For the degrading comments made by the management, see Gender Public Advocacy Coalition, *GenderPAC National News Interviews Darlene Jespersen* (Jan. 29, 2001), http://www.gpac.org/archive/news/notitle.html?cmd=view&msgnum=0273.

160. The leading racial grooming case upheld the prohibitions on cornrows. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981). For more recent allegations of discrimination based on dreadlocks in addition to cornrows, see *McManus v. MCI Commc'ns Corp.*, 748 A.2d 949, 952 (D.C. Cir. 2000); Lewis & Roca, LLP, *Tattoos, Piercings, and Other Looks—Where Can You Draw the Line?*, 8 ARIZ. EMP. L. LETTER 7 (2001). For more successful litigation involving hair length and Native Americans, see Grantmore, *supra* note

Airlines. There, a female African American employee challenged the airline's prohibition on braided cornrows. In rejecting claims of race and sex discrimination, the court noted that the plaintiff had not demonstrated "that an all-braided hair style is worn exclusively or even predominantly by black people," and had herself adopted the style only "after [it] had been popularized by a white actress."[161] Yet it is not necessary to see braiding as the exclusive or dominant preference of black women to understand its racial significance. The practice has been common among African American women "for [over] four centuries," and has often served as an expression of racial pride.[162] To the *Rogers* court, and others that have followed its approach, hairstyle has seemed "a matter of relatively low importance."[163] But that has not been the view of historians who have studied the issue, employees who have been willing to litigate it, and managers who have chosen to fight back.[164] "[O]ne can hear [judges] asking [the plaintiff] Rogers: 'Why is this so important to you?'"[165] But if they had also questioned why it should be so important to her employer, the stakes might have been more apparent.

4. *The cumulative impact of bias based on appearance*

Although individual examples of appearance discrimination often seem insignificant, their cumulative effect is anything but. Such prejudice violates merit principles, undermines equal opportunity, exacerbates stigma, erodes self-esteem, restricts individual liberty, and reinforces disadvantages based on class, race, ethnicity, sex, and sexual orientation. In short, discrimination based on appearance compromises the same values of personal dignity and social equality as other forms of discrimination that are now illegal.[166] What accounts for the difference in treatment?

157, at 914-15. For critiques of prohibitions that have been upheld, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 890-93 (2002).

161. *Rogers*, 527 F. Supp. at 232.

162. Caldwell, *supra* note 160, at 379; Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 115 (2001).

163. *Rogers*, 527 F. Supp. at 231. For other examples, see *McBride v. Lawstaf, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 1758, 1759-60 (N.D. Ga. Sept. 19, 1996); *cf.* Monica C. Bell, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 133 (2007) (describing a 2006 Baltimore police department prohibition on hair braiding).

164. *See* INGRID BANKS, HAIR MATTERS: BEAUTY, POWER, AND BLACK WOMEN'S CONSCIOUSNESS (2000); AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA (2001); Bell, *supra* note 163, at 128-31; Caldwell, *supra* note 160, at 379, 391-93; Patton, *supra* note 121, at 26-27.

165. Yoshino, *supra* note 160, at 896.

166. Yet even when it compounds such discrimination, it is generally tolerated. See the discussion of *Jespersen* and *Rogers*, *supra* text accompanying notes 148-52, and 160-65

B. *The Rationale for Discrimination and Resistance to Prohibitions*

1. *Public attitudes*

Public tolerance of appearance-related prejudice may in part reflect inadequate understandings of its frequency or consequences. Such bias often operates at unconscious levels and neither the perpetrator nor the victim may be aware of its extent. Nor do most victims identify as a cohesive group. Unlike sex, race, or ethnicity, "unattractiveness" falls on a continuum and even who qualifies can be open to dispute. Given the stigma involved, few want to claim that status.[167] Apart from the relatively small number of individuals involved in the "fat acceptance" movement, no organized constituency has mobilized around discrimination based on appearance. Nor are many legal scholars and policymakers sensitive to the causes and consequences of such discrimination. For example, in distinguishing among types of prejudice, one prominent constitutional law expert asserted: "Although aversions and attractions based on physical attractiveness are common, they usually neither derive from nor reinforce biases, ideals, or stereotypes."[168] As the preceding summary made clear, all research is to the contrary.

Other commentators, like Richard Ford, take a comparative perspective. Appearance discrimination, he argues, "is rarely as explicit or as severe as racism. 'Fat' and 'ugly' people . . . don't think of themselves as a discrete social group," and "are spread pretty evenly across families and social classes, so the ill effects of bias against them are often ameliorated by other social advantages."[169] Accordingly, "[w]eightism and looksism aren't problems of social order or of *social* injustice."[170] But why not? Many women do not identify themselves as part of a discrete disadvantaged group. And they too are distributed across classes in ways that reduce the effects of bias. That does not make the social injustice of gender discrimination any less pronounced.

Moreover, discrimination based on appearance appears at least as widespread as other forms of prohibited bias, and many Americans believe that something should be done about it. In one national poll, 16% of workers believed that they had been subject to appearance-related discrimination.[171] That is roughly the same percentage that, in other national polls, reported that they had been victims of sex-based discrimination (12%) and a larger percentage than those who reported racial (12%), age (9%), or religious or

167. *See* Sarah Kershaw, *Move Over, My Pretty, Ugly Is Here*, N.Y. TIMES, Oct. 30, 2008, at E1 (noting that "'[m]ost people would want to disclaim membership'" in any group labeled ugly).

168. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 166 (1992).

169. RICHARD THOMPSON FORD, THE RACE CARD 159 (2008).

170. *Id.*

171. Employment Law Alliance, *supra* note 4.

ethnic bias (3%).[172] So too, almost half of surveyed Americans believe that obese workers suffer discrimination in the workplace, a figure that is higher than for other groups that are the concern of antidiscrimination laws.[173] When asked about legal remedies, the responses were close to evenly divided. Thirty-nine percent of workers "said that employers should have the right to deny employment to someone based on appearance, including weight, clothing, piercing . . . or hair style."[174] By contrast, 33% "said [that] workers who are unattractive, overweight, or generally look or dress unconventionally, should be given special government legal protection such as that given persons with disabilities."[175]

Framing the questions in those terms, however, may have skewed the results. Experience with surveys on related issues indicates that people respond less favorably to strategies described as special treatment than those described as equalizing opportunities.[176] Asking whether the unattractive should get special protection is likely to get less support than asking whether workers should have the right not to be discriminated against because of their appearance. It also bears notice that public opinion varies considerably by sex and race. Women are much less likely than men to agree that employers should have the right to discriminate based on looks (32% compared to 46%) and nonwhites are much less willing to allow discrimination than whites (24% compared to 41%). Such disparities may reflect the fact, noted earlier, that appearance-related bias has a disproportionate impact on already disadvantaged groups.

---

172. NBC News/Wall Street Journal Poll, June 2008, *available at* http://roperweb.ropercenter.uconn.edu/ (A subscription is needed to access this website. Follow "iPoll" hyperlink and sign in; then search for the word "discrimination" appearing in a poll by the organization "NBC News" between 6/1/2000 and 6/30/2000; follow the hyperlink for the first result, "Have you ever personally faced discrimination in the job market?").

173. Employment Law Alliance, *Nearly One-Half of Americans Polled Believe Obese Workers Are Discriminated Against on the Job*, Nov. 6, 2003, http://www.employmentlawalliance.com/en/node/1293. The poll did not use the term "often," so its results are not exactly comparable to other surveys using that term, such as the Harris Poll. Humphrey Taylor, The Harris Poll, *Workplace Discrimination Against, and Jokes About, African Americans, Gays, Jews, Muslims and Others*, Nov. 13, 2002, http://www.harrisinteractive.com/harris_poll/index.asp?PID=340. When asked how often certain groups experienced discrimination in the workplace, the following percentages reported "often": age (32%); sexual orientation (29%); people with disabilities (21%); women (19%); African Americans (18%); Muslims (14%); Hispanics (12%); Jews (5%); Asian Americans (5%). *Id.*

174. Employment Law Alliance, *supra* note 4.

175. *Id.*

176. For example, support for affirmative action is lower when questions are framed in terms of special treatment or preferences than for other strategies that equalize opportunities or take qualifications into account. *See* FAYE J. CROSBY, AFFIRMATIVE ACTION IS DEAD; LONG LIVE AFFIRMATIVE ACTION 73-81 (2004).

2. *Job performance, corporate image, and customer preferences*

To many individuals, however, discrimination based on appearance seems justifiable because appearance seems relevant to job performance. Obesity is related to health and physical capabilities, which can affect absenteeism, effectiveness, and medical insurance costs. Yet in many employment cases challenging weight discrimination, employees have shown that their obesity caused no performance difficulties.[177] As one leading expert has noted, "The extent to which overweight people have difficulty in obtaining work goes far beyond what can be justified by medical data . . . ."[178]

One of the few reported cases involving discrimination based on health costs concerned a woman who was denied employment by Xerox because the corporation's doctor determined that she presented a significant risk to the company's disability and life insurance programs.[179] Yet the plaintiff had neither a history of health difficulties nor any previous performance problems.[180] Although a New York court ultimately held that state disability law protected her from such discrimination, the outcome could have been different in other jurisdictions.[181] And the absence of protection is hard to reconcile with rulings in other discrimination contexts that prevent denial of important individual rights on the basis of highly imperfect statistical correlations.[182]

To some commentators, however, when prejudice based on appearance involves seemingly voluntary characteristics, such as weight, it appears less offensive than other forms of discrimination. As one expert notes, "we're running out of [groups] that we're allowed to hate and to feel superior to . . . . Fatness is the one thing left that seems to be a person's fault—which it isn't."[183] Permitting discrimination on that basis seems justifiable to those who believe that overweight individuals can and should modify their condition. In Ford's view, "obesity causes illness and exacerbates disease," and "losing weight . . . for most [people is] only moderately challenging."[184] He offers no support for that rosy view of dieting, and virtually all expert opinions and statistical surveys are to the contrary. Only about five percent of dieters

177. *See, e.g.*, TERRY POULTON, NO FAT CHICKS 126-32 (1997); Stephanie B. Goldberg, *Obesity: Discrimination Violates Rehab Act*, 80 A.B.A. J. 95, 95 (1994); Sharlene A. McEvoy, *Fat Chance: Employment Discrimination Against the Overweight*, 43 LAB. L.J. 3, 3 (1992); Tamar Lewin, *Workplace Bias Tied to Obesity Is Ruled Illegal*, N.Y. TIMES, Nov. 24, 1993, at A18.

178. POULTON, *supra* note 177, at 133.

179. McDermott v. Xerox Corp., 478 N.Y.S.2d 982, 983 (App. Div. 1984).

180. *Id.* at 983-84.

181. *Id.* at 985-86.

182. For a leading decision striking down discrimination in the insurance context, see *City of L.A. Department of Water & Power v. Manhart*, 435 U.S. 702 (1978).

183. Natalie Angier, *Why So Many Ridicule the Overweight*, N.Y. TIMES, Nov. 22, 1992, at 38 (internal quotation marks omitted).

184. FORD, *supra* note 169, at 132.

manage to achieve long-term weight loss, and those who do frequently require surgical and lifestyle interventions that are anything but moderate.[185] Although the public health community is divided on other issues, there is nearly universal agreement that discrimination against fat people is a singularly unjust and ineffective way to deal with obesity.[186]

A related business concern is that appearance will influence an employee's credibility and an employer's image. So, for example, when Jazzercise refused a franchise to Jennifer Portnick, a 245-pound San Francisco aerobics instructor, the explanation was that the company "[sold] fitness."[187] According to its lawyer, "[o]ne of the keys to success is extending franchises to instructors with a fit, toned body. Being able to portray this image inspires students. The fit and toned body image is a necessary part of what students seek to achieve."[188] But Portnick was in fact fit. She "work[ed] out six days a week and ha[d the] stamina to lead back-to-back aerobics classes,"[189] and was otherwise "acknowledged [by the company] as well qualified."[190] Similarly, Sharon Russell, an obese nursing school student, was expelled not because of her record but because school administrators worried that she would provide a poor "model of health" when counseling patients about nutrition.[191]

Concerns about employee credibility often reflect more about the prejudices of the employer than about the behavior of customers or patients. We do not refuse medical education or doctors' licenses to individuals who smoke or are overweight on the assumption that they cannot counsel patients about health. Nor should we assume, in a country where two-thirds of adults are classified as overweight, that most aerobics students would be deterred rather than inspired by an instructor who looked like them, but was fit and toned. In fact, a growing number of fitness classes are expressly marketing themselves to full-bodied women.[192] Portnick received sympathetic media coverage and went on to teach successfully at another organization; many

---

185. *See, e.g.*, CAMPOS, *supra* note 78; KOLATA, *supra* note 33; *see also supra* text accompanying note 41.

186. *See supra* Part II.A.1 and text accompanying note 102 (discussing stigma). For better policy strategies, see *infra* Part IV.C.

187. Elizabeth Fernandez, *Size-16 Aerobics Teacher Gets National Attention*, S.F. CHRON., Mar. 18, 2002, at A11.

188. Letter from C. Robert Sturm, Attorney, Littler Mendelson, to Mary Gin Starkweather, Contract Compliance Officer, S.F. Comm'n on Human Rights 6 (Oct. 26, 2001) (on file with author). The case was mediated to a successful resolution and the complaint dismissed. *See infra* text accompanying notes 315-16.

189. Elizabeth Fernandez, *Exercising Her Right to Work*, S.F. CHRON., May 7, 2002, at A1.

190. Abby Ellin, *New Breed of Trainers Are Proving Fat Is Fit*, N.Y. TIMES, Sept. 1, 2005, at G8.

191. Russell v. Salve Regina Coll., 890 F.2d 484, 488 (1st Cir. 1989).

192. *See* POULTON, *supra* note 177, at 195; *see also* Ellin, *supra* note 190 (discussing the growing acceptance of overweight trainers and a fitness class that is "designed for people of all sizes").

women agreed that she should be judged on her "merits not on . . . [her] measurements."[193] And Jazzercise "drop[ped] its appearance requirement" in the face of adverse publicity and studies that, according to a company spokesperson, indicated that "people of varying weights [can] be fit."[194]

For some goods and services, however, employees' attractiveness can be an effective selling point, and part of a strategy to "brand" the seller through a certain look.[195] According to a spokesperson for the Borgata Hotel Casino & Spa, its weight limits and periodic "weigh-in" requirements for "Borgata Babes" cocktail waitresses responded to market demands: "Our customers like being served by an attractive cocktail server."[196] Analogous assumptions evidently underpinned the order by a L'Oreal cosmetic store manager to "[g]et me somebody hot" for a sales position,[197] Abercrombie & Fitch's celebrated policy of hiring sexually attractive, "classic American," white salespersons[198] and the preference by certain bars and restaurants for staff that are "young" and "trendy" or not "too ethnic."[199] If an employee has the right to assert identity through appearance, why shouldn't an employer? As one owner of a Santa Cruz restaurant put it, "If someone has 14 earrings in their ears and their nose—and who knows where else—and spiky green hair and smells like a skunk, I don't know why I have to hire them."[200] Other commentators are similarly sympathetic to the elite hotels' desire for "elegance and refinement, not the . . . big hair and press-on nails" of the "working class."[201] "So You

193. Elizabeth Fernandez, *Teacher Says Fat, Fitness Can Mix*, S.F. CHRON., Feb. 24, 2002, at A21; *see* Ellin, *supra* note 190 (describing career).

194. Fernandez, *supra* note 189; *see also* Ellin, *supra* note 190.

195. *See* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 15-19 (2007); Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 494-97 (2005) (citing studies showing that employee attractiveness can positively influence consumer perceptions); Brian D. Till & Michael Busler, *Matching Products with Endorsers: Attractiveness Versus Expertise*, 15 J. CONSUMER MARKETING 576 (1998); Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WK., Mar. 16, 1998, at 18.

196. Gersh Kuntzman, *Casino Gals' Fat Chance—Hotel's Weightress Rule: Gain Pounds, Lose a Job*, N.Y. POST, Feb. 18, 2005, at 3. Any employee who gains more than seven percent of his or her body weight will be required to lose the weight in a gym that the casino pays for. Failure to do so will result in termination. *Id.*

197. Yanowitz v. L'Oreal USA, Inc., 131 Cal. Rptr. 2d 575, 582, 588 (Ct. App. 2003) (finding the "hot" directive impermissible).

198. Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at A12 [hereinafter Greenhouse, *Going for the Look*]. Abercrombie & Fitch ultimately settled claims of race discrimination by agreeing to integrate its staff and advertisements. *See* Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16.

199. Greenhouse, *Going for the Look*, *supra* note 198; *see also* FORD, *supra* note 169, 138-40 (defending similar practices by the Ritz Carlton and Clift Hotels).

200. Paddock, *supra* note 107.

201. FORD, *supra* note 169, at 143.

Want to Hire the Beautiful," ran the title of a *Business Week* column. "Well, Why Not?"[202]

Well, to start with, it may be illegal if employers' definition of beauty has anything to do with race, ethnicity, sex, age, or disability. Discrimination on the basis of those criteria is unlawful under federal and state statutes, as some of the businesses mentioned above have discovered.[203] Moreover, the reasons why antidiscrimination law generally does not permit customer preferences as a defense apply equally to bias based on appearance even if it does not involve race, sex, age, or disability. Those preferences generally reflect and reinforce precisely the attitudes that society is seeking to eliminate. During the early Civil Rights era, Southern employers often argued that hiring blacks would be financially ruinous; white customers would go elsewhere. In rejecting such customer preference defenses, Congress and the courts recognized that the most effective way of combating prejudice was to deprive people of the option to indulge it.

This approach is not without difficulty in some contemporary contexts involving appearance-related discrimination. For example, what is the "essence" of the job for television newscasters? How much does attractiveness matter and what if viewers set higher standards for women than men? In one celebrated case, a court rejected news anchor Christine Craft's claim that she was unlawfully terminated because she was "too old, too unattractive, and not deferential enough to men."[204] Under the court's analysis, viewer ratings were relevant to job performance.[205] By that logic, it would seem perfectly permissible for television media to require that women, but not men, look young and attractive, because viewers will accept a Walter Cronkite or Larry King, but not the female equivalent. Yet such double standards readily become self-perpetuating. Viewers expect youth and beauty in female newscasters in part because they lack significant exposure to an alternative: women who gained those positions through merit-related qualifications. A true commitment to equal opportunity argues for rejecting customer preferences as a defense except where appearance is essential to the occupation, such as modeling, acting, or sexual entertainment.

The same logic applies to grooming codes. As subsequent discussion reflects, courts have sometimes permitted sexually specific grooming codes if they reflect generally accepted community standards, involve no fundamental

---

202. Barro, *supra* note 195.

203. Greenhouse, *Going for the Look*, *supra* note 198 (describing lawsuits against Abercrombie & Fitch, Mondrian Hotel, and a Missouri restaurant that fired a forty-seven-year-old waitress who was deemed unsuitable for its trendy image).

204. Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *aff'd in part, rev'd in part*, 766 F.2d 1205 (8th Cir. 1985); *see also* CRAFT, *supra* note 141.

205. *Craft*, 572 F. Supp. at 879 (noting that "ratings routinely serve as the basis for personnel changes").

rights, or impose no disproportionate burdens on women or men.[206] But such permission should be granted less frequently than is now the case. Customers who want what a Hooters' spokeswoman described as a "little good clean wholesome female sexuality" are no more worthy of deference than the Southern whites in the 1960s who didn't want to buy from blacks, or the male airline passengers in the 1970s who liked stewardesses in hot pants.[207] As long as Hooters markets itself as family-friendly and offers a children's menu, it cannot credibly claim that it is selling sex rather than burgers, and that waitresses with cleavage are a business necessity.[208]

A related economic justification for discriminating on the basis of appearance is that it often reflects other relevant traits. Commentators note that grooming may be seen as a "good indicator" of virtues such as industriousness and sociability.[209] Yet what makes some grooming codes objectionable is not that they prescribe neatness, which could correlate with performance-related traits, but that they reinforce sex stereotypes. Neither research nor common sense suggests that men who wear earrings or women who decline to wear nail polish or high heels are less industrious.

Employers' justifiable concerns can be met by antidiscrimination provisions that permit regulation of health and hygiene, but that do not institutionalize gender inequalities. Judged on that basis, a policy preventing Santa Cruz employees from "smell[ing] like a skunk" stands on different footing than Harrah's requirement of teased hair and makeup.[210] Only the latter reflects traditional sex-based stereotypes, imposes disproportionate burdens on women, and bears no demonstrable relationship to job performance. Indeed, the uncontested evidence was that bartender Darlene Jespersen had consistently received glowing evaluations from supervisors and customers during her twenty-year service, despite her lack of makeup.[211]

Another way to accommodate employer concerns, reflected in the Santa Cruz ordinance, is to prohibit only discrimination on the basis of a "physical characteristic" that arises from birth, accident, disease, or events outside of the control of the individual.[212] The logic underlying this approach is self-evident.

---

206. *See* discussion *infra* Part III.B.2.

207. Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 295 (N.D. Tex. 1981); Deborah L. Rhode, *P.C. or Discrimination?*, NAT'L L.J., Jan. 22, 1996, at A19 [hereinafter Rhode, *P.C. or Discrimination?*]. According to some commentators, Hooters orchestrated a substantial adverse publicity campaign "widely believed to have badly embarrassed the EEOC for bringing charges against the restaurant chain." ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 387 (7th ed. 2004) (quoting Darryl Van Duch, *Bad PR Spurs Cave-Ins: Some Companies Are Settling to Contain Harm from Negative Publicity*, NAT'L L.J., Oct. 13, 1997, at A1).

208. *See, e.g.*, Rhode, *P.C. or Discrimination?*, *supra* note 207.

209. FORD, *supra* note 169, at 160.

210. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106-07 (9th Cir. 2006); Paddock, *supra* note 107.

211. *Jespersen*, 444 F.3d at 1106-08.

212. SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, .020(13) (2008).

Bias against the unattractive seems most unjust when it involves features that people cannot readily alter. Yet American antidiscrimination law is not so restrictive. It protects individuals from prejudice based on religion, which is voluntary, and on disabilities such as tobacco-related medical conditions that individuals have power to affect. Bias based on voluntary characteristics often offends principles of equal opportunity and personal liberty. The same is true of discrimination based on appearance. Moreover, one of the most common forms of appearance discrimination involves weight, which has both biological and behavioral roots, and is far more difficult to control than is commonly assumed.

3. *Pragmatic concerns*

Some commentators argue that banning appearance-related bias is unrealistic. In their view, the preference for attractiveness appears natural and immutable in a way that other forms of bias do not. Sociobiological research suggests that this preference has a genetic basis; the appeal of youthful, attractive women has evolved through natural selection because such an appearance often signals health and fertility.[213] Attempting to ban discrimination based on such deeply rooted preferences strikes many observers as impractical and imprudent.[214] In their view, "[S]ome aspects of what we consider physically attractive are . . . hardwired . . . . [T]he taste for physical beauty is unfair. But legal intervention is unlikely to eliminate it."[215]

It may also risk trivializing other more serious forms of bias. Some courts and commentators, for example, have worried that allowing appearance-discrimination claims under civil rights and disability laws will undermine these statutes' effectiveness in assisting individuals with more severe disadvantages.[216] A common objection is that:

> [T]here are practical limits of human attention and sympathy. The good-natured humanitarian who listens attentively to the first claim of social

213. ROBERT WRIGHT, THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY 65 (1994); Fallon, *supra* note 6, at 82; Langlois et al., *supra* note 19, at 393, 407-08; Robert Wright, *Up from Gorilla Land: The Hidden Logic of Love and Lust*, PSYCHOL. TODAY, Mar.-Apr. 1995, at 26, 29.

214. *See* Thomas C. Grey, *Cover Blindness*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 85, 86-87 (Robert C. Post ed., 2001) [hereinafter PREJUDICIAL APPEARANCES]; James J. McDonald Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMP. REL. L.J. 118, 118 (2003); Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, *in* PREJUDICIAL APPEARANCES, *supra*, at 1, 1-2.

215. FORD, *supra* note 169, at 160-61.

216. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); Andrews v. Ohio, 104 F.3d 803, 809-10 (6th Cir. 1997); Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986), Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1091-92 (S.D. Iowa 1997); Elizabeth E. Theran, *Legal Theory on Weight Discrimination*, *in* WEIGHT BIAS, *supra* note 15, at 195, 197-98.

> injustice will become an impatient curmudgeon after multiple similar admonishments. . . . And a business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal. . . . The growing number of social groups making claims to civil rights protection threatens the political and practical viability of civil rights for those who need them most.[217]

Mario Cuomo put the point succinctly in debates over a proposed New York law banning discrimination based on appearance. This was "one law too many."[218] If the goal is ensuring merit-based employment decisions, where is the stopping point? As an editorial in *The New Republic* asked, should we ban "prejudice on the basis of a whiny voice? . . . What about 'grouch liberation'?"[219] Social critic Andrew Sullivan continued the parody in the *Sunday Times* (London): "But by the time you've finished preventing discrimination against the ugly, the short, the skinny, the bald, the knobbly-kneed, the flat-chested and the stupid, you're living in a totalitarian state."[220] Other hypothetical candidates for the proverbial parade of horribles include a Jewish deli owner compelled to hire a cashier with a swastika tattoo, a fast-food restaurant in a black neighborhood forced to employ a skinhead wearing a "White Power" T-shirt, a newspaper required to offer its "ace crime reporter" position to a transvestite, and workplace regulations banning "fat jokes."[221] As one observer concludes, "Although most slippery slopes are not as slippery as they appear, this one actually [is]."[222]

Part of the problem is that attractiveness and grooming standards fall along a continuum. How would employers or courts determine what aspects of appearance are entitled to protection? As one judge put it, "No Court can be expected to create a standard on such vagaries as attractiveness . . . ."[223] "Will there be a national standard of attractiveness established by EEOC rulemaking?," wonders the author of *Civil Rights for the Aesthetically-Challenged*.[224] "Will beauty contest judges go on to find lucrative careers as expert witnesses in these cases?"[225] Commentators from all points on the

---

217. FORD, *supra* note 169, at 176.

218. POULTON, *supra* note 177, at 136 (quoting Mario Cuomo) (internal quotation marks omitted).

219. Editorial, *The Tyranny of Beauty*, NEW REPUBLIC, Oct. 12, 1987, at 4.

220. Andrew Sullivan, *The Plump Classes Are on a Roll*, SUNDAY TIMES (London), Aug. 29, 1999, at 7.

221. The first three examples come from Joseph Farah, *Job Bias Law Takes a Walk in Purple Zone: Some Cities May Prohibit Discrimination in Hiring on the Basis of Appearance*, L.A. TIMES, Feb. 7, 1992, at B7. The warning about fat jokes appears in Peter Byrne, *As a Matter of Fat*, S.F. WKLY., Jan. 17, 2001, *available at* http://www.sfweekly.com/2001-01-17/news/as-a-matter-of-fat/.

222. Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 468 (2007).

223. Alam v. Reno Hilton Corp., 819 F. Supp. 905, 914 (D. Nev. 1993).

224. McDonald, *supra* note 214, at 127.

225. *Id.*

political spectrum worry that appearance-discrimination statutes will result in "litigiousness run wild," impose "untold costs" on businesses, and erode support for other legislation prohibiting "truly invidious discrimination."[226]

If the objective is greater protection for employee appearance in the workplace, then skeptics also question whether the solution lies in transferring control "from one set of authority figures (employers) to another (judges, officials)."[227] An increasingly conservative federal bench has plenty of members like Richard Posner who believe that the law on sex stereotypes has already "gone off the tracks" in reasoning "as if there were a federally protected right for male workers to wear nail polish . . . and mince about in high heels."[228] As another trial judge put it, "[f]ederal judges have too much to do" to become embroiled in petty disputes about where women can and can't wear pants.[229]

Critics also have questioned the willingness and ability of discrimination victims to take advantage of legal remedies. Won't the same stigma that leads to biased treatment prevent individuals from challenging it? As one civil rights attorney notes, people are unlikely "to say they were wronged because they are ugly."[230] Another adds that most employers will be equally unlikely to acknowledge unattractiveness as the reason for an adverse decision; they will offer a "more neutral reason" that is hard to disprove.[231]

There are, however, a number of difficulties with critics' arguments, beginning with the assumption that prejudice based on appearance is more natural and harder to eradicate than other forms of bias. In fact, considerable evidence suggests that in-group favoritism—the preferences that individuals feel for those who are like them in salient respects, such as race, sex, and ethnicity—are also deeply rooted.[232] *Plessy v. Ferguson*, the shameful 1896 Supreme Court decision that affirmed "separate but equal" racial policies, was

---

226. FORD, *supra* note 169, at 176 (noting the concern that appearance-discrimination statutes would erode support for other legislation prohibiting "invidious discrimination"); Byrne, *supra* note 221 (discussing untold costs); Margaret Carlson, *And Now, Obesity Rights*, TIME, Dec. 6, 1993, at 96 (quoting Fred Siegal regarding litigiousness) (internal quotation marks omitted).

227. Klare, *supra* note 158, at 1446.

228. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring).

229. Rappaport v. Katz, 380 F. Supp. 808, 811-12 (S.D.N.Y. 1974).

230. Kara Swisher, *Overweight Workers Battle Bias on the Job: Looks Discrimination Called Common, but Hard to Prove*, WASH. POST, Jan. 24, 1994, at A1 (quoting civil rights attorney Laura Einstein) (internal quotation marks omitted).

231. *Id.* (quoting Providence, Rhode Island ACLU executive director Steven Brown) (internal quotation marks omitted).

232. For general discussion of in-group bias, see Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 554 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra*, at 357.

built on the assumption that segregation was a natural desire.[233] Yet that desire has proven open to change, partly through legal interventions. A half-century ago, a majority of Americans surveyed thought that the Supreme Court's ruling in *Brown v. Board of Education* prohibiting school segregation had "caused a lot more trouble than it was worth."[234] Today, only 11% share that view and the ruling is widely regarded as one of the Court's finest moments.[235] Legislation such as the American Disabilities Act also has had powerful positive effects on attitudes about the capacities of disabled individuals.[236] And in less than a decade, views on gay and lesbian relationships have shifted dramatically, in part as a result of laws that have helped to publicize injustice and normalize same-sex orientation.[237] There is no reason to doubt that similar initiatives on appearance discrimination could result in similar shifts in popular opinion and practices.

Nor is there reason to believe that prohibiting such discrimination would erode support for other civil rights legislation. Jurisdictions with such ordinances, such as Santa Cruz, San Francisco, Madison, and the District of Columbia, are not known for problems either of "totalitarianism" or backlash against antidiscrimination policies. There are, to be sure, limits to how far such policies can be extended without diminishing their moral force. But no evidence suggests that we have reached that limit. Nor is it likely that prohibitions on appearance discrimination would unleash a barrage of loony litigation. As the research summarized below indicates, jurisdictions that have such laws report relatively few complaints. Cities and counties average

---

233. 163 U.S. 537 (1896); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 41 (1993).

234. THE GALLUP ORG., GALLUP POLL #614, May 29-June 3, 1959, at Q.31A, *available at* http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/Catalog40/Catalog40.htx;start=summary_link?archno=USAIPO1959-0614.

235. HARRIS INTERACTIVE, TIME MAGAZINE/CNN POLL # 2004-05: 2004 PRESIDENTIAL ELECTION/WAR IN IRAQ/ABUSE OF IRAQI PRISONERS, May 12-13, 2004, at Q.33, *available* at http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/Catalog40/Catalog40.htx;start=summary_link?archno=USHARRISINT2004-05 (when asked whether the *Brown* decision had been good or bad for the U.S., 11% said bad, 82% said good, and 7% said not sure); *see also* DEBORAH L. RHODE & CHARLES J. OGLETREE, JR., *Preface* to *BROWN* AT 50: THE UNFINISHED LEGACY (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004).

236. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 241-45 (2003); Michael Stein, *15 Years from Implementation of ADA in the USA: From the Perspective of Employment and Reasonable Accommodation*, http://www.dinf.ne.jp/doc/english/rights/050307/stein.html (last visited Mar. 30, 2009).

237. For example, compare PENN, SCHOEN & BERLAND ASSOCS., POLL, July 30-Aug. 2, 1998 (finding only 27% believed that homosexuals should be allowed to marry) with ABT SRBI, INC., POLL, PEW RESEARCH CENTER/PEW FORUM ON RELIGION & PUBLIC LIFE POLL #2008-08RELIG: AUGUST 2008 RELIGION AND PUBLIC LIFE SURVEY, July 31-Aug. 10, 2008, *available at* http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/Catalog40/Catalog40.htx;start=summary_link?archno=USPEW2008-08RELIG (finding that 47% believed gay and lesbian couples should be allowed to marry).

between zero and nine a year, and Michigan averages about thirty, only one of which ends up in court.[238] Moreover, most complaints allege violations apart from appearance discrimination, so they could be brought even without such ordinances. Given the costs and difficulties of proving bias, and the qualifications built into current legal prohibitions, their enforcement has not proven nearly as burdensome as opponents have feared.

Of course, legal requirements that ask too much of human nature may lack moral authority and undermine the legitimacy of legal institutions. Prohibition is a textbook case. But for every one of these examples, there is always a counterexample. Many laws that have been widely ignored or resisted at the outset have gradually acquired legitimacy and reshaped public values. Indeed, much of American civil rights legislation is a case in point. By providing a forum to air injustice, law can be a powerful catalyst for social change. Although stigma and evidentiary difficulties will prevent most victims from coming forward, the same is true in other discrimination contexts. Even laws that are notoriously underenforced can serve a crucial role in designating public norms, deterring violations, and affirming social ideals.[239]

4. *The parallel of sex harassment*

In predicting the potential impact of expanded prohibitions on appearance bias, the nation's experience with sexual harassment is instructive. For centuries, women were harassed but the law provided neither a label nor a remedy. In the mid-1980s, the Supreme Court agreed with the Equal Employment Opportunity Commission that sexual harassment was a form of sex discrimination that was actionable under federal civil rights law.[240] The initial reception in many quarters was less than enthusiastic. The men who dominated the upper levels of employment, judicial, and policy circles were often skeptical that sexual overtures and workplace banter were significant problems and that women were, or should be, offended. As one manager put it in a 1980s survey by the *Harvard Business Review*, "I have never been harassed but I would welcome the opportunity."[241] Conservative critics had a field day with the occasional frivolous case—women who were offended by photographs of a bikini-clad wife, copies of *Playboy*, or a Goya portrait of a nude.[242] So too, many federal judges were unpersuaded that courts were the appropriate forum to cope with sexual "horseplay." In their view, the civil

238. *See* discussion *infra* Part III.C.1-2.

239. For two classic accounts, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 44-47 (Illini Books ed. 1985); Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 177-78 (1967).

240. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 through 2000e-17 (2006); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986).

241. Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, 59 HARV. BUS. REV. 76, 92 (1981).

242. *See* RHODE, SPEAKING OF SEX, *supra* note 135, at 98.

rights law was not meant to be a "clean language act" or a remedy for the "petty slights suffered by the hypersensitive."[243] One trial judge expressed common views with uncommon candor: "So, we will have to hear [your complaint], but the Court doesn't think too much of it."[244]

In fact, the principal problem with sexual harassment law has been underreporting, not overreaction. Only a small percentage of those experiencing abuse make any complaints, and far fewer can afford the financial and psychological costs of litigation.[245] Yet despite such underenforcement, the opportunity for legal remedies has made an enormous difference in deterring and redressing harassment. The public has grown more aware of the costs of such abuse both for employees and employers, including economic and psychological injuries, decreased productivity, and increased turnover.[246] Strategies designed to prevent litigation such as training programs and internal complaint procedures have all helped to reshape understandings of unacceptable conduct.

5. *The contributions of law*

Similar results might follow if more jurisdictions enacted prohibitions on appearance discrimination. Additional complaints like those involving the overweight nursing student and aerobics instructor could build public awareness of the injustice of such bias, and challenge the stereotypes underlying it. The outcome in the Jazzercise case underscores the distinction between overweight and unfit. That distinction is important for the public to

243. Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (D. Wis. 1984).

244. *See* Henson v. Dundee, 682 F.2d 897, 900 n.2 (11th Cir. 1982).

245. U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 33 (1995) (reporting that only 6% of victims filed a formal complaint); *see also* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 23-24 (2003) (noting studies finding low rates of filing sexual harassment complaints); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 182-83 (2001) (citing Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, *in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152, 158 (William O'Donohue ed., 1997)) (describing various studies showing that between 5% and 15% of employees seek organizational relief in response to sexual harassment); Emily Couric, *Women in the Large Firms: High Price of Admission?*, NAT'L L.J., Dec. 11, 1989, at S2 (presenting survey results finding that at least 60% of women at large law firms experienced unwanted sexual attention of some kind); Tamar Lewin, *The Thomas Nomination: A Case Study of Sexual Harassment*, N.Y. TIMES, Oct. 11, 1991, at A18 (noting that women fear reprisals and harm to their careers and reputations if they sue for sexual harassment, even if they win and that most women do not make formal complaints or leave the job); *cf.* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 21-22 (1978) (only 9% of women quit immediately upon harassment; most stayed, though many of these did quit eventually when the situation escalated later).

246. RHODE, SPEAKING OF SEX, *supra* note 135, at 101.

grasp in light of growing evidence indicating that unfitness is more predictive of health difficulties than obesity.[247] So too, the adverse publicity concerning the Borgata Babes weigh-in policy focused useful attention on our culture's unrealistic female body images and their link to eating disorders. In some cases, employers have abandoned appearance requirements as a result of well-publicized legal claims. Both Harrah's Casino and Continental Airlines dropped their makeup mandates in the wake of unsympathetic media coverage.[248] Litigation forced other Atlantic City casinos to abandon requirements of revealing uniforms and high heels.[249] To settle the Florida graduation photo controversy, the local school board created an appeal process allowing students to show "good cause" why they should not have to follow the specified yearbook-picture dress code. Other schools also modified their codes to eliminate "ultra-feminine" requirements.[250]

But not everyone lives happily ever after. Nikki Youngblood lost her case in the trial court and had no photo in her yearbook; other students who lack free legal assistance or face recalcitrant school boards remain subject to similar, often more restrictive daily dress codes.[251] The Borgata plaintiffs won their case, but the casino's policy remains in force and other workers are unprotected.[252] Darlene Jespersen's refusal to "fix" her face cost her a job at which she excelled, one with decent pay and health benefits. She didn't find a replacement. As her lawyer explained, "Reno is a small town" when it comes to blacklisting in the casino business.[253] That case illustrates why a law banning such appearance discrimination in the first instance would be useful. Our prejudices run deep, and while law can never eliminate them entirely, it can at least address the worst abuses. Abuses based on appearance go largely unremedied under existing civil rights and disability statutes.

---

247. *See* KOLATA, *supra* note 33, at 203-06.

248. Selmi, *supra* note 222, at 481 n.63, 488; Elizabeth A. Brown, *Many Women Still Battle 'Grooming' Discrimination*, CHRISTIAN SCI. MONITOR, June 10, 1991, at 1 (discussing refusal by Continental employee to wear makeup); Bob Egelko, *Court OKs Sex-Based Grooming Standards*, S.F. CHRON., Apr. 15, 2006, at B1 (noting Harrah's statement that it no longer enforces the makeup requirement and offered to rehire Jespersen without makeup).

249. Suzette Parmley, *At Borgata Casino, It's Fit the Mold—or Else*, PHILA. INQUIRER, May 31, 2005.

250. *See, e.g.*, Josh Zimmer, *Students Can Challenge Photo Dress Code*, ST. PETERSBURG TIMES, May 11, 2004, at 3B.

251. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 86 (2006); Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debtate*, 1998 B.Y.U. EDUC. & L.J. 147, 147-48.

252. Telephone Interview with Jill Owens, Lawyer for the Plaintiffs, Meiselman, Denlea, Packman, Carton & Eberz P.C. (Feb. 17, 2009).

253. Telephone Interview with Jennifer Pizer, LAMBDA Legal Defense (Sept. 10, 2008).

III. LEGAL FRAMEWORKS

A. *The Regulation of Appearance*

The legal regulation of appearance has a long and not entirely becoming history. Beginning in the late thirteenth century, many European governments enacted sumptuary laws prohibiting all but the aristocracy from wearing certain fabrics, colors, and garments.[254] In the United States, legislation focused more on sex and disability than class. Most jurisdictions banned public display of clothing (or lack of clothing) that was considered indecent.[255] Dress reform efforts by early women's rights advocates ran afoul of ordinances forbidding divided "harem" skirts and "knickerbockers," and appearing out of doors without a corset.[256] A number of jurisdictions also prohibited "ugly" or "unsightly" individuals from appearing in public.[257]

Contemporary defenses of modesty are more limited, but have not entirely vanished. In 2005, the Virginia legislature considered a provision modeled on an earlier Louisiana prohibition on the intentional display of "below waist undergarments . . . in a lewd or indecent manner." The legislation aimed at male adolescents who wore sagging pants and female teens who flaunted thongs. Sponsors billed such measures as a "vote for character"; as one Louisiana legislator put it, "if we pull up their pants, we can lift their minds while we're at it."[258] Yet policy makers who have welcomed penalties in support of propriety have had no interest in civil remedies in support of equality. The result is a legal framework that leaves many significant injustices based on appearance unchallenged and unchanged.

---

254. *See* ANDREW HUSSEY, PARIS: THE SECRET HISTORY 70 (2006); CATHERINE KOVESI KILLERBY, SUMPTUARY LAW IN ITALY: 1200-1500 at 23-26 (2002). A few laws also prohibited the deceptive use of makeup and other grooming aids. *See* SALLY POINTER, THE ARTIFICE OF BEAUTY 96 (2005) (quoting Elizabethan edict stipulating, "Any woman who through the use of false hair, . . . make-up, . . . high heeled shoes or other devices, leads a subject of Her Majesty into marriage, shall be punished with the penalties of witchcraft'").

255. For early laws, see KARLYNE ANSPACH, THE WHY OF FASHION 261 (1967); Lynn A. Botelho, *Clothing*, *in* 2 PURITANS AND PURITANISM IN EUROPE AND AMERICA: A COMPREHENSIVE ENCYCLOPEDIA 348 (Francis J. Bremer & Tom Webster eds., 2006).

256. BROWNMILLER, *supra* note 130, at 198; JILL FIELDS, AN INTIMATE AFFAIR: WOMEN, LINGERIE, AND SEXUALITY 53-55 (2007).

257. Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 863-64 (1975) (quoting CHI., ILL,. MUN. CODE § 36-34 (1966) (repealed 1974) (imposing fines on persons who appeared in public who were "diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object")).

258. FIELDS, *supra* note 256, at 1 (quoting unnamed legislators in Virginia and Louisiana).

B. *The Limitations of Prevailing Legal Frameworks*

In jurisdictions that do not explicitly prohibit appearance discrimination, victims have occasionally sought relief under more general legal protections.[259] The most common are: constitutional protections of liberty and due process; statutes banning discrimination in employment based on sex, race, and religion; and prohibitions on discrimination based on disability. All have proven seriously inadequate.

1. *Constitutional challenges*

Constitutional challenges to appearance regulation generally have been unsuccessful except when religious freedom is involved. Even then, the success rate has been mixed.[260] One reason is the requirement of state action. The Due Process Clause of the Fifth and Fourteenth Amendments protects liberty interests and equality interests only against regulation by the government, not private-sector employers. A second constraint is the deference that judges generally accord to governmental interests. A 1976 decision set the tone for many to follow. In *Tardif v. Quinn*,[261] a public high school official fired a teacher because he disapproved of the length of her skirt. She sued, claiming that her termination violated liberty interests protected under the Constitution's Due Process Clause. The trial court found that her skirt was within reasonable limits, was not lewd, and was no shorter than outfits worn by other professional women. Nor did it have any demonstrably "adverse effect on her students" or her teaching.[262] Despite such findings, the court of appeals ruled that the government's interest in approving a teacher's image outweighed her personal interest in defining her own appearance.[263] What exactly that interest in image was remains unclear, given its lack of connection to classroom effectiveness. On similar equally strained reasoning, other courts have sustained a school's refusal to allow a teacher to wear a head scarf and police departments' prohibitions on long hair or on earrings even when officers are off duty.[264]

---

259. For the jurisdictions with express prohibitions, see *infra* Part III.C.

260. *Compare* Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003) (upholding correction officer's challenge to discipline based on his refusal to change his hair style on religious grounds where Jewish and Sikh officers had been granted a religious exemption from hair regulations) *with* Daniels v. City of Arlington, 246 F.3d 500 (5th Cir. 2001) (finding a compelling state interest to justify a police department's ban on an officer's wearing religious jewelry on his uniforms). For an overview of the inconsistent application of First Amendment protection to religious dress and grooming, see Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to this Article of Faith*, RUTGERS J.L. & RELIGION, Spring 2008, at 54-57.

261. 545 F.2d 761 (1st Cir. 1976).

262. *Id.* at 763.

263. *Id.*

264. Kelley v. Johnson, 425 U.S. 238 (1976) (hair length); United States v. Bd. of Educ., 911 F.2d 882 (3d Cir. 1990) (head scarf); Rathert v. Vill. of Peotone, 903 F.2d 510,

Underlying these decisions is an assumption similar to that expressed by the distinguished British philosopher H.L.A. Hart:

> [T]he rules of . . . dress . . . occupy a relatively low place in the scale of serious importance. They may be tiresome to follow, but they do not demand great sacrifice: no great pressure is exerted to obtain conformity and no great alterations in other areas of social life would follow if they were not observed . . . .[265]

For an Oxford professor this may have been true. But as discussion in Part I noted, for many Americans, the costs of conformity are considerable. And reducing the impact of sex stereotypes on appearance is likely to have at least some influence on gender roles in other aspects of social life.

2. *Statutory challenges based on sex, race, and religious discrimination*

Most of the early challenges to appearance discrimination involved sex-neutral requirements applied on a sex-specific basis, often termed "sex-plus" requirements. In contexts other than appearance, courts have often found such standards to constitute discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.[266] A leading Supreme Court case held unlawful an employer's denial of job opportunities for women, but not men, with preschool children.[267] However, courts have generally allowed grooming rules applicable to only one sex on the assumption that Congress intended to protect "equality of employment opportunities," not to prevent regulations requiring both sexes to conform to "generally accepted community standards."[268]

Grooming codes have been permissible as long as they involve no immutable characteristics, no fundamental rights, and no greater burden for one sex than the other.[269] Cases finding unequal burdens have included regulations that required only women to be thin and attractive or to wear uniforms.[270] But courts have also failed to perceive inequalities despite obvious differences in the effort and expense required for men and women to comply with appearance standards. For example, in the case involving Harrah's casino discussed earlier, an en banc panel of federal judges saw no disparity in requirements of makeup, nail polish, and teased or styled hair for female bartenders, but only short hair

---

516 (7th Cir. 1990) (off-duty police officer).

265. H.L.A. HART, THE CONCEPT OF LAW 169 (1961).

266. KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 94 (4th ed. 2006).

267. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

268. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975).

269. *Id.*

270. Frank v. United Airlines, Inc., 216 F.3d 845, 853-55 (9th Cir. 2000); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032-33 (7th Cir. 1979).

and "neatly trimmed" nails for men.[271] Courts have also failed to question the sex stereotypes underlying conventional "community standards" and to demand a reasonable business justification for employers' restrictions. One typical case upheld the termination of a male optometrist for wearing a small earring, despite the absence of any evidence that it affected his work or customer relations.[272]

The problem with this approach to appearance regulation is not only that judges often seem clueless about the practical demands that many codes impose on women. The difficulty is also that a framework comparing male and female burdens fails to capture all of what makes these regulations objectionable. Darlene Jespersen resisted Harrah's makeup requirement not because it took more time and money for her to be presentable than her male counterparts, but because she felt that being "dolled up" was degrading and undermined her credibility with unruly customers. Dress codes that require women to wear skirts and not pants are problematic for similar reasons, regardless of what the codes demand of men.[273]

In other contexts, courts have recognized that sexualizing women in the workplace can constitute sex discrimination. For example, where an accountant claimed that she was denied a partnership in part because of sex, the Supreme Court viewed references to her need to "'dress more femininely, wear make-up, have her hair styled, and wear jewelry'" as evidence of unlawful gender bias.[274] Courts' failure to apply the same analysis to grooming codes points up a serious inadequacy in prevailing law.[275]

Similar limitations are applicable to decisions involving appearance-related discrimination based on race or religion. Typical cases involve grooming requirements that have a different impact on certain racial groups or that are inconsistent with religious beliefs and practices. So, for example, some employers have been required to allow Muslim employees to request accommodations for head coverings (hijabs) or beards.[276] However, workers have generally not succeeded in challenging bans on dreadlocks or cornrows on grounds that they are racially discriminatory.[277] Moreover, many courts have been highly deferential to employers' business justifications for restrictions.

---

271. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

272. Kleinsorge v. Eyeland Corp., No. CIV. A. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000).

273. *See* Klare, *supra* note 158, at 1419.

274. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

275. *See* Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 699 (2006).

276. EEOC v. Am. Airlines, Inc., No. 02 C 6172 (N.D. Ill. Sept. 3, 2002) (order of resolution); EEOC v. Fed. Express Corp., No. CV100-50 (S.D. Ga. May 24, 2001) (consent decree).

277. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 261-67 (S.D.N.Y. 2002); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981).

Costco was entitled to ban facial piercings consistent with an employee's religious beliefs because of the undue hardship that accommodation would assertedly cause to the company's public image.[278] Sikh employees who claimed religious reasons for wearing turbans or beards could be denied desirable positions; according to one court, a family restaurant was entitled to project a "'clean cut' image" and to worry that customers might find a bearded manager "unsanitary."[279]

3. *Discrimination based on disability*

One final avenue of challenge for appearance discrimination involves protections for the disabled. The federal Americans with Disabilities Act (ADA) and the Rehabilitation Act prohibit discrimination against "qualified" disabled individuals, whom the ADA defines as those able to "perform [] essential [job] functions" "with or without reasonable accommodation."[280] To qualify as disabled under these acts, individuals must be "substantially limit[ed]" in a "major life activit[y]" by "[a] physical or mental impairment," have "a record of . . . impairment," or be perceived as impaired.[281] States have comparable statutes, which vary but typically define disability in similarly restrictive terms.[282]

The vast majority of appearance-related disability claims have involved overweight or obese individuals, and the vast majority of these have been unsuccessful. In a recent survey of weight-related cases in which the complainant received some relief, only 13% proceeded under the ADA and only 4% under other disability law.[283] The Equal Employment Opportunity Commission Interpretive Guidance on the ADA states that, except in rare circumstances, obesity is not a disabling impairment.[284] Only morbid obesity (100% over average weight), caused by a physiological disorder (such as a thyroid dysfunction) will qualify, a limitation that excludes about 99% of obese individuals.[285] Although a small minority of state and local laws offers broader

278. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134-37 (1st Cir. 2004).

279. EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 89-90 (N.D. Ga. 1981); *accord* Birdi v. UAL Corp., No. 99 C 5576, 2002 WL 471999, at *1-2 (N.D. Ill. Mar. 26, 2002).

280. 42 U.S.C. § 12111(8) (2006); *see also* 29 U.S.C. § 705 (2006).

281. 29 C.F.R. § 1630.1(g) (2008).

282. *See* Kari Horner, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589, 609-10 (2005).

283. Marsha Katz & Helen Lavan, *Legality of Employer Control of Obesity*, 13 J. WORKPLACE RTS. 59, 67 (2008).

284. 29 C.F.R. pt. 1630 app. § 1630.2(j) (stating that "except in rare circumstances, obesity is not considered a disability.").

285. DEP'T OF HEALTH AND HUMAN SERVS., NAT'L CTR. FOR HEALTH STATS., PREVALENCE OF OVERWEIGHT, OBESITY, AND EXTREME OBESITY AMONG ADULTS: UNITED STATES, TRENDS 1976-80 THROUGH 2005-2006, at tbl.1 (2008), *available at*

protection than the federal statute, all but a few victims of weight discrimination fall into the "disability gap": they are "either too disabled to be qualified for their jobs or insufficiently disabled to merit statutory protection."[286] And the inconsistency in legal approaches makes it difficult to obtain class-wide remedies or comprehensive internal policies involving large, national organizations.

The relatively rare cases of successful plaintiffs indicate why a remedy for weight discrimination is necessary. Take Bonnie Cook, who, for five years, satisfactorily performed her work as an aide at a Rhode Island residential center for severely retarded children. A daughter's illness forced her resignation. When she reapplied for her former position, the center denied her application on the ground that her morbid obesity made her "susceptible" to a host of health problems. But her weight was the same as it had been during her prior period of employment, a physical exam found no impairments that would interfere with her job performance, and her condition was the result of a metabolic dysfunction. Accordingly, a federal court ruled that the Rehabilitation Act entitled her to reinstatement and $100,000 in punitive damages.[287] In commenting on the verdict, the executive director of the American Civil Liberties Union office representing Cook noted: "'[t]he irony . . . is that we have an agency that has worked hard to change public attitudes toward the mentally disabled and here they are discriminating against someone based on all the stereotypes of obesity.'"[288] Cook herself drew a more straightforward lesson: "'[P]eople shouldn't judge others because of how they look. What's important is whether or not they can do the job.'"[289] In a similar

---

http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overweight_adult.htm; SOLOVAY, *supra* note 11, at 149; Maggie Fox, *Obese Americans Now Outweigh the Merely Overweight*, REUTERS, Jan. 9, 2009; *see* Korn, *supra* note 10, at 42-43 nn.124, 127 (noting that approximately "one half of one percent of obese people qualify as morbidly obese" and approximately "five percent of obesity is caused by an underlying physiological disorder"); *see also* 29 C.F.R. § 1630.2(j) (2008) (requiring mental or physiological disorder for qualification); Brief of EEOC Amicus Curiae, Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993). In *Cook*, the court held that morbid obesity qualified as both a disability and a perceived disability under section 504 of the Rehabilitation Act of 1973. According to the EEOC guidelines to the ADA, Congress adopted the Rehabilitation Act definitions of "disability" in the ADA with the intent that relevant case law developed under the Rehabilitation Act be generally applicable to the ADA. 29 C.F.R. pt. 1630 app. § 1630.2(6); EEOC v. Tex. Bus Lines, 923 F. Supp. 965, 975 (S.D. Tex. 1996) (agreeing with the EEOC's contention that even when morbid obesity does not result in an impairment which in fact substantially limits "a major life activity, the reaction of others may prove just as disabling").

286. Elizabeth E. Theran, *Legal Theory on Weight Discrimination*, *in* WEIGHT BIAS, *supra* note 15, at 195, 206.

287. Cook v. Rhode Island, No. Civ. A. 90-0560, 1992 WL 535788, at *7 (D.R.I. Sept. 21, 1992), *aff'd sub nom.* Cook v. R.I. Dep't of Mental Health, Retardation and Hosps, 10 F.3d 17 (1st Cir. 1993).

288. POULTON, *supra* note 177, at 126 (quoting Steve Brown, Executive Director of the Rhode Island ACLU).

289. *Id.*

case, a morbidly obese teacher was allowed to proceed against a college that refused to renew her contract. The court held that a jury could find that the college's reason involved not inadequate performance but stereotypical perceptions that overweight professors were "less disciplined and less intelligent" than those of average weight.[290]

In most cases, however, plaintiffs lose even when they present compelling evidence of weight discrimination. Victims are unsuccessful because they fail to show that their employer views them as impaired, that their condition is caused by a physiological disorder, or that their life activities are substantially limited.[291] A typical example involved a morbidly obese woman who lost her job when her employer moved to a smaller office. Her supervisor explained that "there was no room" for such a "'big girl'" in the new location.[292] However, according to the court's analysis, she was not entitled to reinstatement, given the absence of proof that obesity limited her life activities or that her employer perceived her weight as disabling.[293] Also unprotected are individuals who allege wrongful termination due to employers' perceptions that such employees do not fit their organization's "corporate image," or lack the discipline necessary to inspire "respect."[294]

As currently interpreted, federal and state disability laws offer a highly inadequate response to weight-related discrimination. By excluding all but the extremely obese, these statutes deny protection in cases where the discrimination is most likely to be irrational—cases in which moderate obesity or overweight does not compromise job performance and impair major life activities. By requiring complainants to demonstrate impairment as a condition of relief, these statutes also reinforce the stereotypes that underpin discrimination.[295] Such stereotypes give rise to the same forms of bias that

290. Nedder v. Rivier Coll., 944 F. Supp. 111, 119 (D.N.H. 1996).

291. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (relying on EEOC guidelines to find no disability); Coleman v. Ga. Power Co., 81 F. Supp. 2d 1365, 1370 (N.D. Ga. 2000) (no showing of physiological disorder); Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 703, 705 (S.D.N.Y. 1997) (no showing that obesity limited life activity or that employer regarded plaintiff as disabled); Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1154 (Cal. 1993) (no disablement affecting job or life activities); Civil Serv. Comm'n v. Pa. Human Relations Comm'n, 591 A.2d 281, 284 (Pa. 1991) (no proof of impairment or perception of disability).

292. *Hazeldine*, 954 F. Supp. at 701.

293. *Id.* at 703, 705.

294. *See, e.g.*, Spiegel v. Schulmann, No. 03-CV-5088, 2006 WL 3483922 at *14 (E.D.N.Y. Nov. 30, 2006); Goodman v. L.A. Weight Loss Ctrs., Inc., No. 04-CV-3471, 2005 U.S. Dist. LEXIS 1455, at *7 (E.D. Pa. Feb. 1, 2005); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1092 (S.D. Iowa 1997).

295. *See* SOLOVAY, *supra* note 11, at 149-52; Michelle Levander, *A Disabling Prejudice: Voluntarily Obese Deserve Protection, EEOC Says*, SAN JOSE MERCURY NEWS Nov. 13, 1993, at 10D (quoting Dawn Atkins of the Santa Cruz Body Image Task Force, noting that "[m]ost of us in fat acceptance don't want it to be seen as disability"); *cf.* Adam R. Pulver, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination Law*, 41 COLUM. J.L. & SOC. PROBS.. 365, 373-74 (2008).

prompted passage of disability statutes, and that diminish the life opportunities of those affected. Indeed, some research suggests that stigma based on weight is greater than that based on physical handicap.[296] Clearly, a different approach is necessary to protect those whose weight does not constitute an actionable disability.

C. *Prohibitions on Appearance Discrimination*

Any informed judgment about the law's effectiveness in responding to appearance discrimination requires a better understanding of how explicit prohibitions play out in practice. To that end, the following analysis offers the first systematic research concerning efforts to ban such discrimination.

Most of these efforts are relatively recent, and they vary in scope and impact. Except for Michigan, which included height and weight as prohibited forms of discrimination in 1975, and the District of Columbia, which added appearance discrimination to its civil rights law in 1982, the five other American jurisdictions with such bans enacted them in the 1990s and 2000s. Two (Michigan and San Francisco) cover only height and weight. Santa Cruz covers involuntary physical characteristics. The others prohibit appearance discrimination generally but permit reasonable grooming rules. Remedies also differ. One ordinance authorizes fines not to exceed $500 in cases brought only by the city attorney (Urbana). Other laws allow victims to recover reasonable compensatory damages and attorneys' fees (Santa Cruz, Madison), and two permit fines between $10,000 and $50,000 (Michigan and the District of Columbia). Enforcement activity varies from no complaints over fifteen years (Santa Cruz), to an average of twenty a year (Michigan), but many of these complaints involve other grounds in addition to appearance. No jurisdiction has experienced the flood of frivolous litigation and business backlash that critics have predicted.

1. *Local ordinances: Santa Cruz, Urbana, San Francisco, the District of Columbia, Howard County, and Madison*

The most well-publicized prohibition on appearance-related bias is a 1992 ordinance in Santa Cruz, California. As initially proposed, the ordinance banned discrimination based on a variety of factors, including height, weight, and appearance.[297] After an onslaught of protests and negative publicity, the Santa Cruz City Council replaced "appearance" with "physical characteristic," defined as any condition "which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that

296. *See* Korn, *supra* note 10, at 60. For a review of research on weight stigma, see Katz & Lavan, *supra* note 283, at 60, and *supra* Part II.A.1.

297. *See* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 2 (2000).

person . . . ."[298] Excluded from coverage were characteristics that would "present a danger to the health, welfare or safety of any individual."[299] Courts may grant "appropriate" remedies including compensatory damages, attorneys' fees, and injunctive relief.[300]

As amended, the ordinance permits employers to discriminate on the basis of voluntary attributes, a fact omitted in much of the critical commentary on its provisions. In many accounts, the "poster child" for critics was a psychiatric aide with purple hair, five earrings, and a nose ring; it was a tongue piercing that finally pushed his employer over the edge.[301] Ironically, the aide did not even work in Santa Cruz, and if he had, his termination would not have been unlawful because the objectionable piercing was not outside his control.[302] Other aspects of critics' portrayals have proven equally unfounded. Fifteen years after passage of the ordinance, it had prompted no recorded complaint based on height, weight, or physical characteristic and no discernible backlash.[303]

Santa Cruz's experience is not unique. Urbana, Illinois also has had no reported cases on personal appearance in the thirty years since enactment of its ordinance.[304] Part of the reason may be the extremely limited remedies available. The ordinance authorizes the city attorney to seek injunctive relief or fines not to exceed $500 for each violation.[305] Attorneys' fees or other compensatory damages are not available.

---

298. *See id.*; *see also* SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, 9.83.020(13) (2008).

299. SANTA CRUZ, CAL., MUN. CODE § 9.83.020(13) (2008) (defining "physical characteristic"). The ordinance prohibits discrimination in employment, education, housing, and public accommodation "based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic." *Id.* § 9.83.010. Discrimination based on personal appearance is prohibited only in housing. *Id.* § 21.01.010.

300. *Id.* § 9.83.120(2)(c) (authorizing a court to "grant such relief as it deems appropriate, including but not limited to, compensatory damages, attorney's fees, equitable relief, and injunctive relief including an injunction ordering the respondent to cease and desist from the unlawful discriminatory practice. Punitive damages are not recoverable in any civil action brought pursuant to this chapter.").

301. *See* FORD, *supra* note 169, at 137. For other commentary, see Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMPL. & LAB. L. 476, 498-99 (2000).

302. *See* Krieger, *supra* note 301, at 499.

303. E-mail from Joe McMullen, Principal Analyst, Human Res. Dep't, City of Santa Cruz (Apr. 8, 2007) (on file with the author).

304. URBANA, ILL., MUN. CODE § 12-37 (2007), *available at* http://www.city.urbana.il.us/ (online version notes that the code was adopted in 1979); Telephone Interview by Sonia Moss with Todd Rent, Human Relations Officer, City of Urbana (Apr. 12, 2007).

305. URBANA, ILL., MUN. CODE §§ 12-101, -103(c) (2007) (stipulating that "[a]ny person found in violation of any provision of this article by the commission, or in subsequent judicial proceedings in a court of law, shall be fined not more than five hundred dollars ($500.00) for each violation" and providing the city attorney with the power to issue

San Francisco has a wider range of remedies, but not a significantly greater amount of enforcement activity. In 2000, the city added a prohibition against height and weight discrimination to its human rights law.[306] That law provides criminal as well as civil penalties for housing discrimination.[307] For other types of violations, the ordinance authorizes the court to award triple damages, fines between $200 and $400, attorneys' fees, legal costs, and punitive damages.[308] In the first eight years under the amended prohibition, the city's Human Rights Commission received only two complaints of height and weight discrimination.[309] One involved the overweight aerobics instructor, described earlier.[310] That case attracted sympathetic coverage and public protests, as well as revision of the employer's policy. The other case, a weight discrimination complaint against the San Francisco Ballet School, also generated significant favorable publicity.[311] Krissy Keefer, a San Francisco dancer, claimed that the school had denied admission to her eight-year-old daughter Fredrika, on the basis of height and weight, and had applied its appearance standards "more specifically and unfairly to female applicants."[312] Such bias, the complaint alleged, contributed to "serious and severe health problems . . . including eating disorders such as anorexia nervosa and bulimia."[313] The school responded that it had denied Fredrika's admission based on published criteria that did not include height, weight, or gender, although they did define the ideal candidate as a "healthy child with a well-proportioned, slender body."[314] The case was settled on confidential terms. However, an interview with Ms. Keefer and correspondence from the San Francisco Human Rights Commission confirmed that the school agreed to remove language involving body type from its promotional literature, and to conduct a symposium regarding the dangers of

---

injunctions, respectively).

306. S.F., CAL., ADMIN. CODE § 12A.1 (2008); Carole Cullum, *We Won: A Victory for San Francisco—and a Springboard for Communities Everywhere*, RADIANCE ONLINE, http://www.radiancemagazine.com/issues/2000/summer_00/we_won.htm.

307. S.F., CAL., POLICE CODE §§ 3304, 3306, 3308 (2008).

308. *See id.* § 3306.

309. Letter from Larry Brinkin, Senior Contract Compliance Officer, S.F. Human Rights Comm'n, to Sonia Moss (Apr. 5, 2007) (on file with author).

310. *See supra* text accompanying notes 187-90, 194; *see also* Complaint of Discrimination, Portnick v. Jazzercise, Inc. (S.F. Human Rights Comm'n Sept. 25, 2001).

311. *See* Complaint of Discrimination, Krissy Keefer v. S.F. Ballet Ass'n/S.F. Ballet School (S.F. Human Rights Comm'n Nov. 13, 2000) [hereinafter Keefer Complaint]. For coverage, see Joan Acocella, *A Ballerina Body*, NEW YORKER, Mar. 5, 2001, at 38; Beverly Beyette, *Pride and Prejudice at the Barre*, L.A. TIMES, Dec. 26, 2000, at E1; Jennifer Dunning, *Dance Notes: Measuring Up for Ballet Class*, N.Y. TIMES, Jan. 13, 2001, at B23; Edward Epstein, *Girl Fights for a Chance to Dance*, S.F. CHRON., Dec. 7, 2000, at A1.

312. Keefer Complaint, *supra* note 311, at 3.

313. *Id.*

314. Letter from Emily E. Flynn, Pillsbury, Madison & Sutro, LLP, to Larry Brinkin, Senior Contract Compliance Officer, S.F. Human Rights Comm'n 2 (Dec. 6, 2000) (on file with author).

eating disorders for parents and staff.[315] In commenting on the case, Ms. Keefer felt that it had raised public awareness about the issue, but felt hamstrung by the lack of funds to hire a lawyer and pursue her concerns more aggressively.[316]

The District of Columbia, which passed the nation's first local Human Rights Act banning discrimination based on "personal appearance," has also reported relatively little enforcement activity despite relatively broad remedial provisions.[317] The District's Human Rights Commission has authority to reinstate employees and to award back pay, compensatory damages, and reasonable attorneys' fees.[318] In addition, fines for violations range from a maximum of $10,000 for first time offenders up to a maximum of $50,000 for repeat offenders, payable to the city's General Fund.[319] A comprehensive survey reveals only eleven complaints between January 1981 and November 2007, an average of fewer than one a year.[320] Of those actions, three resulted in judgments of discrimination against the defendant.[321] A fourth case survived a motion to dismiss, but its ultimate outcome is unknown.[322]

One reason for the limited enforcement is the Act's exception for any "requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied . . . for a reasonable business purpose."[323] Judges and juries have

---

315. Telephone Interview with Krissy Keefer (Mar. 4, 2008).

316. *Id.*

317. D.C. CODE ANN. § 2-1401.01 (LexisNexis 2008) prohibits discrimination against an individual:

> for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

318. *See id.* § 2-1403.13.

319. *See id.* § 2-1403.13(E-1). If plaintiffs file a grievance with the Commission, they may not, however, pursue legal action in the courts. *See id.* § 2-1403.16.

320. Wilson v. Riggs Bank N.A., 2005 WL 758264 (D.D.C. 2005); Underwood v. Archer Management Servs., Inc., 857 F. Supp. 96 (D.D.C. 1994); Garvin v. Am. Assoc. of Retired Persons, 1992 WL 693382 (D.D.C. 1992); McMamus v. MCI Commc'n Corp., 748 A.2d 949 (D.C. 2000); Natural Motion by Sandra, Inc. v. D.C. Comm'n on Human Rights, 687 A.2d 215 (D.C. 1997); Turcios 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); Atlantic Richfield Co. v. D.C. Comm'n on Human Rights, 515 A.2d 1095 (D.C. 1986); Honig v. D.C. Office of Human Rights, 388 A.2d 887 (D.C. 1978); Flecha de Lima v. Int'l Med. Group, Inc., 2004 WL 2745654 (D.C. Super. 2004). Westlaw and LexisNexis searches have revealed no information about the ordinance's legislative history.

321. *Natural Motion by Sandra*, 687 A.2d at 215; *Kennedy*, 654 A.2d at 847; *Atlantic Richfield*, 515 A.2d at 1095.

322. *Underwood*, 857 F. Supp. at 97 (finding that plaintiff stated a claim of personal appearance discrimination under the DCHRA where plaintiff alleged she was terminated by defendant employer because she "is a transsexual and retain[ed] some masculine traits").

323. *See* D.C. CODE ANN. § 2-1401.02(22) (LexisNexis 2008). Personal appearance 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,

broadly interpreted that exception. For example, the D.C. Court of Appeals determined that the fire department could regulate facial hair as long as the regulation was uniformly applied, despite findings by the Department of Equal Opportunity that the regulation did not foster *esprit de corps* and had no rational safety justification.[324] In another case, the jury found, and an appellate court agreed, that a janitorial service could apply a requirement of "neat hair" to prohibit a male employee from wearing a pony tail.[325] A client's desire that janitors "look sharp at all times" was thought to be a sufficient business reason for the regulation.[326]

Although the volume of complaints imposes no great burden on business, there are clearly some cases that border on the frivolous. Yet these typically include allegations of discrimination based on additional factors besides appearance. A representative example involved a woman of color who wore African-styled apparel, dreadlocks, and cornrows.[327] These provoked complimentary comments or questions by managers with no supervisory authority over her, such as "your earrings are interesting" or "what kind of hair style is this, how did they do this?"[328] After a decade, her position was eliminated, along with the jobs of two white women, and the court found no evidence that her termination reflected bias based on race or appearance.[329]

Of the cases that found discrimination, only one involved appearance alone.[330] The others also included claims of bias based on multiple bases, including sex and disability.[331] One of the cases finding discrimination, *Atlantic Richfield Co. v. D.C. Commission on Human Rights*, has become a textbook illustration of the need for prohibitions on appearance-related discrimination.[332] There, the evidence before the D.C. Commission established that a supervisor repeatedly criticized the complainant for low-cut blouses and disheveled hair, and compared her behavior to that of a prostitute.[333] In finding discrimination, the Commission noted that the employee's appearance was similar to that of her coworkers and that Atlantic Richfield did not have a

---

including, but not limited to, hair style and beards." *Id.*

324. *See Kennedy*, 654 A.2d at 855-57 (ruling that regulation was permissible but that substantial evidence supported the finding that the regulation was discriminatory as applied).

325. *See Turcios*, 680 A.2d at 1024-25.

326. *Id.* at 1029.

327. *See* McManus v. MCI Commc'ns Corp., 748 A.2d 949 (D.C. 2000).

328. *Id.* at 952.

329. *Id.* at 952-54.

330. *See* Atlantic Richfield Co. v. D.C. Comm'n on Human Rights, 515 A.2d 1095, 1097 (D.C. 1986).

331. Natural Motion by Sandra, Inc. v. D.C. Comm'n on Human Rights, 687 A.2d 215 (D.C. 1997) (disability and appearance based on AIDS-related disease). In *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994), which involved sex, sexual orientation, and personal appearance claims by a transvestite, the court permitted the appearance claim to go forward.

332. 515 A.2d. 1095 (D.C. 1986).

333. *Id.* at 1097.

"uniformly prescribed standard of dress [supported by a] reasonable business purpose."[334]

Howard County, Maryland has had a similar experience. Its civil rights code includes "personal appearance" as one of the prohibited forms of discrimination, and defines the term to encompass the "outward appearance of a person with regard to hair style, facial hair, physical characteristics or manner of dress. It does not relate to a requirement of cleanliness, uniforms or prescribed attire, when uniformly applied. . . ."[335] Remedies include civil penalties of reasonable attorneys' fees and up to $5000 for employment claims and $1000 for other claims.[336] The Office of Human Rights (OHR) refused to release copies of personal appearance complaints for review because the County Code requires the investigation to be "conducted without publicity" and the information held confidential.[337] According to the OHR administrator, any outside review "would be contrary to the public interest" because it "would have the effect of chilling frank and full disclosure to OHR investigators and discouraging settlement discussion as a result."[338]

However, OHR did release general information on the sixteen physical appearance complaints filed between 2003 and 2007 (an average of four a year).[339] Only one was based on appearance alone; the other characteristics were: physical or mental handicap (6), race (4), sex (4), religion (2), age (2), marital status (2), source of income (2), political opinion (2), and occupation (1).[340] Of the total complaints, two were dismissed, seven resulted in findings of no reasonable cause, three resulted in findings of reasonable cause, and four resulted in predetermination agreements.[341] Only one reached a public hearing, and its disposition was still pending at the time of the report.[342] Of the settlements, four included monetary remedies ranging between $787.50 and $5000, and three included policy changes.[343]

Of all the cities or counties with appearance ordinances, Madison, Wisconsin has experienced the greatest number of complaints. Its prohibition on discrimination based on "physical appearance" in employment, credit, housing, and public accommodations exempts any "requirement of cleanliness,

---

334. *Id.* at 1100.

335. COUNTY OF HOWARD, MD., CODE §§ 12.200(II), 12.201(XIV) (1992).

336. *Id.* § 12.216.

337. *Id.* § 12.214(I).

338. Letter from C. Vernon Gray, Adm'r, Howard County Office of Human Rights, to Sonia H. Moss, Robert Crown Law Library, Stanford Law School (Sept. 19, 2008) (on file with author).

339. C. Vernon Gray, Report on Howard County MD Office of Human Rights "Personal Appearance" Cases Filed Between January 1, 2003 and December 31, 2007 (Sept. 19, 2008) (unpublished report, on file with author).

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

uniforms, or prescribed attire, if and when such requirement is uniformly applied . . . for a reasonable business purpose."[344] Remedies include compensatory damages, injunctive relief, and reasonable attorneys' fees and costs.[345] The city's Equal Opportunity Commission reported thirty-six complaints between 2003 and 2007, an average of nine a year. Of these, the Commission supplied fifteen complaints that raised colorable claims.[346] None of these cases resulted in a Commission finding of discrimination.[347] Forty percent (6 of 15) resulted in a finding of no probable cause; another 40% (6 of 15) resulted in a settlement.[348] Of the remaining cases, one complaint was withdrawn, one was pending, and the third was being handled by another agency.[349]

One striking feature of these cases is that only one involved an exclusive claim of appearance discrimination. All of the others, including some that appeared frivolous on their face, alleged at least one additional basis for complaint, such as race, sex, age, or sexual orientation. From the limited information available from the files, allegations concerning appearance occasionally seemed trivial, particularly in relation to the objective reasons given for rejecting or terminating an employee.[350] Yet all but one of these cases could have been brought even without the appearance prohibition. In that case, the employer had little apparent difficulty in establishing that its termination of the complainant was due to complainant's marijuana use, not his dreadlocks.[351]

So too, the Commission and its investigative staff generally appeared deferential to employers' concerns. For example, it upheld a grooming code of Pet World Warehouse Outlet that prohibited employees from having visible tattoos or males from having visible piercings or wearing earrings. The company's desire to ensure customers a "pleasant shopping experience" was held to be a "reasonable business purpose."[352] Similarly, Wal-Mart's rule that "clothes must fit well and not be too tight" was reasonably applied when a

344. MADISON, WIS., CODE OF ORDINANCES §§ 39.03(1), 39.03(2)(bb) (2007).

345. *Id.* § 39.03(10)(b)(7) (granting the Equal Opportunities Commission the power to adopt necessary rules and regulations); EQUAL OPPORTUNITIES COMM'N, MADISON, WIS., RULES OF THE EQUAL OPPORTUNITIES COMM'N § 10 (2008), *available at* http://www.cityofmadison.com/dcr/documents/Rules.pdf.

346. Memorandum from Rachel Velcoff to Deborah L. Rhode 1 (May 21, 2008) (unpublished memorandum) (on file with author) [herinafter Velcoff Memorandum].

347. *Id.*

348. *Id.*

349. *Id.*

350. An example was EOC Case No. 20032013, Karl Wayne Dersch (May 12, 2003), where the complainant claimed discrimination based on age and appearance due to his grey hair and facial sores, and the employer established that he was terminated pursuant to the employer's sales quota policy. *See* Velcoff Memorandum, *supra* note 346.

351. EOC Case No. 20032178, Christopher Brickman (Mar. 3, 2004); *see* Velcoff Memorandum, *supra* note 346.

352. EOC Case No. 20042029, Luis James Burns (May 5, 2004).

supervisor asked a pregnant employee to wear a jacket or a larger shirt because of the "inappropriate" appearance of her stomach or breasts.[353] Also permissible were bans on facial jewelry by Sam's Club in order to promote a "conservative, no frills" image and requirements of "appropriate accessories" and "stylish shoes" by the American Association of Retired Persons.[354] In the 20% (3 of 15) of cases where the Commission's investigator found probable cause to believe discrimination had occurred, the file included uncontested evidence of racial as well as appearance bias, and of grooming requirements selectively applied.[355] All of these cases were settled without a formal Commission decision.

2. *Michigan*

In 1977, Michigan became the first and still only state to prohibit appearance discrimination in employment, by adding height and weight to the characteristics protected by the Elliott-Larsen Civil Rights Act.[356] The Act invests the Human Rights Commission with broad remedial powers including the authority to order reinstatement, money damages, attorneys' fees, fines ranging from $10,000 to $50,000, and other "appropriate" relief.[357] Alternatively, an individual may bring a civil action and, if successful, can receive injunctive or monetary remedies as well as attorneys' fees.[358]

Nonetheless, this prohibition has also resulted in limited enforcement activity. Between 1985 and 2007, only eighteen lawsuits alleged height or weight discrimination, fewer than one a year. Only one resulted in a final judgment of discrimination, and that judgment was short-lived, as the court granted the defendant a new trial on the plaintiff's weight-discrimination claim. Three reversed summary judgments for the defendants, and the ultimate results of those cases are unclear. Between 2005 and 2007, the Department of Civil Rights received 61 complaints, 48 involving weight, 6 involving height, and 7 involving both. None resulted in a final judgment of discrimination. About two-fifths (43%) were dismissed for insufficient evidence; about a quarter (26%) remained open; about a fifth (21%) settled; 6% were withdrawn to

353. EOC Case No. 20062058, Heather Ehlert (Nov. 2, 2006).

354. EOC Case No. 20062112, Jill Watskey (Mar. 27, 2007); Sam's Club, Inc. v. Madison Equal Opportunities Comm'n, No. 02-2024, 2003 WL 21707207 (Wis. Ct. App. July 24, 2003).

355. EOC Case No. 20042095, Camara Stovall (May 17, 2004) (race and afro hair style); EOC Case No. 20062029, Deirdra Nash (Apr. 20, 2006) (race and lip ring); EOC Case No. 20033219, Gregory B. Banks II (Oct. 14, 2003) (race and bandana head covering).

356. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 2008) (effective Mar. 31, 1977).

357. *Id.* § 37.2605(2).

358. *Id.* § 37.2801(1). Unlike the District of Columbia, Michigan permits either remedy and does not foreclose someone who has filed with the commission from subsequently suing in court.

pursue action in court; and the remaining 3% were withdrawn or dismissed for lack of jurisdiction.[359]

A number of factors may account for the lack of litigation and low success rates for plaintiffs. One is that employers are sufficiently aware of the law that they avoid discriminating on the basis of height or weight, or at least expressing those factors as a reason for adverse actions. Another explanation is the difficulty of proving that bias was responsible for substantial damages except in egregious cases, and those may well settle without formal action. In cases where height or weight may be one, but not the only, factor accounting for a decision, courts tend to side with employers. A typical case involved an African American man weighing about 300 pounds who unsuccessfully applied for a firefighter position.[360] Although he passed the physical agility test, a psychologist found that he was only "marginally suitable," due to his immaturity, interpersonal difficulties, and problems responding to stress.[361] His excessive weight, according to the psychologist, was a "physical manifestation of an inability to deal with stress."[362] The trial granted summary judgment for the defendant, and the appellate court affirmed on the ground that objective reasons supported the plaintiff's rejection.[363] In a similar case, although a jury found that a physician's obesity was a determining cause for her loss of hospital privileges, the judge granted a new trial; in his view, the "clear preponderance of the evidence" demonstrated that the physician would have been terminated even if her weight had not been a factor.[364] Such judicial rulings may discourage potential plaintiffs and attorneys from pursuing claims in the absence of unequivocal facts, which are hard to come by in discrimination cases.

Yet the cases in which the plaintiffs at least got an opportunity for trial illustrate the kind of inequitable treatment that justifies a ban on appearance discrimination. One case involved Libby Knowlton, a waitress who was told to take early maternity leave when she was six or seven months pregnant despite a doctor's letter indicating that she was still fit for work.[365] Although the restaurant's stated reason was concern for the safety of the mother and her unborn child, three witnesses testified that the manager wanted Knowlton gone because of her appearance.[366] According to one employee's testimony, the

359. Will Rawson, Personal Appearance Discrimination: A Study of State, Local, and International Laws (Jan. 18, 2008) (unpublished directed research paper, Stanford Law School) (on file with author).

360. Howard v. City of Southfield, No. 95-1014, 1996 WL 518062 (6th Cir. Sept. 11, 1996).

361. *Id.* at *1.

362. *Id.*

363. *Id.* at *8.

364. Ross v. Beaumont Hosp., 687 F. Supp. 1115, 1125 (E.D. Mich. 1988).

365. Knowlton v. Levi's of Kochville, Inc., No. 190677, 1997 WL 33345022, at *1 (Mich. Ct. App. June 3, 1997).

366. *Id.* at *2.

manager believed Knowlton was "getting too fat to work on the floor. She didn't look good for business."[367] In another case that was allowed to go to trial, a 5'6" applicant for a firefighter's position was rejected for failure to meet a 5'8" height requirement.[368] In support of its requirement, the department offered testimony by one witness of unspecified credentials.[369] He concluded that the 5'8" cutoff was based on "safety concerns" and the need for "efficient teamwork," which was impeded by "disparities in height under conditions of emergency."[370] Yet as the court noted, these conclusions were based on personal "observation and experience," not "study or research," and failed to explain why the department had a minimum, but not a maximum, height requirement.[371]

3. *Australia*

The only jurisdiction outside the United States with an appearance regulation for which information is available is Australia's state of Victoria. Its 1995 Equal Opportunity Act prohibits discrimination in employment, education, and other contexts based on characteristics including "physical features." These include height, weight, size, shape, facial features, hair, and birthmarks.[372] The Act has a number of exceptions, including discrimination that is reasonably necessary for the protection of health, safety, or property, or for purposes of dramatic, artistic, entertainment, photographic, or modeling work.[373] All complaints are subject to conciliation by the Victorian Equal Opportunity and Human Rights Commission.[374] Those that cannot be resolved are referred to the Victoria Civil and Administrative Tribunal (VCAT) first for mediation, and if that is unsuccessful, then for a hearing and decision on the merits. The Tribunal has broad remedial authority to redress and prevent violations.[375] Parties may appeal Tribunal decisions to the courts, but not file with them directly to bypass the administrative process.

---

367. *Id.*

368. Micu v. City of Warren, 382 N.W.2d 823, 823 (Mich. Ct. App. 1985).

369. *Id.* at 825.

370. *Id.* at 827.

371. *Id.* at 827-28.

372. Equal Opportunity Act, 1995 (Vict., Austl.) §§ 4(1), 6(f), *available at* http://www.austlii.edu.au/au/legis/vic/consol_act/eoa1995250/index.html#205; *see also* VICTORIAN EQUAL OPPORTUNITY & HUMAN RTS. COMM'N, YOUR RIGHT TO A FAIR GO: DISCRIMINATION—PHYSICAL FEATURES 1 (2007), *available at* http://www.humanrightscommission.vic.gov.au/pdf/attributes/physical%20features.pdf.

373. Equal Opportunity Act, 1995 (Vict., Austl.) §§ 17(3)-(4), 80(1).

374. *Id.* § 112(1).

375. *Id.* § 159(1); *see also* Carol Andrades, *What Price Dignity?: Remedies in Australian Anti-Discrimination Law* (Parliament of Australia, Research Paper No. 13 1997-98, 1998), *available at* http://www.aph.gov.au/library/Pubs/rp/1997-98/98rp13.htm.

In its most recent publication, the Commission reported some 122 inquiries in one year and fifty-six complaints of discrimination based on physical features, largely in the employment context.[376] Relatively few of these complaints resulted in a reported Tribunal decision. A comprehensive database search over the period since the law's passage identified only ten rulings on appearance discrimination.[377] In addition, the Tribunal published five decisions concerning appearance-related exemptions from antidiscrimination rules. Several factors may account for the infrequency of complaints and decisions. One is the difficulty of finding legal representation. Very little legal aid or pro bono assistance is available for discrimination claims.[378] Parties who manage to find help and file a complaint are subject to conciliation and mediation processes that are likely to resolve meritorious grievances. The Tribunal's frequent practice of awarding costs against a losing party may also deter unsuccessful parties from going forward.[379] Judicial skepticism concerning the merits may have the same effect. Over the last decade, not one of the discrimination cases that have gone before the Australian High Court has been successful, and in the last three discrimination cases before the intermediate appellate court, complainants who had been successful in the VCAT had their judgments overturned.[380]

As is generally true in American jurisdictions, most (60%) of the individual complaints before the VCAT involved discrimination claims in addition to appearance, such as race, sex, religion, or disability. The vast majority (90%) were unsuccessful. The only case in which a claimant prevailed involved derogatory comments based on weight. There, a personal care assistant received AU $2500 for the "hurt, humiliation, and loss of dignity" resulting from statements made by her manager to her supervisor suggesting that she was "unsightly" and should be fired.[381] Complainants in other cases involving weight, size, tattoos, height, or facial features failed to establish detrimental treatment based on these characteristics. Most of these claims seemed close to frivolous. A majority involved self-represented litigants who

376. *See* VICTORIAN EQUAL OPPORTUNITY & HUMAN RTS. COMM'N, ANNUAL REPORT 2006/2007, at 35-36 (2007), *available at* http://www.humanrightscommission.vic.gov.au/pdf/veohrcannualreport2007.pdf.

377. Search engines have limited coverage of Australian case law. LexisNexis does not carry decisions from the Victorian Civil and Administrative Tribunal. Westlaw carries only some VCAT decisions, without their full texts. A search of all case law under the Equal Opportunity Act under the Australian Legal Information Institute search engine revealed ten cases involving appearance-discrimination claims, excluding cases of disability discrimination or sex harassment in which appearance was mentioned.

378. E-mail from Beth Gaze, Associate Professor, Melbourne Law School, to Deborah Rhode (Oct. 9, 2008) (on file with author).

379. *Id.*

380. *Id.*

381. Hill v. Canterbury Road Lodge Pty. Ltd. (2004) VCAT 1365, ¶¶ 45, 77.

seemed intent on exposing ostensible bias even though they could not link it to any demonstrable injury.[382]

By contrast, the petitions for exemptions from the act generally seemed reasonable, and all but one were granted, at least in part. When safety was at issue, such as where individuals might be too heavy for a stable's horses, a favorable decision was always forthcoming.[383] However, where a recruitment business sought to use photographs of interviewees during the selection process to prompt recollections of the applicant, the tribunal denied the exemption. In the judge's view, viewing the photographs "might make it easier for a person to base decisions on physical characteristics."[384] And in a decision involving a dating service, the tribunal allowed only a partial exemption. The service could ask applicants about physical attributes, but not deny them services on that basis.[385]

4. *Europe*

Relatively little systematic information is available concerning other nations' approaches to appearance discrimination.[386] The most analogous comparisons are with Europe, where antidiscrimination and privacy laws have some application. European Union law protects against bias based on race,

382. *See, e.g.*, Prolisko v. Arthur Knight Mgmt. Pty. Ltd. (2005) VCAT 1868, ¶ 19 (no showing that complainant was the subject of derogatory statements about weight since she was "skinniest" staff member); Kenyon v. Austl. Coop. Foods (2001) VCAT 1981 (pro se litigant made no showing that unfavorable treatment was related to his tattoos); Ruddell v. State of Victoria Dep't of Human Servs. (2001) VCAT 1510 (no showing that child protection worker's size or loud voice adversely affected employer's treatment of him); Judd v. Dep't of Transp. & Reg'l Servs. (2000) VCAT 2495 (pro se litigant made no showing that tourist bus services provided unsatisfactory seating for persons of his height); Jamieson v. Benalla Golf Club Inc. (2000) VCAT 1849 (finding that complainant's tattoo was not the reason he was not hired, but rather that the position was deemed unnecessary); Hanson v. Perera (2000) VCAT 1285 (pro se litigant made no showing of detrimental impact from surgeon's comment about patient's gross overweight); Mondio v. Toyota Motor Corp. Austl. (1999) VCAT 653 (pro se litigant made no showing that abuse by coworkers related to physical features such as his nose).

383. *See, e.g.*, *In re* Riding for the Disabled Ass'n of Victoria (2000) VCAT 1085; *In re* Council of Adult Educ. (2000) VCAT 411.

384. *In re* N2N People Pty. Ltd. (2001) VCAT 1507, ¶ 28.

385. *In re* People Matching Pty. Ltd. (1997) VCAT 55.

386. The Lexis and Europa Case Law indexes include no cases or statutes on appearance discrimination, and the most accessible treatises on employment law do not address the issue. *See* EMPLOYMENT LAW IN EUROPE (Leigh-Anne Buxton ed., 2d ed. 1995); JEFF KENNER, EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND (2003); SUSAN MAYNE & SUSAN MALYON, EMPLOYMENT LAW IN EUROPE (2001); ALAN C. NEAL, EUROPEAN LABOUR LAW AND SOCIAL POLICY (1999). For European references I am indebted to Annabelle Lever of University College London, and her paper, What's Wrong with that Beard? Privacy and Equality in the Workplace: The Struggle Over Dress and Grooming Codes (Sept. 2004) (unpublished paper for the Priority in Practice Workshop, School of Public Policy, University College, London) (on file with author).

ethnicity, sex, sexual orientation, gender, age, religion, and disability, but not appearance. However, there are some reported challenges to grooming codes as a violation of gender equality and privacy protections.

Courts have generally interpreted European sex discrimination law on appearance along similar lines as American courts. Sex-specific grooming codes are permissible as long as their overall effect is comparable for men and women and the regulations have a reasonable business justification. So, for example, English courts have held that an employer's interest in projecting a "conventional" image and promoting customer relations is sufficient to sustain requirements of short hair for a male supermarket clerk and skirts for bookstore staff.[387]

The extent of deference to employer concerns is apparent from one British case involving a male administrative assistant whose job involved clerical, mail, and related secretarial duties, but no public contact. The employer required all workers to maintain a "professional and business-like" appearance. Men had to wear a coat and tie and women had to "dress appropriately and to a similar standard," by avoiding "obviously inappropriate" clothing such as "shorts; cropped tops; trainers; and baseball caps." An employment tribunal held for the complainant on the ground that requiring men to wear clothing of a particular kind imposed a "higher level of smartness" than that applicable to women. An appellate court reversed and remanded for more specific findings about whether a coat and tie was the only way in which men could achieve the "smartness" demanded of both sexes.[388] Missing from the court's analysis was any discussion of the business justification for requiring a clerical worker with no public interaction to conform to such a standard.

By contrast, continental Europe, particularly France and Germany, tend to be somewhat more protective of employee interests in privacy and dignity.[389] German law respects a general right of "free development of . . . personality," which includes rights to express oneself in appearance and dress, subject to employers' demonstration of a countervailing business necessity.[390] Under that standard, a labor court found no reason why a truck driver could not wear

---

387. Smith v. Safeway [1996] I.C.R. 868 (U.K.) (hair); Schmidt v. Austicks Bookshops [1978] I.C.R. 85 (U.K.) (skirts).

388. Dep't for Work & Pensions v. Thompson, [2004] I.R.L.R. 348 (Employment Appeal Tribunal) (U.K.).

389. *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155-56 (2004); *see also* Matthew W. Finkin, Menschenbild*: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J. 577, 578-80 (2002) [hereinafter Finkin, Menschenbild].

390. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 2(1); *see also* Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 258 (1996) [hereinafter Finkin, *Employee Privacy*]; Finkin, Menschenbild, *supra* note 389, at 580, 582; Manfred Weiss & Barbara Geck, *Worker Privacy in Germany*, 17 COMP. LAB. L.J. 75, 78-79 (1995).

shorts in summer.[391] Appearance standards are often set through codetermination between management and elected worker councils, a process subject to bargaining requirements of good faith and fair dealing.[392] So too, French labor law provides that "[n]o[] one can limit the rights of the individual . . . unless the limitations are justified by the task to be performed or are in proportion to the goal towards which they are aimed."[393] In assessing such limitations, a French Labor Court held that French law protected the right of an employee of a telemarketing firm to wear a headscarf, despite the objections of her employer.[394] Female workers who are in contact with customers also cannot be required to wear provocative clothing that could subject them to sexual harassment.[395]

In balancing employer and employee interests, European courts are not unresponsive to business interests in maintaining customer relations and respect. Teachers as well as students have sometimes been prohibited from wearing veils on the ground that they may undermine gender equality or the secular status and security interests of the state.[396] So too, the European Commission of Human Rights upheld the London Education Authority's right to bar a male transvestite from wearing dresses to work. In the Commission's view, such a restriction on the employee's right to respect for his private life under Article 8(1) of the European Convention on Human Rights was offset by the Authority's interest in "enhancing the employer's public image and facilitating its external contacts."[397] However, as compared with American law, European privacy standards generally accord somewhat greater respect for individual self-expression and place greater limits on an employer's right to require that workers convey its image rather than their own.[398]

---

391. Finkin, Menschenbild, *supra* note 389, at 583.

392. *See* Finkin, Menschenbild, *supra* note 389, at 581. *But see* Michael Ford, *Two Conceptions of Worker Privacy*, 31 INDUS. L.J. 135, 146 (2002).

393. Labor Code art. L.120-2, Law No. 92-1446 of Dec. 31, 1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 1, 1993, p. 19; *see also* Matthew W. Finkin, *Life Away from Work*, 66 LA. L. REV. 945, 947 (2006); Jean-Emmanuel Ray & Jacques Rojot, *Worker Privacy in France*, 17 COMP. LAB. L.J. 61, 64 (1995).

394. Paul Michaud, *Court Allows French Muslim Woman to Wear Headscarf at Work*, ARAB NEWS, Dec. 19, 2002, *available at* http://www.arabnews.com/?page=4&section=0&article=21212&d=19&m=12&y=2002 (discussing Dallila Tahri's lawsuit against Téléperformance France and the court's decision that Tahri must be reinstated, reimbursed for lost salary, and allowed to wear her headscarf at work).

395. Ray & Rojot, *supra* note 393, at 66.

396. *See, e.g.*, Sahin v. Turkey, 44 Eur. H.R. Rep. 5 (2007); Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. 1, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670930&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

397. Kara v. United Kingdom, App. No. 36528/97, 1999 Eur. H.R. L. Rev. 232, 233 (Eur. Comm'n on H.R.).

398. Anita Bernstein, *Foreword: What We Talk About When We Talk About Workplace Privacy*, 66 LA. L. REV. 923, 928-31 (2006); *see also* Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L &

5. *The contributions and limitations of laws on appearance discrimination*

This analysis of appearance-related prohibitions holds a number of lessons about the capacities of law to reduce social prejudice. First, the limited enforcement activity under such prohibitions suggests that their impact is less significant than either critics have warned or supporters have hoped. At least in some jurisdictions, the same tolerant attitudes that led to passage of the laws may help account for their circumscribed role; employers may be less likely to discriminate or to articulate their biases openly. The existence of legal prohibitions may also discourage discrimination and encourage informal resolution of cases where it occurs.

Other explanations for the limited enforcement involve the narrow scope of legal prohibitions, the difficulties of proof, and the frequent lack of substantial damages. Constitutional protections of individual liberty extend only to government actions that are not supported by a compelling interest, and such safeguards have almost never been applied to appearance discrimination except where religious freedom is involved. Sex discrimination statutes allow appearance-related regulations as long as they do not impose unequal burdens on men or women, and courts have taken unrealistically narrow views of what constitutes inequality. Disability law generally protects only a small group of overweight individuals: the morbidly obese who have, or are perceived to have, physiologically based major life impairments but are qualified for the position in question. Appearance laws in Michigan and San Francisco cover only height and weight. Santa Cruz and Victoria include only involuntary physical characteristics, and rulings in Madison and the District of Columbia are overly deferential to restrictive grooming regulations. Inadequate remedies may also be a problem, particularly in Urbana, which permits only minimal fines in cases brought by the city attorney. Given all these limitations, successful claims are infrequent. However unsuccessful claims are not particularly burdensome and typically do not involve appearance alone; most could have been brought under other civil rights laws.

Yet the low incidence of legal victories is not unique to appearance-related law; it is common in other areas of discrimination. Relatively few victims of bias file complaints, and only a tiny percentage successfully litigate their claims.[399] Yet despite the infrequency of enforcement, appearance protections,

---

COMP. L. 379, 399 (2000) ("To a certain extent both American workers and their employers begin with a legal concept of privacy that is much narrower than the Europeans' (at least the workers') notion of human dignity.").

399. *See* BARTLETT & RHODE, *supra* note 266, at 420 (citing surveys finding that only 5% to 15% of sex harassment victims make any complaint, and far fewer bring lawsuits); LAURA BETH NIELSEN ET AL., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION, 1987-2003, at 29, 41 (2008) (finding that only 5.5% of federal employment discrimination claims survived to trial, of which only a quarter were successful); Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 514 (2008) (reviewing RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) and citing

like civil rights law generally, have made substantial contributions. Particularly where statutory safeguards extend beyond involuntary characteristics and offer sufficient remedies, victims of discrimination have achieved some significant judgments or settlements. Their complaints have also forced changes in grooming policies that reinforce sex stereotypes and gender inequalities.[400]

In some cases, like those involving the San Francisco aerobics instructor and ballet school, complaints have raised public awareness of the costs of discrimination and the importance of focusing on health and fitness, rather than just body image. For decades, critics have noted the physical risks that accompany life as an underweight ballerina. *Dancing on My Grave* was the title of one representative memoir.[401] But it will clearly take greater efforts, in which law can play a role, to challenge the cult of thinness that restricts opportunities for many talented dancers and encourages eating disorders and related diseases for others. In this and other contexts, the adverse publicity or legal costs of potential complaints can encourage a desirable reevaluation of appearance-related practices.

IV. DIRECTIONS FOR REFORM

No one advocating change in such attitudes toward appearance should be naive about all that stands in the way. Appearance discrimination is deeply rooted and widely practiced, and there are obvious limits to how much the law can affect it. But the same has been true for other forms of discrimination. And the last half-century leaves no doubt that civil rights law, together with the political activism and policy initiatives that it inspires, can promote significant change.

A. *Defining the Objectives*

At the cultural level, a central priority should be to promote more attainable, healthy, and inclusive ideals. Our aspirational standards should reflect greater variation across age, weight, race, and ethnicity, and our grooming requirements should reflect greater tolerance for diversity and self-expression. Judgments based on attractiveness should not spill over to

---

studies); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 445 (2004).

400. The San Francisco Ballet School changed its recruitment materials and added training on weight disorders. *See supra* text accompanying notes 315-16. Jazzercise dropped its weight requirement. *See supra* text accompanying note 194. Even when claims are unsuccessful, as in the Title VII suit against Harrah's Casino, they can often force policy changes, such as elimination of the makeup requirement. *See supra* text accompanying note 248.

401. GELSEY KIRKLAND WITH GREG LAWRENCE, DANCING ON MY GRAVE (1986); *see also* SUZANNE GORDON, OFF BALANCE: THE REAL WORLD OF BALLET ch. 6 (1983); Lewis Segal, *The Shape of Things to Come*, L.A. TIMES, Apr. 1, 2001, at 9.

educational and employment contexts where they have no socially defensible role. More effort should focus on encouraging healthy lifestyles and addressing the weight-related problems that prompt discrimination.

Laws affecting appearance can assist that agenda in several ways. One way is to promote equal opportunity, and to challenge the group stereotypes that stand in the way. A second is to ensure respect for individual liberty and dignity, and to demand a reasonable justification for rules that interfere with expression of core values involving appearance. An employer's interest in appropriate grooming standards deserves recognition, but it needs to be balanced against employees' expressive interests. Law can also do more to protect consumers from unsafe appearance-related products and fraudulent marketing practices. Taken together, these strategies can raise awareness of bias and encourage practices that will promote more healthy and inclusive cultural ideals.

B. *Legal Strategies*

The most straightforward law reform strategy would be to prohibit discrimination based on appearance in employment, housing, public accommodations, and related contexts. "Appearance" should include not only physical characteristics but also grooming and dress that reflect core values and that are not inconsistent with reasonable business needs. As with disability and religion, organizations should have to make reasonable accommodations for personal appearance that do not impose undue hardship. An accessible dispute resolution process should be available to resolve controversies, such as a human rights commission or mediation system, coupled with rights of judicial appeal. Parties should have access to compliance guidelines and to staff or volunteer lawyers to help them assess their cases and to satisfy procedural and evidentiary requirements. Reasonable costs and attorneys' fees should be awarded to complainants who establish that appearance bias was the determining factor in the decisions at issue.[402]

In the absence of such specific prohibitions on appearance discrimination, courts, legislatures, and administrative agencies should broaden protections under existing discrimination and disability law. When evaluating sex-specific regulations under Title VII and constitutional provisions, courts should take a realistic view of what constitutes a disproportionate burden on one sex, and should disallow rules that reinforce gender stereotypes. Requirements regarding makeup, high heels, and provocative uniforms for women, and prohibitions on earrings for men, should be open to challenge. It should not require expert witnesses for courts to notice that styled hair and cosmetics for female bartenders constitute a greater burden than clean fingernails for their male colleagues. Customer or coworker preferences for attractive or sexy

402. For a discussion of the burden of proof, see Sablosky, *supra* note 28, at 349-50.

employees should not constitute a justification for discrimination unless those attributes are a business necessity, as in occupations involving modeling, acting, or sexual entertainment.

So too, disability law should be extended to cover weight discrimination without a showing of morbid obesity that results from physiological disorders and impairs major life activities. Indeed, bias is even more arbitrary when directed against overweight individuals who are capable of handling major life functions. It should be enough for these individuals to show that they are qualified for a position and that any necessary accommodations would cause no undue hardship to the organization.

More legal strategies and enforcement resources should also target misleading and high-risk cosmetic and weight loss practices. Sanctions for deceptive claims should be strengthened and individuals should be made more aware of the serious risks or low probabilities of success of many appearance-related purchases.[403] For example, the FTC has launched a campaign on "Weighing the Evidence in Diet Ads," which includes warnings about specific product claims. The agency has a teaser website that mimics common diet sites. If consumers try to purchase a weight loss pill promising "no sweat, no starvation," they receive information about typical weight loss rip-offs.[404] We need more such efforts targeting a wider range of appearance-related purchases.

Broader workplace reforms should also be a priority. Involving employees in decisions concerning dress and grooming codes would help raise awareness of the injustice of appearance discrimination and the values of self-expression. Survey research indicates that almost two-thirds of workers would like to have more influence over decisions that affect their workplace conduct.[405] What sociologist Erving Goffman once termed "the presentation of self in everyday life" is surely one of those decisions.[406] Increasing employees' participation in rule-making and increasing employers' incentives to reduce workplace discrimination could help promote more tolerant appearance standards.

---

403. *See, e.g.*, Bryan A. Liang & Kurt M. Hartman, *It's Only Skin Deep: FDA Regulation of Skin Care Cosmetics Claims*, 8 CORNELL J.L. & PUB. POL'Y 249, 276 (1999) (arguing for greater showings of support for claims of efficacy by cosmetic manufacturers); Termini & Tressler, *supra* note 45 at 273-74 (surveying the current regulatory framework and describing plans for a website to educate consumers about cosmetic products and ingredients); Natasha Singer, *Should You Trust Your Makeup?*, N.Y. TIMES, Feb. 15, 2007, at G1 (describing state and local policy initiatives to promote safety in cosmetic products).

404. Fed. Trade Comm'n, FTC Teaser Pages: FatFoe, http://www.wemarket4u.net/fatfoe (last visited Nov. 19, 2008).

405. U.S. DEP'T OF LABOR, WORKER REPRESENTATION AND PARTICIPATION SURVEY app. A (1995), *available at* http://www.dol.gov/oasam/programs/history/reich/reports/dunlop/appendixa.htm.

406. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

C. *Political Activism, Policy Initiatives, and Research Agendas*

Law is, of course, only one of the strategies necessary to promote cultural change. Another major benefit of legal reform may be to raise public awareness about the injustices related to appearance and the broader societal initiatives necessary to address them.

To achieve such reform, as well as other essential public policies, individuals should employ all the standard tactics of activism. They can write letters, op-eds, and blogs. They can support women's rights and disability organizations, and groups like the National Association to Advance Fat Acceptance, the Council on Size and Weight Discrimination, or the International Size Acceptance Organization. They can boycott products, stage protests, and organize guerilla tactics. New York activists gained attention by placing "feed me" stickers on billboards featuring emaciated models. In San Francisco, organizers similarly took advantage of a fitness center's advertisement that featured a space alien and a caption "When they come, they'll eat the fat ones first." Protesters showed up at the center in alien costumes wearing signs that said "Eat Me" and "This Gym Alienates Fat People."[407] To build support for an antidiscrimination ordinance, fat activists organized witnesses to testify before the San Francisco Human Rights Commission. They described instances of job and housing discrimination, mistreatment by health professionals, inability to fit in classroom and courtroom chairs, or find appropriately sized medical equipment.[408] In Santa Cruz, citizens used a weight discrimination lawsuit with sympathetic facts to enlist support for an ordinance that would prevent such injustices in the future.[409] On the relatively rare occasions when a critical mass of individuals has registered concern, their complaints have produced results. Ads have been pulled, sponsorship decisions reconsidered, and legislation passed.[410] Further progress could occur if employers and employees took a leadership role in advocating additional antidiscrimination and healthy lifestyle initiatives in the workplace.[411]

Local, state, and national governments should also do much more to prevent appearance-related discrimination and high-risk behaviors. The fashion industry should be held accountable for the unhealthy images that it promotes. It should not take more tragedies like the deaths of two South American models from anorexia to nudge designers into action. In 2006, Madrid passed the first law banning underweight models, and the trade organization that oversees

407. SOLOVAY, *supra* note 11, at 236.

408. *Id.*

409. The case was *Cassista v. Community Foods*, 856 P.2d 1143 (Cal. 1993).

410. For examples, see MAINE, *supra* note 32.

411. Alan Lyles & Ann Cotten, *Weight Control, Private Health Insurance and Public Policies*, *in* OBESITY, BUSINESS AND PUBLIC POLICY, *supra* note 28, at 106, 126.

Milan's runways then followed suit.[412] London's Fashion Week now requires a medical certificate from models indicating that their health is not at risk.[413] If American organizations fail to implement such measures, the law should require them to do so.[414]

More attention should also focus on preventing unhealthy appearance-related behaviors, such as those contributing to obesity and eating disorders. Examples include: more information about health and nutrition; regulation of children's advertising; prohibitions on school junk food and soda; use of zoning laws and financial incentives to reduce "nutritional deserts" in low-income communities; and greater support of recreational programs.[415] A few states have considered or enacted taxes on cosmetic surgery, and others have proposed taxes on junk food.[416] More evaluation of these and other appearance-related initiatives is necessary. What little information is available suggests that not all policy initiatives have been as successful as proponents expected. For example, in four states that have taxed soft drinks, the result has not been a significant decrease in consumption. Economists estimate that extremely large increases in prices, on the order of 100%, would be necessary to achieve even a 10% reduction in sales.[417] We need a more diverse array of strategies and in-depth research about their cost effectiveness.

So too, although we know that most appearance-discrimination ordinances have not resulted in significant enforcement activities, we need to know more about why. Are their remedies insufficient? Do victims of bias lack the information or legal assistance necessary to file complaints? Is the stigma of

---

412. Robin Givhan, *Milan's Beef About Skeletal Models*, WASH. POST, Dec. 8, 2006, at C1; *World Briefing: Europe: Italy: Milan Bans Too-Thin Models*, N.Y. TIMES, Dec. 20, 2006, at A6.

413. Michael Gove, *Fatten Up Models and You'll End Starvation Slavery*, TIMES (London), Sept. 18, 2007, at 7.

414. For further reasons militating for legislative action, see Guy Trebay, *Still Too Thin, and Getting Younger*, N.Y. TIMES, Sept. 27, 2007, at G1.

415. *See* BROWNELL & HORGEN, *supra* note 101, at 103-04, 121, 196, 213-14; Zoltan J. Acs, Ann Cotten, & Kenneth R. Stanton, *The Infrastructure of Obesity*, *in* OBESITY, BUSINESS AND PUBLIC POLICY, *supra* note 28, at 135, 147 (noting regulations proposed or passed including matters such as: nutrition standards and vending machines for foods available at school; physical education and obesity education programs; mandatory coverage of obesity treatment in health coverage; and research support); Zoltan J. Acs et al., *A Policy Framework for Confronting Obesity*, *in* OBESITY, BUSINESS AND PUBLIC POLICY, *supra* note 28, at 221, 245 (reviewing policy options); John Cawley, *The Economics of Childhood Obesity Policy*, *in* OBESITY, BUSINESS AND PUBLIC POLICY, *supra* note 28, at 27, 37-40, 44; Kersh & Morone, *supra* note 85, at 853.

416. *See* Julie Ann Elston et al., *Tax Solutions to the External Costs of Obesity*, *in* OBESITY, BUSINESS AND PUBLIC POLICY, *supra* note 28, at 171 (explaining how tax mechanisms could be applied to the social infrastructure to improve diet); Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1224-26 (2005); Sandy Kobrin, *Plastic Surgeons Say 'Vanity Tax' Discriminates*, WOMEN'S ENEWS, Aug. 8, 2005, http://www.womensenews.org/article.cfm/dyn/aid/2403/context/archive.

417. OLIVER, *supra* note 28, at 174.

doing so too substantial? More research about what works, or fails to work, in practice is necessary to craft effective policy initiatives.

CONCLUSION

Beauty may be only skin deep, but the damages associated with its pursuit go much deeper. The financial, physical, and psychological costs of appearance demand closer attention and collective action. Our personal attitudes regarding attractiveness may be hard to change, but we can become more conscious of their influence and the need to reduce their most unjust consequences. To reach that point will require treating appearance as a legal and political as well as aesthetic issue.