

# THE LOOKING-GLASS CEILING: APPEARANCE-BASED DISCRIMINATION IN THE WORKPLACE

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## INTRODUCTION

The advantages of beauty extend far beyond the aesthetic. Countless studies devoted to this captivating quality demonstrate that we not only value beauty in the abstract, but we also generally believe that beautiful people are, in fact, better people. On the basis of appearance alone, people consistently attribute a host of positive characteristics to their attractive peers—many of which bear no association to appearance itself: on the whole, attractive people are perceived to be more competent, happy, and successful than the general population.<sup>1</sup> They are expected to attain more prestigious jobs, enjoy happier marriages, and lead richer social lives.<sup>2</sup> Moreover, these positive assumptions, referred to collectively as the “what is beautiful is good” stereotype, beget preferential treatment throughout a person’s life.<sup>3</sup> In primary school, attractive students are called on more often than their peers<sup>4</sup> and judged more leniently for their transgressions.<sup>5</sup> In college, attractive students get more dates<sup>6</sup> and are more often elected to leadership positions by their peers.<sup>7</sup> And “lookism,” as the phenomenon has been termed,<sup>8</sup> is perhaps most acutely observed in the workplace, where attractive employees and job candidates

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<sup>1</sup> Karen Dion et al., *What is Beautiful is Good*, 24 *J. PERS. & SOC. PSYCHOL.* 285 (1972); Stefanie K. Johnson et al., *Physical Attractiveness Biases in Ratings of Employment Suitability: Tracking Down the “Beauty is Beastly” Effect*, 150 *J. SOC. PSYCHOL.* 301 (2010).

<sup>2</sup> Dion et al., *supra* note 1, at 288.

<sup>3</sup> See Judith H. Langlois et al., *Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review*, 126 *PSYCHOL. BULL.* 390, 390, 401 (2000).

<sup>4</sup> Elaine Hatfield & Susan Sprecher, *MIRROR, MIRROR: THE IMPORTANCE OF LOOKS IN EVERYDAY LIFE* 49-50 (1986).

<sup>5</sup> Karen Dion, *Physical Attractiveness & Evaluations of Children’s Transgressions*, 24 *J. PERS. & SOC. PSYCHOL.* 207, 212 (1972).

<sup>6</sup> Murray Webster, Jr. & James E. Driskell, Jr., *Beauty as Status*, 89 *AM. J. SOC.* 140, 141 (1983).

<sup>7</sup> Janet R. Goktepe & Craig E. Schneier, *Role of Sex, Gender Roles, and Attraction in Predicting Emergent Leaders*, 74 *J. APP. PSYCHOL.* 165, 166 (1989).

<sup>8</sup> Samantha Kwan & Mary N. Trautner, *Judging Books by Their Covers: Teaching about Physical Attractiveness Biases*, 39 *TEACHING SOC.* 16, 17 (2011) (“‘Lookism’ has meant that physically attractive people are in fact treated better in many arenas of social life.”).

are hired more often than their less attractive peers, more readily promoted, and paid more over their lifetimes.<sup>9</sup> Even attractive criminals enjoy the benefits of lookism by receiving fewer convictions and more lenient sentences than less attractive defendants.<sup>10</sup> But why do we assume that attractiveness amounts to anything more than a pretty face?

Various explanations for this beauty bias exist. One article theorizes that beauty is a form of social status on par with sex or race.<sup>11</sup> According to this hierarchical model, the general population elevates attractive people in status through advantageous cognitions—*i.e.*, assumptions about attractive people's superior abilities—and behaviors—*i.e.*, preferential treatment based on those assumptions.<sup>12</sup> Other studies suggest that lookism may be, to a large extent, a self-fulfilling prophecy.<sup>13</sup> The likely origin of this theory is an often-cited study conducted in 1968 which concluded that a teacher's expectations of a child significantly affect that child's actual performance.<sup>14</sup> In the study, teachers were told that certain students had been identified as "intellectual bloomers," when they had actually been selected at random;<sup>15</sup> after one year, those students' performance on IQ tests had far surpassed their peers' despite the reality that they were, in fact, intellectual equals.<sup>16</sup> Presumably, students who were expected to succeed were given the attention and encouragement that enabled them to do so. Numerous subsequent studies confirm that teachers have disproportionately high performance expectations of attractive students.<sup>17</sup> When the two findings are combined, it appears attractive students may outperform their peers because they are expected and encouraged to do so.

The educational advantage afforded to attractive students may, in turn, evolve into the professional edge afforded to attractive adults, thereby creating a self-fulfilling prophecy. Researchers in a 1986 study attempted to isolate the professional advantage of attractiveness by having subjects solve as many mazes as possible in fifteen minutes—a task that bears no relation to attractiveness.<sup>18</sup> While

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<sup>9</sup> Johnson et al., *supra* note 1, at 301-02, 313-15 (describing the advantages bestowed upon attractive individuals in the workplace).

<sup>10</sup> See Gloria Leventhal & Ronald Krate, *Physical Attractiveness and Severity of Sentencing*, 40 PSYCHOL. REP. 315, 317 (1977).

<sup>11</sup> Webster & Driskell, *supra* note 6, at 144.

<sup>12</sup> *Id.* at 144-45.

<sup>13</sup> See Margaret M. Clifford & Elaine Walster, *The Effect of Physical Attractiveness on Teacher Expectations*, 46 SOC. EDUC. 248 (1973).

<sup>14</sup> R. Rosenthal & L. Jacobson, *Pygmalion in the Classroom*, THIS WEEK'S CITATION CLASSIC (1980).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Clifford & Walster, *supra* note 13; Debra DeCastro-Ambrosetti & Grace Cho, *A Look at "Lookism": A Critical Analysis of Teachers' Expectations Based on Students Appearance*, 18 MULTICULTURAL EDUC. 51 (2011).

<sup>18</sup> See Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 96 AM. ECON. REV. 222 (2006) (citing Hatfield & Sprecher, *supra* note 4).

the attractive subjects ultimately performed no better than others, they were evaluated more favorably when permitted to have visual or oral contact with their evaluators.<sup>19</sup> The study found the disparity was largely attributable to attractive subjects demonstrating greater confidence and communication skills than their peers<sup>20</sup>—both of which could result from preferential treatment bestowed upon schoolchildren by their teachers. Accordingly, it is conceivable that disproportionately encouraging attractive schoolchildren increases those students' confidence and performance, creating more confident adults.<sup>21</sup> That confidence then perpetuates the assumption and expectation that attractive adults will outperform their peers, rendering them more appealing as candidates for jobs and promotions.

A final theory, rooted in evolutionary psychology, proposes that humans value physical features associated with increased odds of survival.<sup>22</sup> According to this theory, traits that signal “strength, reproductive quality and good health” trigger a favorable reaction in the human mind because they were historically most conducive to survival.<sup>23</sup> Although these traits are no longer necessary to ensure endurance of the species, evolutionary psychologists suggest the brain still holds latent receptors and instinctual preferences for such information.<sup>24</sup>

Regardless of why attractive individuals receive social benefits, countless studies confirm that they do. And because those benefits often become palpable disparities in wealth and opportunity between the attractive and unattractive, discrimination on the basis of appearance carries potential legal implications. Specifically, the professional disadvantages faced by less attractive individuals mirror in many ways the forms of employment discrimination that gave rise to Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>25</sup> the Age Discrimination in Employment Act (ADEA),<sup>26</sup> and the Americans with Disabilities Act (ADA).<sup>27</sup> Indeed, the advantages bestowed upon attractive people are not only parallel to, but are also entangled with the advantages of being white, healthy, and young. As will be discussed below, appearance-based judgments draw also from measures of affluence, conservatism, and gender conformity. As evidenced by our current

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<sup>19</sup> *Id.* at 222-23.

<sup>20</sup> *Id.*

<sup>21</sup> This hypothesis is bolstered by a finding that so-called “ugly ducklings”—unattractive children who grow into attractive adults—demonstrated higher levels of “shyness, social avoidance and distress, and public self-consciousness” than their peers. See Kenneth L. Dion et al., *Appearance Anxiety as a Dimension of Social-Evaluative Anxiety: Exploring the Ugly Duckling Syndrome*, 14 CONTEMP. SOC. PSYCHOL. 220 (1990).

<sup>22</sup> See Mads M. Jæger, “A Thing of Beauty is a Joy Forever”? Returns to Physical Attractiveness Over the Life Course, 89 SOC. FORCES 983, 985-86 (2011).

<sup>23</sup> *Id.* at 985.

<sup>24</sup> *Id.* at 985-86.

<sup>25</sup> 42 U.S.C.A. § 2000e-2 (2006).

<sup>26</sup> 29 U.S.C.A. § 623 (2006).

<sup>27</sup> 42 U.S.C.A. § 12112 (2006).

federal employment-discrimination regime, discrimination on such bases is not only socially undesirable, but in many cases legally prohibited. Accordingly, this Article questions whether appearance-based employment discrimination—as an amalgamation of other prejudices and also a harm of its own—merits legal recognition.

To answer that question, this Article will examine the psychology of attractiveness, exploring both what registers as attractive and what responses attractiveness commonly evokes. Despite identifying very real and often significant manifestations of a beauty bias, this Article ultimately concludes that the complex processes dictating our cognitions of attractiveness are simply ill-suited for legal intervention. Part I will attempt to define attractiveness in both biological and performed terms, emphasizing the gendered nature of our aesthetic preferences. Part II will identify the many facets of the beauty bias in employment decisions, looking first at the professional advantages bestowed upon attractive adults and then at the disparity in their perceived and actual abilities. Having identified in Part II a measurable harm associated with appearance-based employment decisions, Part III will summarize the existing legal remedies available to victims of appearance-based discrimination and in turn, the arguments commonly advanced in favor of appearance-specific legal reform. Finally, this Article will explain the inadequacy of law as a remedial tool in this context and will suggest instead that the desired reform be pursued through pedagogical and managerial literature and efforts.

### I. ATTRACTIVENESS DEFINED

Beauty is a classic example of a social construct in that its definition varies across societies and changes over time.<sup>28</sup> For instance, while paleness and fullness of figure were once deemed attractive traits because they signaled affluence, today's beauties are slender and tanned.<sup>29</sup> What, then, does it take to be beautiful today? To some extent, beauty is a biological combination of features, largely dependent on the person's waist-to-hip ratio<sup>30</sup> and the symmetry of the person's face.<sup>31</sup> Beauty is also a matter of presentation. For women especially, perceived

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<sup>28</sup> For example, a study of *Playboy* centerfolds over a 48-year period found that “over time, bust and hip size decreased whereas waist size increased.” Maryanne L. Fisher & Martin Voracek, *The Shape of Beauty: Determinants of Female Physical Attractiveness*, 5 *J. COSMETIC DERMATOLOGY* 190, 192 (2006).

<sup>29</sup> See Mark R. Leary & Jody L. Jones, *The Social Psychology of Tanning and Sunscreen Use: Self-Presentational Motives as a Predictor of Health Risk*, 23 *J. APP. SOC. PSYCHOL.* 1390 (1993) (finding a belief that being tan enhances attractiveness).

<sup>30</sup> See Barnaby J. Dixson et al., *Eye-Tracking of Men's Preferences for Waist-to-Hip Ratio and Breast Size of Women*, 40 *ARCH. SEX. BEHAV.* 43 (2011) (finding men rated women with an hourglass figure and small waist as most attractive). Waist-to-hip ratio is “an index of fat deposition, calculated by dividing the circumference of the waist . . . by the circumference of the hips[.]” Fisher & Voracek, *supra* note 28, at 191.

<sup>31</sup> See, e.g., Bernhard Fink et al., *Facial Symmetry and Judgments of Attractiveness, Health and Personality*, 41 *PERSONAL & INDIVIDUAL DIFFERENCES* 491 (2006).

attractiveness is largely influenced by wardrobe,<sup>32</sup> hair color or style,<sup>33</sup> and cosmetics choices.<sup>34</sup> This Section will discuss the elements of each type of beauty, both biological and performed.

### A. Biological Beauty

Despite cultural and temporal variations in aesthetic valuations, certain biological features and combinations of features emerge as more-or-less universally attractive.<sup>35</sup> Some of these preferences require no scientific introduction—the number of breast augmentation and rhinoplasty procedures performed annually<sup>36</sup> demonstrates a consensus that where breasts and noses are concerned, respectively, bigger is better and less is more. Other preferences, however, would likely go undetected in the absence of empirical research: for example, a 2010 study found that “individual attractiveness is optimized when the face’s vertical distance between the eyes and the mouth is approximately 36% of its length, and the horizontal distance between the eyes is approximately 46% of the face’s width.”<sup>37</sup>

With regard to biological features found to influence perceived physical attractiveness, researchers consistently find that attractiveness is largely defined in terms of gender. Thus, to the extent that studies have succeeded in identifying certain preferred traits, those traits tend to fall along sexually dimorphic dimensions.<sup>38</sup> In other words, the traits that contribute most significantly to female and male attractiveness are positively correlated with femininity and masculinity respectively. Thus, for the female figure, a small waist-to-hip ratio and a light body weight have been found to be the most significant predictors of an attractive body.<sup>39</sup> The attractive male figure, on the other hand, has a larger waist-to-hip

<sup>32</sup> See Hilda M. Buckley, *Perceptions of Physical Attractiveness as Manipulated by Dress: Subjects Versus Independent Judges*, 114 J. PSYCHOL. 243, 246 (1983) (“[P]hysical attractiveness was successfully manipulated using dress.”).

<sup>33</sup> See, e.g., Michael R. Cunningham et al., *Angels, Mentors and Friends: Trade-offs among Evolutionary Variables in Physical Appearance*, in EVOLUTIONARY SOC. PSYCHOL. 109 (Jeffrey A. Simpson & Douglas T. Kenrick eds., 1997). “[B]londe were rated as more attractive, feminine, emotional, and pleasure seeking” than brunettes. *Id.*

<sup>34</sup> See Thomas F. Cash et al., *Effects of Cosmetics Use on the Physical Attractiveness and Body Image of American College Women*, 129 J. SOC. PSYCHOL. 349, 353 (2001) (finding that males judged women wearing cosmetics as more attractive than the same women without cosmetics).

<sup>35</sup> See Karl Grammer et al., *Darwinian Aesthetics: Sexual Selection and the Biology of Beauty*, 78 BIOL. REV. 385, 388 (2003) [hereinafter Grammer et al., *Darwinian Aesthetics*] (“[R]ecent studies . . . suggest that the constituents of beauty are neither arbitrary nor culture bound.”).

<sup>36</sup> According to the American Society for Aesthetic Plastic Surgery, in 2010, 318,123 breast augmentation procedures and 133,511 rhinoplasties were performed in the U.S. *Cosmetic Surgery National Data Bank Statistics*, AM. SOC. AESTHETIC PLASTIC SURG. (2011), available at [www.surgery.org/sites/default/files/Stats2010\\_1.pdf](http://www.surgery.org/sites/default/files/Stats2010_1.pdf).

<sup>37</sup> Pamela M. Pallett et al., *New “Golden” Ratios for Facial Beauty*, 50 VISION RES. 149, 149 (2010).

<sup>38</sup> See, e.g., Masashi Komori et al., *Effect of Averageness and Sexual Dimorphism on the Judgment of Facial Attractiveness*, 49 VISION RES. 862, 868 (2009) (finding “feminized features increase the attractiveness of female faces”).

<sup>39</sup> Martin Gründl et al., *Quantifying Female Bodily Attractiveness by a Statistical Analysis of Body*

ratio and a muscular, rather than slender, build.<sup>40</sup> In addition, while height always contributes to a man's attractiveness,<sup>41</sup> the ideal female height is relative. That is, men tend to be attracted to women who are shorter than they are, and women are attracted to men who are taller.<sup>42</sup>

Sexually dimorphic preferences are especially prominent in ratings of facial attractiveness. One researcher summarized this finding as follows: "For both male and female faces, the faces that are further away from the average faces of the opposite sex . . . were preferred and the faces that resemble the faces of the opposite sex had low attractiveness evaluations."<sup>43</sup> Thus, for example, female facial attractiveness is commonly linked with a small size of the lower face, while the attractive male face possesses a "longer, broader lower jaw."<sup>44</sup> Female attractiveness also corresponds with hair length in that women are generally considered more attractive the longer they wear their hair.<sup>45</sup> Of course, women's hair length reflects some measure of personal choice, but hair loss in men is actually determined by male sex hormones;<sup>46</sup> thus, even hair length is sexually linked and a further dimension of sexually dimorphic predilections. Other features commonly associated with female facial attractiveness are wide eyes, a thick mouth and upper lip, and high, prominent cheekbones.<sup>47</sup> Correspondingly, female faces are rated less attractive when they exhibit characteristically masculine features like a pronounced brow ridge and a wide nose or chin.<sup>48</sup>

Additional measures affecting facial attractiveness relate not to the proportions of facial features but to their appearance. The color and texture of skin, for example, play a considerable role in determining facial attractiveness: studies show that the attractive female face has smooth skin with a slightly reddish tint.<sup>49</sup> Also associated with facial attractiveness in females is a heightened contrast between skin and lip color.<sup>50</sup> Indeed, women exhibit greater overall luminance

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*Measurements*, 123 *PLASTIC & RECONSTRUCTIVE SURG.* 1064, 1068 (2009).

<sup>40</sup> Alan F. Dixson et al., *Masculine Somatotype and Hirsuteness as Determinants of Sexual Attractiveness to Women*, 32 *ARCH. SEX. BEHAV.* 29, 32 (2003).

<sup>41</sup> See Wayne E. Hensley, *Height as a Basis for Interpersonal Attraction*, 29 *ADOLESCENCE* 469 (1994) (finding that tall men and men of medium height are significantly more desirable than short men).

<sup>42</sup> See John S. Gillis & Walter E. Avis, *The Male-Taller Norm in Mate Selection*, 6 *PERSONAL. & SOC. PSYCHOL. BULL.* 396 (1980) (finding females prefer males approximately 6 inches taller, while males prefer females approximately 4.5 inches shorter).

<sup>43</sup> Komori et al., *supra* note 38, at 867.

<sup>44</sup> Grammer et al., *Darwinian Aesthetics*, *supra*, note 35, at 390.

<sup>45</sup> Karl Grammer et al., *Female Faces and Bodies*, *ADVANCES VISUAL COGNITION VOL. I: FACIAL ATTRACTIVENESS* (G. Rhodes & L.A. Zebrowitz eds., 2001).

<sup>46</sup> See Grammer et al., *Darwinian Aesthetics*, *supra* note 35, at 391.

<sup>47</sup> Jean-Yves Baudouin & Guy Tiberghien, *Symmetry, Averageness, and Feature Size in the Facial Attractiveness of Women*, 117 *ACTA PSYCHOLOGICA* 313, 325 (2004).

<sup>48</sup> *Id.*

<sup>49</sup> Bernhard Fink et al., *Human (Homo sapiens) Facial Attractiveness in Relation to Skin Texture and Color*, 115 *J. COMP. PSYCHOL.* 92, 96-97 (2001).

<sup>50</sup> Ian D. Stephen & Angela M. McKeegan, *Lip Colour Affects Perceived Sex Typicality and*

contrast in facial features and skin than do men.<sup>51</sup> Not surprisingly, increased luminance contrast has been found to enhance femininity and female facial attractiveness and to detract from masculinity and male facial attractiveness.<sup>52</sup>

With the exception of surgical alteration, features like height, jaw size, and cheekbone prominence are nonmalleable. Thus, to a certain extent, the sexual dimorphism and corresponding attractiveness of an individual's features are fixed. There are, however, some traits that are more open to manipulation than others. Women's skin texture, tint, and contrast are regularly altered with cosmetics. Women's hair length and style are generally discretionary. A woman may also strategically emphasize or downplay aspects of her figure through her manner of dress. Even men's attractiveness can be manipulated, but to a lesser extent, by increasing muscularity,<sup>53</sup> dressing in a manner that signals status,<sup>54</sup> and displaying light facial stubble.<sup>55</sup> These examples illustrate that attractiveness may be performed in addition to being biologically determined. Because such aesthetic enhancements are primarily performed by women, the following Section will discuss the performed elements of a female's appearance and their contributions to perceived attractiveness.

### B. *Performed Beauty*

A recent study in the *New York Times* sought to determine the effects of cosmetics on perceptions of women.<sup>56</sup> By gauging participants' reactions to images of women with increasing quantities of makeup, the study concluded that makeup can not only enhance women's attractiveness but also increase their perceived "likeability," "competence," and "trustworthiness."<sup>57</sup> These results indicate that like biological determinants of attractiveness, the performed elements of attractiveness can affect an individual's experience and status. More importantly, they suggest that the status and privilege associated with beauty may be attained through individual effort in addition to one's biological makeup. Accordingly, performed beauty merits individual discussion in a larger examination of physical attractiveness.

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*Attractiveness of Human Faces*, 39 PERCEPTION 1104 (2010).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Louise Wasyliw et al., *Perceptions of Male Ideals: The Power of Presentation*, 9 INT'L J. MEN'S HEALTH 144 (2010).

<sup>54</sup> Elizabeth M. Hill et al., *Physical Attractiveness: Manipulation by Physique and Status Displays*, 8 ETHOLOGY & SOCIOBIOLOGY 143 (1987).

<sup>55</sup> Nick Neave & Kerry Shields, *The Effects of Facial Hair Manipulation on Female Perceptions of Attractiveness, Masculinity, and Dominance in Male Faces*, 45 PERSONAL. & INDIV. DIFFERENCES 373, 373 (2008).

<sup>56</sup> Catherine S. Louis, *Up the Career Ladder, Lipstick in Hand*, N.Y. TIMES, Oct. 12, 2011, at E3.

<sup>57</sup> *Id.* at E2-E4 (ensuring that participants' corresponding levels of confidence did not skew the results, the women were not permitted to see themselves in a mirror during the study).

The study referenced by the *New York Times* is consistent with the findings discussed above regarding female facial attractiveness.<sup>58</sup> Having uncovered the biological traits that contribute to female facial appeal, common experience reveals that makeup application tends to mimic innate aesthetic preferences: foundation satisfies the preference for smooth, homogenous skin;<sup>59</sup> concealer camouflages blueish tones that detract from facial attractiveness;<sup>60</sup> blush increases skin saturation, which is perceived as attractive and healthy;<sup>61</sup> and lipstick creates the desired contrast between skin and lip color.<sup>62</sup> Not even the structural elements of facial attractiveness are beyond the reach of skillful makeup application. Glamour magazines regularly offer tutorials on applying makeup to create the illusion of wider eyes,<sup>63</sup> fuller lips,<sup>64</sup> and higher cheekbones.<sup>65</sup> Given the sexually dimorphic nature of these goals, one can conclude that cosmetics are intended, at least in part, to heighten a woman's attractiveness by enhancing her femininity. And if experiential evidence is insufficient to suggest the effectiveness of applying makeup to increase attractiveness, numerous studies confirm its success in doing so.<sup>66</sup>

In addition to applying cosmetics, women may also influence their perceived attractiveness by changing their hair length, style, or color. A 2004 study examined the effects of hair style and length on women's physical attractiveness by asking participants to rate subjects first with their hair pulled back and again with their hair down or styled.<sup>67</sup> The study found that long and medium-length hair worn down significantly improves a woman's physical attractiveness, regardless how attractive she was initially rated with her hair pulled back.<sup>68</sup> In fact, the women who were initially rated less attractive experienced nearly twice the improvement in ratings as compared to their more attractive counterparts just by exhibiting longer hair.<sup>69</sup> Once again, it seems that a woman can improve her appearance by

<sup>58</sup> See *supra* notes 49-52 and accompanying text.

<sup>59</sup> See Grammer et al., *Darwinian Aesthetics*, *supra* note 35, at 397 (discussing the influence of skin on facial attractiveness).

<sup>60</sup> See Bernhard Fink et al., *supra* note 49, at 92, 97.

<sup>61</sup> See *id.* at 92, 97-98.

<sup>62</sup> See Stephen, *supra* note 50.

<sup>63</sup> See, e.g., Beth Shapouri, *Makeup Tricks that Make Your Eyes Look Huge and Doe-Like*, GLAMOUR (July 9, 2010, 9:00 AM), [www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2010/07/3-little-makeup-tricks-that-ma.html](http://www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2010/07/3-little-makeup-tricks-that-ma.html).

<sup>64</sup> See, e.g., Megan Gustashaw, *Psst! The Lipstick Color That Makes Your Lips Look Fuller*, According to Pat McGrath, GLAMOUR (Aug. 17, 2011, 1:30 PM), [www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2011/08/psst-the-lipstick-color-that-m.html](http://www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2011/08/psst-the-lipstick-color-that-m.html).

<sup>65</sup> Petra Guglielmetti, *How to Get Better Cheekbones in About Five Seconds*, GLAMOUR (Oct. 25, 2010, 9:00 AM), [www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2010/10/how-to-fake-better-cheekbones.html](http://www.glamour.com/beauty/blogs/girls-in-the-beauty-department/2010/10/how-to-fake-better-cheekbones.html).

<sup>66</sup> See, e.g., Cash et al., *supra* note 34.

<sup>67</sup> See Norbert Mesko & Tamas Bereczkei, *Hairstyle as an Adaptive Means of Displaying Phenotypic Quality*, 15 HUM. NATURE 251 (2004).

<sup>68</sup> *Id.* at 260.

<sup>69</sup> *Id.* at 262.

feminizing it—this time, through her hairstyle. Like cosmetics, hair choices can also affect a woman's overall reception: participants in one study deemed blonde women not only more attractive than brunettes, but also “more feminine, emotional, and pleasure seeking.”<sup>70</sup>

The correlation between attractiveness and performed femininity also carries into women's clothing choices. Researchers in one study attempted to identify the social cues communicated by various types of women's dress.<sup>71</sup> They photographed subjects in five different outfits—a formal skirt, formal pants, a casual skirt, casual pants, and jeans—and gauged participants' reactions to the subjects in each form of attire.<sup>72</sup> The results indicated that both males and females consider a woman wearing a formal skirt outfit to be most “happy, successful, feminine, interesting, attractive, intelligent, and wanted as a friend.”<sup>73</sup> Conversely, subjects wearing jeans were rated lowest among each category.<sup>74</sup> These results demonstrate once again that women can not only influence their attractiveness, but can also elicit other desirable inferences generally bestowed upon attractive people simply by manipulating their appearance. As will be discussed further below, these studies also demonstrate the intersection of appearance-based value judgments, considering that a formal skirt suit can signal not only femininity but also affluence—another performative form of status that is positively correlated with physical attractiveness.<sup>75</sup>

Aside from superficially altering their physical appearance,<sup>76</sup> women may also engage in other behaviors that affect their perceived attractiveness. Behaviors found to positively affect female physical attractiveness span from simple, intuitive gestures like smiling<sup>77</sup> and maintaining direct eye contact,<sup>78</sup> to more nuanced conduct like eating smaller meals in the presence of others.<sup>79</sup> The full range of these behaviors is beyond the scope of this Article, but their significance is clear: combined with the aesthetic options discussed above, women have at their disposal significant means by which to manipulate their perceived attractiveness.

<sup>70</sup> Cunningham et al., *supra* note 33.

<sup>71</sup> Mary B. Harris et al., *Clothing: Communication, Compliance, and Choice*, 13 J. APP. SOC. PSYCHOL. 88 (1983).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See Hall et al., *supra* note 54.

<sup>76</sup> This paper acknowledges that women can, and do, surgically alter their physical appearances. However, given the extreme nature of elective cosmetic surgery, this paper does not discuss surgery as an option available to women to manipulate their day-to-day appearance.

<sup>77</sup> Harry T. Reis et al., *What is Smiling is Beautiful and Good*, 20 EUROPEAN J. SOC. PSYCHOL. 259, 265 (1990).

<sup>78</sup> Louise Ewing et al., *Have You Got the Look? Gaze Direction Affects Judgments of Facial Attractiveness*, 18 VISUAL COGNITION 321 (2010).

<sup>79</sup> Beth C. Bock & Robin B. Kanarek, *Women and Men Are What They Eat: The Effects of Gender and Reported Meal Size on Perceived Characteristics*, 33 SEX ROLES 109 (1995) (finding female subjects who ate smaller meals were deemed better looking and more feminine).

Understanding that one's perceived attractiveness is subject to manipulation, the following Section addresses the incentives individuals have to be perceived as attractive, particularly in the professional realm.

## II. THE BEAUTY BIAS

The seminal study on the beauty bias was conducted in 1972 by Karen Dion, Ellen Berscheid, and Elaine Walster. Their study sought to determine, in part, whether people hold "stereotyped notions of the personality traits possessed by individuals of varying attractiveness."<sup>80</sup> Participants were given photographs of subjects previously classified as attractive, moderately attractive, or unattractive and were asked to record their impressions of each.<sup>81</sup> The results revealed a broad spectrum of positive traits ascribed to attractive individuals based only on photographs: participants predicted that attractive subjects would be happier, possess more socially desirable personalities, practice more prestigious occupations, and exhibit higher marital competence.<sup>82</sup> These results were published in an article entitled "What is Beautiful is Good," as the phenomenon it described also came to be known.

In the wake of this experiment, researchers began to adapt the "what is beautiful is good" hypothesis to other fields of behavioral research. Contemporary studies in occupational psychology, for example, had already uncovered the existence of a beauty bias in hiring decisions.<sup>83</sup> Marrying those findings with the "what is beautiful is good" hypothesis, the field advanced two complementary theories to account for the role of attractiveness in employment decisions: implicit personality theory<sup>84</sup> and the lack-of-fit model.<sup>85</sup>

The implicit personality theory explores the relationship between an individual's attributes or personality traits and the set of inferences people draw between and among them.<sup>86</sup> For example, stereotypes serve as implicit personality theories, wherein outsiders draw relevant inferences from group membership regarding associated personal attributes.<sup>87</sup> Viewed through this lens, the beauty bias or "what is beautiful is good" stereotype is also an implicit personality theory: observers process attractiveness as a personal attribute from which they make

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<sup>80</sup> Dion et al., *supra* note 1.

<sup>81</sup> *Id.* at 286-87. The subjects' levels of attractiveness had been determined in a separate study and remained consistent based on the second study's ratings. *Id.*

<sup>82</sup> *Id.* at 288-89.

<sup>83</sup> See, e.g., Robert L. Dipboye et al., *Relative Importance of Applicant Sex, Attractiveness, and Scholastic Standing in Evaluation of Job Applicant Résumés*, 60 J. APP. PSYCHOL. 39 (1975).

<sup>84</sup> See Richard D. Ashmore & Frances K. Del Boca, *Sex Stereotypes and Implicit Personality Theory: Toward a Cognitive-Social Psychological Conceptualization*, 5 SEX ROLES 219 (1979).

<sup>85</sup> See Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORG. BEHAV. 269 (1983).

<sup>86</sup> See Megumi Hosoda et al., *The Effects of Physical Attractiveness on Job-Related Outcomes: A Meta-Analysis of Experimental Studies*, 56 PERSONNEL PSYCHOL. 431, 434 (2003).

<sup>87</sup> *Id.*

certain assumptions regarding other attributes.<sup>88</sup> Because the attractiveness stereotype carries positive associations, implicit personality theory predicts that employers favor attractive candidates and employees because they ascribe more favorable attributes to them.<sup>89</sup>

The lack-of-fit model shares a common foundation with implicit personality theory: it, too, predicts that an observer will draw certain inferences based upon a subject's personal attributes and characteristics.<sup>90</sup> In the work context, the lack-of-fit model predicts that a decisionmaker will use those inferences about one's character to judge a candidate's "fit" with the requirements of a given job.<sup>91</sup> The greater the perceived disparity, the greater the decisionmaker's resulting bias against the candidate.<sup>92</sup> Accordingly, an employer who ascribes certain characteristics to attractive applicants will be more likely to hire those candidates not because they are more attractive, but because he implicitly assumes their personalities will be better suited to a given position by virtue of their appearance.

Implicit personality theory and the lack-of-fit model have gained acceptance as complementary—rather than competing—explanations for a variety of appearance-based employment trends that have emerged over the years.<sup>93</sup> From initial hiring decisions<sup>94</sup> to long-term career success,<sup>95</sup> attractive individuals appear to experience a considerable professional advantage. And consistent with the discussion above, both biological and performed attractiveness factor into this system.<sup>96</sup> The following two sections will address the impact of lookism on employment decisions and will compare employers' expectations of attractive employees with their realities.

#### A. Employment Decisions

Given the high-stakes nature of job acquisition, many researchers have focused their efforts on the intricacies of interviewing and hiring practices. Accordingly, much of the research regarding lookism in the workplace asks whether attractive job candidates are more likely to be hired than their peers.

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<sup>88</sup> See Alice H. Eagly et al., *What is Beautiful is Good, But ... : A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 PSYCHOL. BULL., 109 (1991).

<sup>89</sup> See Hosoda, *supra* note 86, at 435.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 433.

<sup>94</sup> See Nadia R. Bardack & Francis T. McAndrew, *The Influence of Physical Attractiveness and Manner of Dress on Success in a Simulated Personnel Decision*, 125 J. SOC. PSYCHOL. 777, 778 (1985) ("Generally, the attractive stimulus person was hired significantly more often than was the unattractive one[.]").

<sup>95</sup> See Jæger, *supra* note 22, at 998 ("Women with more attractive faces and women with lower BMI reach more prestigious occupations, especially later in their careers.").

<sup>96</sup> See, e.g., Bardack & McAndrew, *supra* note 94 (finding that dressing well increased women's chances of being hired).

Overwhelmingly, the answer is yes.<sup>97</sup> Consistent with an implicit personality theory of hiring practices, attractive applicants are deemed to be more hireable than less attractive candidates, more likeable as individuals, and more likely “to have all it takes to be successful in life.”<sup>98</sup> This is true regardless of an applicant’s gender and whether a study is conducted using college students or actual personnel professionals.<sup>99</sup> Indeed, the advantage of beauty persists even when reviewers are provided with other job-relevant information: studies that paired applicants’ photographs with information like college major, relevant work experience, and performance reviews failed to attenuate the effects of the beauty bias.<sup>100</sup> This advantage does not stop at the job offer—on average, physically attractive job candidates are also offered higher starting salaries than their less attractive peers.<sup>101</sup>

Once on the job, the benefits continue. Studies suggest that attractive employees receive more favorable job performance evaluations than their co-workers.<sup>102</sup> Even attractive college professors see an average 0.8 jump in student evaluation scores on a five-point scale.<sup>103</sup> In conjunction with higher evaluations, attractive employees are also more likely to be selected for management training and promoted to managerial positions.<sup>104</sup> It bears mentioning that while most studies in this area manipulate attractiveness with head shots, attractiveness in this context is not limited to facial attractiveness: for example, women with lower body-mass indexes reach more prestigious occupations in their careers and taller men have been found to reach higher earnings throughout their careers.<sup>105</sup> In fact, Malcolm Gladwell uncovers a greater phenomenon with respect to men’s height in his book *Blink*: among chief executive officers of Fortune 500 companies, fifty-eight percent are six feet or taller—in the U.S. population, that figure is a mere 14.5 percent.<sup>106</sup> Finally, with respect to earnings, a longitudinal study of MBA graduates reveals that the earnings gap between attractive and unattractive

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<sup>97</sup> See, e.g., Pascale Desrumaux et al., *Effects of Facial Attractiveness, Gender, and Competence of Applications on Job Recruitment*, 68 SWISS J. PSYCHOL. 33 (2009); Bardack & McAndrew, *supra* note 94, at 778; Hosoda, *supra* note 86, at 451.

<sup>98</sup> Desrumaux et al., *supra* note 97, at 39.

<sup>99</sup> See Hosoda, *supra* note 86, at 451, 453.

<sup>100</sup> *Id.* at 452.

<sup>101</sup> Linda A. Jackson, *The Influence of Sex, Physical Attractiveness, Sex Role, and Occupational Sex-Linkage on Perceptions of Occupational Suitability*, 13 J. APP. SOC. PSYCHOL. 31 (1983).

<sup>102</sup> Lisa M. Drogosz & Paul E. Levy, *Another Look at the Effects of Appearance, Gender, and Job Type on Performance-Based Decisions*, 20 PSYCHOL. WOMEN Q. 437 (1996).

<sup>103</sup> Todd C. Riniolo et al., *Hot or Not: Do Professors Perceived as Physically Attractive Receive Higher Student Evaluations?*, 133 J. GEN. PSYCHOL. 19 (2006).

<sup>104</sup> See Thomas F. Cash & Robert N. Kilcullen, *The Aye of the Beholder: Susceptibility to Sexism and Beautyism in the Evaluation of Managerial Applicants*, 15 J. APP. PSYCHOL. 591 (1985).

<sup>105</sup> Jæger, *supra* note 22, at 998. Interestingly, the same study could not identify a positive effect on women’s earnings by virtue of attractiveness.

<sup>106</sup> MALCOLM GLADWELL, *BLINK* 90 (2005). *BLINK* is Gladwell’s attempt to deconstruct the elements of the first impression. This discussion appears in a chapter entitled, “The Warren Harding Error: Why We Fall for Tall, Dark, and Handsome Men.” *Id.*

employees only widens over time: for every additional unit of attractiveness on a five-point scale, men earned on average an extra \$2,600 annually and women an additional \$2,150 over their peers.<sup>107</sup>

Despite the general correlation between attractiveness and professional success, the data suggests that men and women do not enjoy these advantages uniformly. For instance, the same study of MBA graduates found that attractive men receive higher starting salaries, while attractive women do not, indicating that attractiveness benefits men from the start whereas the advantage for women unfolds only in time.<sup>108</sup> Indeed, some studies have found that physical attractiveness actually hinders women's professional advancement.<sup>109</sup> A study titled "When Beauty is Beastly" asked evaluators to rank equivalently credentialed but differentially attractive applicants on three dimensions: (1) the applicant's level of qualifications for a given job; (2) the evaluator's likelihood of hiring the applicant; and (3) the evaluator's suggested starting salary for the applicant.<sup>110</sup> Unsurprisingly, the study found that attractiveness offered men a competitive advantage across each dimension, regardless of the type of job sought.<sup>111</sup> Attractive women, on the other hand, benefitted only when seeking stereotypically feminine jobs—in that case, clerical positions.<sup>112</sup> When the test subjects evaluated women seeking managerial positions, attractiveness correlated significantly with lower rankings in all three dimensions.<sup>113</sup>

The same researchers performed a follow-up study to determine whether physical attractiveness would affect performance evaluations and recommended personnel actions for already-employed individuals.<sup>114</sup> As predicted, attractiveness was only beneficial for female employees holding non-managerial jobs; for women holding managerial positions, attractiveness lowered performance evaluations and

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<sup>107</sup> Irene Hanson Frieze et al., *Attractiveness and Income for Men and Women in Management*, 21 J. APP. SOC. PSYCHOL. 1039 (1991).

<sup>108</sup> *Id.*

<sup>109</sup> See Madeline E. Heilman & Lois R. Saruwatari, *When Beauty is Beastly: The Effects of Appearance and Sex on Evaluations of Job Applicants for Managerial and Non-Managerial Jobs*, 23 ORG. BEHAV. & HUM. PERFORMANCE 360 (1979); Johnson et al., *supra* note 1, at 302-03. Consider also the recent case of a dental assistant who was fired for being too attractive. See *Nelson v. James H. Knight DDS, P.C.*, No. 11-1857, 2012 WL 6652747 (Iowa Dec. 21, 2012). The court framed the issue as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views the employee as an irresistible attraction." *Id.* at \*5. Declining to recognize the plaintiff's appearance-based termination as sex discrimination, the court answered its question affirmatively. *Id.* at \*5-7. Thus, *Nelson* illustrates that for women especially, attractiveness can prove to be a double-edged sword.

<sup>110</sup> Heilman & Saruwatari, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Madeline E. Heilman & Melanie H. Stopeck, *Being Attractive, Advantage or Disadvantage? Performance-Based Evaluations and Recommended Personnel Actions as a Function of Appearance, Sex, and Job Type*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 202, 207 (1985).

recommended personnel actions.<sup>115</sup> Their findings, collectively referred to as the “beauty is beastly” effect, comport with the lack-of-fit model described above. With regard to attractiveness, the lack-of-fit model posits that the stereotypical masculinity or femininity of a job will determine whether attractiveness is regarded as an asset or a liability.<sup>116</sup> Because “attractive women [are] regarded as more feminine, and attractive men [are] regarded as more masculine than their less good-looking counterparts,”<sup>117</sup> it follows that attractiveness will benefit men in managerial positions by signaling heightened masculinity. Interestingly, this hypothesis held true in a study that added a third category of androgynous individuals for consideration: it found that masculine and androgynous individuals were viewed as more suitable for masculine jobs, and feminine and androgynous individuals were seen as more suitable for feminine jobs.<sup>118</sup>

Despite the potential implications of these findings for attractiveness and gender studies, it must be noted that support for the “beauty is beastly” effect has been inconsistent.<sup>119</sup> In part, this may be because the seminal studies reporting these findings were conducted between 1979 and 1985, a time when sensitivity to the impact of implicit biases on employment decisions was presumably lower.<sup>120</sup> Since then, “[t]he majority of research in this area has found support for the ‘what is beautiful is good’ effect rather than for the ‘beauty is beastly’ effect, regardless of job type.”<sup>121</sup> Seeking to reconcile the historic inconsistencies in findings, a 2010 study examined the interactions between applicant sex, applicant attractiveness, and sex-type of a desired job.<sup>122</sup> It found that attractive applicants were rated as significantly more suitable for employment than less attractive applicants regardless of job-type—and, more significantly, regardless of gender.<sup>123</sup> Thus, while attractiveness benefitted women more highly in feminine jobs than masculine jobs, the study ultimately found no support for the theory that attractiveness would actually detract from women’s suitability with respect to masculine jobs.<sup>124</sup>

In addition to a gradual breakdown of traditional gender roles, this may also be explained by a more holistic view of what is required to succeed in traditionally masculine jobs today. One scholar theorizes “[i]n the case of managerial jobs, attractiveness (for both genders) emphasizes certain positive female features like

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<sup>115</sup> *Id.* at 212.

<sup>116</sup> Hosoda et al., *supra* note 86, at 435.

<sup>117</sup> Heilman & Stopeck, *supra* note 114, at 203.

<sup>118</sup> Linda A. Jackson, *The Influence of Sex, Physical Attractiveness, Sex Role, and Occupational Sex-Linkage on Perceptions of Occupational Suitability*, 13 J. APP. SOC. PSYCHOL. 31 (1983).

<sup>119</sup> Johnson et al., *supra* note 1, at 302-03.

<sup>120</sup> See Comila Shahani-Denning et al., *The Effects of Physical Attractiveness and Gender on Selection Decisions: An Experimental Study*, 28 INT’L J. MGMT. 16 (2011).

<sup>121</sup> Johnson et al., *supra* note 1, at 302.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 308.

<sup>124</sup> *Id.* at 314.

social ease and expressiveness, which are consistent with the job's requirements, and certain positive male attributes like control and dynamism."<sup>125</sup> In this vein, the same lack-of-fit model that was previously advanced as an explanation for the "beauty is beastly" effect is offered instead to explain why attractive employees of both genders now enjoy success in supervisory roles. Altogether, these studies suggest that whatever gender effects may have been present thirty years ago, attractiveness today—and the corresponding display of masculinity or femininity—is a considerable professional asset for men and women alike. In the next Section, this Article will determine whether this advantage is deserved.

### *B. Beauty: Facts v. Fictions*

The occupational studies discussed above demonstrate that the beauty bias results in more than merely positive judgments for its benefactors: attractive individuals are actually afforded better opportunities and achieve greater long-term success than their peers. Given the prevalence of the beauty bias in the workplace, a corresponding body of research poses the following question: "Are attractive people, in fact, more capable than their less attractive peers?" In a 1992 article titled "Good-Looking People Are Not What We Think," psychologist Alan Feingold answered this question in the negative.<sup>126</sup> Feingold conducted a meta-analytic study of the then-decades' worth of attractiveness research in three stages: first, he aggregated the results of seventy-eight attractiveness stereotyping studies to identify the attributes most commonly ascribed to attractive people; second, he consulted ninety-three additional studies measuring the actual relationships between attractiveness—both objective and self-perceived—and those traits; and third, Feingold compared the expected and actual correlations for each trait.<sup>127</sup>

In its first stage, Feingold's study confirmed that people undoubtedly ascribe more socially desirable attributes to physically attractive individuals.<sup>128</sup> Specifically, people anticipated that attractiveness would bear a modest correlation with intelligence, a moderate correlation with sociability, dominance, and mental health, and the strongest correlation with social skills.<sup>129</sup> In the study's second stage, however, Feingold found "no notable differences" in levels of sociability, dominance, general mental health, or intelligence between attractive and unattractive people.<sup>130</sup> In fact, the only area in which attractive people were expected to and did exhibit an advantage was with regard to social skills—and even here, actual correlation fell significantly short of people's expected values.<sup>131</sup>

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<sup>125</sup> Desrumaux et al., *supra* note 97, at 40.

<sup>126</sup> Alan Feingold, *Good-Looking People Are Not What We Think*, 111 PSYCHOL. BULL. 304 (1992).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 327.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 304, 328, 331.

Despite the general myth-busting nature of Feingold's findings, his study did reveal certain traits with which attractiveness seemed to be correlated. Feingold found, for example, that attractive people are generally less lonely, less prone to social anxiety, and more comfortable interacting with members of the opposite sex than their peers.<sup>132</sup> He also identified a gender divide with respect to certain characteristics. Attractiveness served as a stronger predictor for self-esteem, opposite-sex popularity, better grades, and sexual permissiveness for women as compared to men.<sup>133</sup> Within gender categories—*i.e.*, comparing attractive men to unattractive men—attractive men enjoyed greater popularity and social comfort, but suffered from lower intelligence and heightened public self-consciousness.<sup>134</sup> Attractiveness in women, on the other hand, correlated positively with nearly every measured trait but public self-consciousness—including dominance, mental health, self-esteem, and superior grades.<sup>135</sup> Although Feingold found some relationship between attractiveness and these traits, he noted that the very weak correlation between them indicated that “physical attractiveness was essentially unrelated to these dimensions for both sexes.”<sup>136</sup> Thus, while attractiveness did appear to correspond with heightened social comfort and certain other behaviors, it generally served as a poor predictor for measures of ability.

In addition to these findings, Feingold uncovered one additional relationship of note: the relationship between expected correlations and correlations of self-rated attractiveness.<sup>137</sup> Unlike objective attractiveness, self-rated attractiveness did positively correlate with measures of sociability, dominance, and mental health, including self-esteem—attributes that were expected in higher measure among objectively attractive people.<sup>138</sup> And like objectively attractive individuals, those who rated themselves as attractive also demonstrated higher levels of social comfort, including freedom from loneliness, from general social anxiety, and from anxiety with regard to opposite-sex interactions.<sup>139</sup> Thus, Feingold's findings provide two insights with respect to self-rated attractiveness: (1) considering oneself attractive is more predictive of many socially desirable traits than actually being attractive, and (2) even the attributes that are more often found among objectively attractive individuals—namely, social skills and comfort—are present among those who merely consider themselves attractive.

More recent meta-analytic reviews of the attractiveness literature confirm Feingold's conclusion that looks do not live up to their reputation.<sup>140</sup> One notable

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<sup>132</sup> Feingold, *supra* note 126, at 313.

<sup>133</sup> *Id.* at 318.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 304.

<sup>138</sup> Feingold, *supra* note 126, at 304.

<sup>139</sup> *Id.* at 319.

<sup>140</sup> See, e.g., Linda A. Jackson et al., *Physical Attractiveness and Intellectual Competence: A Meta-*

example is a 2000 study titled "Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review."<sup>141</sup> Like Feingold, Judith Langlois and others sought to separate the inferred correlates of attractiveness from reality and determined that the advantages of attractiveness are primarily social.<sup>142</sup> The study revealed that attractive people are not only judged more favorably than their peers, but are also treated significantly better.<sup>143</sup> Accordingly, they found evidence of positive correlations with both internal and external measures of social advantages: compared with unattractive adults, attractive people experienced more occupational success, were better liked, had more dating experience and more sexual experience, and generally exhibited better physical health.<sup>144</sup> Moderately correlated with attractiveness were measures of extroversion, traditionalism, self-esteem, social skills, and mental health.<sup>145</sup> In addition, Langlois and her peers found that attractive adults hold somewhat more favorable self-perceptions than their peers, perceiving themselves to be more mentally healthy and more competent.<sup>146</sup> In the end, the correlation between attractiveness and intelligence was very slight.<sup>147</sup>

Another meta-analytic review conducted in the mid-1990s focused specifically on the relationship between attractiveness and intellectual competence.<sup>148</sup> The study, titled "Physical Attractiveness and Intellectual Competence: A Meta-Analytic Review," reaffirmed the finding that attractive individuals are perceived as more competent than their less attractive peers.<sup>149</sup> After aggregating the results of 113 attractiveness studies, however, the article concluded that the actual correlation between physical attractiveness and intellectual competence is "virtually zero."<sup>150</sup>

### III. ARGUMENTS FOR LEGAL REFORM

Given the demonstrated disconnect between people's expectations of attractive people and their realistic capabilities, the reasons for affording them such opportunities have been proven to be not only unfounded but also unfair, for any advantages bestowed upon attractive people necessarily translate into disadvantages for their less attractive peers. One study found "an American worker who was among the bottom one-seventh in looks . . . earned 10 to 15 percent less per year

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*Analytic Review*, 58 SOC. PSYCHOL. Q. 108 (1995); Langlois et al., *supra* note 3.

<sup>141</sup> Langlois et al., *supra* note 3.

<sup>142</sup> *Id.* at 402.

<sup>143</sup> *Id.* at 401.

<sup>144</sup> *Id.* at 402.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Langlois et al., *supra* note 3.

<sup>148</sup> See Jackson et al., *supra* note 140.

<sup>149</sup> *Id.* at 113.

<sup>150</sup> *Id.* at 115. This conclusion was reached after the researchers removed an outlier study and a potentially invalid study.

than a similar worker whose looks were assessed in the top one-third—a lifetime difference, in a typical case, of about \$230,000.”<sup>151</sup> In the employment context, lookism is therefore akin to other types of discrimination as a form of implicit bias that can lead to considerable disparities in wealth and opportunity.

Currently, victims of appearance-based discrimination are not wholly without recourse: employment discrimination laws may prohibit certain forms of appearance discrimination if an individual’s appearance is sufficiently linked to a protected category to which he or she belongs.<sup>152</sup> Federal employment discrimination statutes do not, however, prohibit lookism or discrimination purely on the basis of appearance. In light of the measurable disadvantages faced by the unattractive—and the corresponding privileges bestowed upon the attractive people with whom they compete for jobs and resources—some scholars call for legal reform.<sup>153</sup> As economist Daniel Hamermesh put it, perhaps indelicately, “why not offer legal protections to the ugly, as we do with racial, ethnic and religious minorities, women and handicapped individuals?”<sup>154</sup> The following sections provide first a brief overview of existing appearance-based protections and then common arguments advanced in favor of legal reform.

#### *A. Appearance-Based Protections*

Although no federal statute explicitly recognizes appearance as a protected category under the existing employment-discrimination regime, some victims of appearance-based discrimination may seek recourse under Title VII,<sup>155</sup> the ADEA,<sup>156</sup> or the ADA.<sup>157</sup> In the well-known case *Price Waterhouse v. Hopkins*, for example, the U.S. Supreme Court ruled that a female accountant who was denied partnership in part for her failure to “dress more femininely, wear make-up, have her hair styled, and wear jewelry” had been a victim of unlawful sex discrimination under Title VII.<sup>158</sup> Thus, appearance-based employment decisions may bring an employer’s actions under the purview of a relevant statute if they are sufficiently related to an individual’s federally protected status.

The availability of protection under federal law to a victim of appearance-based discrimination is dictated by the scope of the relevant statute. Title VII prohibits an employer from discriminating on the basis of “race, color, religion,

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<sup>151</sup> Daniel S. Hamermesh, *Ugly? You May Have a Case*, N.Y. TIMES, Aug. 28, 2011, at SR12.

<sup>152</sup> See, e.g., Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 200 (2000) (“When an appearance trait constitutes a disabling condition, the ADA may provide relief.”).

<sup>153</sup> See, e.g., Karen Zakrzewski, *The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431 (2005); Adamitis, *supra* note 152.

<sup>154</sup> Hamermesh, *supra* note 151.

<sup>155</sup> 42 U.S.C.A. § 2000e-2.

<sup>156</sup> 29 U.S.C.A. § 623.

<sup>157</sup> 42 U.S.C.A. § 12112.

<sup>158</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

sex, or national origin[.]”<sup>159</sup> The ADEA further extends Title VII’s protections to include employment decisions made on the basis of an employee’s age, but only for persons forty years of age and older.<sup>160</sup> Cases brought under Title VII include not only discrimination on the basis of physical characteristics related to one’s protected status but also to grooming or attire.<sup>161</sup> In *Bradley v. Pizzaco of Nebraska, Inc.*, for example, an African-American employee had been fired for his failure to comply with an employer’s no-beard policy.<sup>162</sup> The employee suffered from pseudofolliculitis barbae, a skin condition which affects approximately fifty-percent of African-American men and makes shaving uncomfortable or, in some cases, impossible.<sup>163</sup> The Eighth Circuit Court of Appeals agreed that the employer’s policy disproportionately burdened African-American men in violation of Title VII and mandated that the employer adopt an exception for affected employees.<sup>164</sup> Contrastingly, in *Jespersen v. Harrah’s Operating Company*, the Ninth Circuit upheld a casino’s grooming policy requiring female employees to wear face makeup and lipstick and their hair “teased, curled, or styled” each day.<sup>165</sup> Despite the advances secured by *Price Waterhouse* and its progeny, *Jespersen* demonstrates the inconsistency with which victims of appearance-based discrimination are treated under federal employment discrimination laws—even in cases where appearance seems inextricably linked with a plaintiff’s otherwise protected status.

Indeed, even if a plaintiff successfully establishes a *prima facie* case of intentional or disparate-impact discrimination, an employer may assert a number of defenses to escape Title VII or ADEA liability. An employer who has discriminated intentionally based upon an impermissible trait may, for example, assert that the trait at issue constitutes a bona fide occupational qualification—in other words, that despite being related to a protected category, an employee’s possession or lack of a particular trait is reasonably necessary for the normal operation of the employer’s business.<sup>166</sup> To defend against a claim of religious discrimination, an employer may assert that providing reasonable accommodation for an employee’s religious observance—otherwise mandated by Title VII—would present an undue hardship.<sup>167</sup> In *Webb v. City of Philadelphia*, for example, a Muslim police officer brought a discrimination claim against the city for refusing to allow her to wear a hijab while on duty.<sup>168</sup> Although the Third Circuit found that

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<sup>159</sup> 42 U.S.C.A. § 2000e-2(a)(1).

<sup>160</sup> See Zakrzewski, *supra* note 153, at 435; 29 U.S.C.A. § 623.

<sup>161</sup> See Adamitis, *supra* note 152, at 203.

<sup>162</sup> *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 796 (8th Cir. 1993).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 799.

<sup>165</sup> *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006).

<sup>166</sup> 42 U.S.C.A. § 2000e-2(e).

<sup>167</sup> *Id.*

<sup>168</sup> *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009).

the officer had established a *prima facie* case of religious discrimination, it ultimately upheld summary judgment in favor of the city because the requested accommodation would have imposed undue hardship on the police department.<sup>169</sup> Finally, with respect to claims of disparate-impact discrimination based on race, color, religion, sex, or national origin, an employer may demonstrate that the challenged employer policy is job-related and constitutes a business necessity.<sup>170</sup> Historically, however, employers have generally been unsuccessful defending appearance-based discrimination on the basis of consumer preference.<sup>171</sup>

In addition to Title VII's broad protections, employees may also seek recourse for appearance-based discrimination under the ADA. The ADA protects qualified individuals from discrimination on the basis of an actual or perceived disability.<sup>172</sup> A qualified individual is defined as one who can perform essential job functions, even if that individual would require reasonable accommodation to do so.<sup>173</sup> To qualify as disabled under the ADA, an individual must: (1) be substantially limited in a major life activity—*e.g.*, walking or reading—by a physical or mental impairment; (2) have a record of such impairment; or (3) be perceived as having such an impairment.<sup>174</sup> "Impairment," for purposes of the ADA, does not include "ordinary physical characteristics, height, weight, or muscle tone within 'normal' range and not resulting from an underlying physiological condition."<sup>175</sup> Thus, a victim of appearance-based discrimination may only seek legal protection under the ADA if her appearance is either symptomatic of an impairment or leads an employer to perceive that individual as having a limiting impairment.

Whether to recognize obesity as a disability under the ADA has been the subject of widespread debate and litigation. As a subset of the unattractive, obese people are often subject to the inverse assumptions from those bestowed upon attractive people; as an illustration, "[b]etween equally qualified candidates, the overweight applicant will be perceived as being less qualified, having poorer work habits, and as more likely to be absent."<sup>176</sup> As one scholar points out, the negative stereotypes about obese people are, in many cases, wholly distinct from being unattractive: "studies indicate that fat people are seen as lazy, lacking in self-control, sloppy, and hav[ing] poor personal hygiene."<sup>177</sup> However, obese plaintiffs

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<sup>169</sup> *Id.* at 262.

<sup>170</sup> See Adamitis, *supra* note 152, at 204.

<sup>171</sup> *Id.*; see *e.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (finding that passenger preference for single, female, flight attendants did not constitute a bona fide occupational qualification for gender).

<sup>172</sup> 42 U.S.C.A. § 12112.

<sup>173</sup> 42 U.S.C.A. § 12111(8).

<sup>174</sup> 42 U.S.C.A. § 12102; see also Adamitis, *supra* note 152, at 201; Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1078 (2009).

<sup>175</sup> See Adamitis, *supra* note 152, at 201.

<sup>176</sup> Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 225 (2010).

<sup>177</sup> *Id.* at 226.

who have attempted to litigate the discrimination they face under the ADA have achieved varying degrees of success. While some courts have recognized severe or morbid obesity as a disability<sup>178</sup> or as an actionable perceived disability,<sup>179</sup> most have interpreted the ADA to mean that obesity must result from an underlying physiological disorder to be considered an impairment for purposes of the Act.<sup>180</sup> Because the causes of obesity are complex and often indeterminable,<sup>181</sup> “most courts have ruled that obesity is a voluntary and mutable condition”<sup>182</sup> and therefore beyond the ADA’s scope of protection.

Beyond federal discrimination laws, victims of appearance-based discrimination may also fall under a handful of state and local protections. In 1977, Michigan became the first state to outlaw appearance-based discrimination by expanding the protected categories under its employment statute to include height and weight.<sup>183</sup> Today, Michigan remains the only state to prohibit appearance-based discrimination, but it has since been joined by a number of localities. The District of Columbia, for example, prohibits discrimination on the basis of “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”<sup>184</sup> Perhaps the most well-known locality to outlaw appearance-based discrimination is Santa Cruz, California, which adopted an ordinance in 1992 prohibiting discrimination on the basis of height, weight, and “physical characteristic.”<sup>185</sup> Other jurisdictions to have adopted appearance-based employment protections include Madison, Wisconsin,<sup>186</sup> San Francisco, California,<sup>187</sup> Urbana, Illinois,<sup>188</sup> and Howard County, Maryland.<sup>189</sup>

Despite the availability of these statutory protections, victims of appearance-based discrimination are still largely without legal recourse.<sup>190</sup> As we have seen in

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<sup>178</sup> See, e.g., *E.E.O.C. v. Resources for Human Dev., Inc.*, No. 10-3322, 2011 WL 6091560 \*4-5 (E.D. La. Dec. 7, 2011); *E.E.O.C. v. Texas Bus Lines*, 923 F.Supp. 965, 979 (S.D. Tex. 1996).

<sup>179</sup> See, e.g., *Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hosp.*, 10 F.3d 17, 28 (1st Cir. 1993).

<sup>180</sup> Korn, *supra* note 176, at 231.

<sup>181</sup> M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 39-47 (2010).

<sup>182</sup> *Id.* at 23 (internal citations omitted).

<sup>183</sup> Rhode, *supra* note 174, at 1088; see Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2202(1)(a) (2008) (effective Mar. 31, 1977).

<sup>184</sup> D.C. Code Ann. § 1-2512 (1981).

<sup>185</sup> Santa Cruz Prohibition Against Discrimination, Santa Cruz, Cal., Code § 9.83 (1995); see also Rhode, *supra* note 174, at 1081.

<sup>186</sup> See Madison, Wis., Code of Ordinances §§ 39.03(1), 39.03(2)(bb) (2007).

<sup>187</sup> See S.F., Cal., Admin. Code § 12A.1 (2008).

<sup>188</sup> See Urbana, Ill., Mun. Code § 12-37 (2007).

<sup>189</sup> See Cty. of Howard, Md., Code §§ 12.200(II), 12.201(XIV) (1992).

<sup>190</sup> See Adamitis, *supra* note 152, at 212 (“Although some appearance claims might fall within the scope of Title VII, the ADA, or the ADEA, the vast majority of appearance-discrimination claims are not actionable.”).

this Section, those whose appearance corresponds with a federally protected status face an uphill battle in persuading courts to recognize their appearance-based claims under existing discrimination laws. Even those plaintiffs who succeed in establishing a *prima facie* case of discrimination may nevertheless be denied recovery by the host of defenses built into those statutes. Worse still, in the many cases where appearance-based employment decisions are made without regard to legally protected traits, the federal employment-discrimination regime offers no solutions at all. Thus, many scholars advocate the extension of employment discrimination protections to appearance-based discrimination. The following Section will summarize their arguments.

### *B. A Call for Legal Reform*

In light of the consequences of lookism in the workplace and the present inadequacy of federal employment discrimination protections as a solution, many scholars propose the adoption of explicit legal prohibitions against appearance-based discrimination.<sup>191</sup> For the most part, these proposals suggest one of three strategies: (1) to reinterpret the current employment discrimination framework to recognize appearance—or, more often, some element of appearance like obesity or sexual orientation—within existing protected categories;<sup>192</sup> (2) to adopt relevant state and local anti-discrimination laws like those in Santa Cruz and Washington, D.C.;<sup>193</sup> or (3) to bring appearance under the federal employment discrimination regime with the passage of a new law.<sup>194</sup>

Most scholars to have considered this topic appear to fall into the first camp, believing that appearance-based discrimination would be combatted most effectively by reinterpreting elements of existing employment discrimination laws.<sup>195</sup> Economist David Hamermesh proposes, for example, that unattractiveness as a whole should be construed as a disability, thereby shielding all unattractive individuals from discrimination with the protections of the ADA.<sup>196</sup> Another author argues, on the other hand, that it is Title VII that should be expanded to recognize all “appearance-challenged” individuals as a protected class.<sup>197</sup> Still other scholars dissect appearance into its component parts and advocate protections for them individually: Professor Jane Korn is among the many

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<sup>191</sup> See, e.g., *id.*; Rhode, *supra* note 174; Zakrzewski, *supra* note 153; Hannah Fleener, *Looks Sell, But Are They Worth the Cost?: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination*, 83 WASH. U. L.Q. 1295 (2005); Hamermesh, *supra* note 151.

<sup>192</sup> See, e.g., Fleener, *supra* note 191; Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261 (2006).

<sup>193</sup> See, e.g., Adamitis, *supra* note 152; Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483 (2004).

<sup>194</sup> See, e.g., Zakrzewski, *supra* note 153.

<sup>195</sup> See, e.g., Fleener, *supra* note 191; Steinle, *supra* note 192.

<sup>196</sup> David S. Hamermesh, *BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL* 148-68 (2011).

<sup>197</sup> Zakrzewski, *supra* note 153, at 452.

voices to suggest that discrimination on the basis of obesity should be prohibited by the ADA, regardless of physiological condition.<sup>198</sup> Another paper advocates using Title VII to prohibit attractiveness-based hiring as a form of implicit race discrimination.<sup>199</sup> And in the wake of *Price Waterhouse*, many scholars focus on the gendered implications of lookism, suggesting that a reinterpretation of Title VII's protections would best serve this cause.<sup>200</sup> This argument is especially prevalent among LGBT advocates who can point to gender-non-conforming dress or grooming choices as the basis for many cases of sexual harassment.<sup>201</sup> Among them, EEOC attorney Samuel Marcossan has argued that harassment on the basis of sexual orientation should be recognized as "a species of sex discrimination" under Title VII.<sup>202</sup>

The suggestion that existing discrimination statutes should be reinterpreted to encompass appearance-based discrimination invites much criticism. Some might argue, for example, that appearance-based discrimination lacks the pervasiveness of other forms of discrimination protected under Title VII.<sup>203</sup> In response, one paper offers historic "ugly laws" that "prevented disabled, physically maimed, or very unattractive people from appearing in public" as evidence of the longstanding nature of appearance-based discrimination—even if such discrimination has never risen to the level of race discrimination in the U.S.<sup>204</sup> With respect to obesity proposals, some medical professionals refute the notion that obesity is mutable and, therefore, ineligible for federal protection.<sup>205</sup> As to the subjectivity of attractiveness judgments, Professor Hamermesh reminds critics that courts regularly engage in subjective measurements when determining whether a condition qualifies as a disability for the purposes of the ADA.<sup>206</sup> Furthermore, he suggests that attractiveness is less subjective than we might think: "[i]n one study, more than half of a group of people were assessed identically by each of two observers using a five-point scale; and very few assessments differed by more than one point."<sup>207</sup>

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<sup>198</sup> See Korn, *supra* note 176, at 209.

<sup>199</sup> Bello, *supra* note 193.

<sup>200</sup> See, e.g., Olivia Szwabnest, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75 (2010); Steinle, *supra* note 192.

<sup>201</sup> See, e.g., *id.*; Shannon H. Tan, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579 (2008).

<sup>202</sup> Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 7 (1992).

<sup>203</sup> *Id.*

<sup>204</sup> Zakrzewski, *supra* note 153, at 453.

<sup>205</sup> M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1 (2010).

<sup>206</sup> Hamermesh, *supra* note 151.

<sup>207</sup> *Id.*

Skepticism as to the adaptability of the existing employment-discrimination regime—bolstered by courts' numerous opportunities and failures to embrace the proposed interpretations of federal law—has led other scholars to propose state and local legislation as the more appropriate avenue for legal reform.<sup>208</sup> One paper, for example, suggests that expanding federal law to encompass appearance-based protections is unrealistic for a number of the reasons discussed above.<sup>209</sup> It argues instead that states and localities are better equipped to address the problem of lookism because they can adopt more expansive protections and apply them to smaller employers who are immune from federal discrimination laws.<sup>210</sup> For instance, unlike federal discrimination laws that place great weight on the mutability of protected traits, state and local laws are free to protect both the mutable and immutable characteristics associated with appearance—*e.g.*, grooming and attire.<sup>211</sup> Another scholar suggests that states and localities also have more incentive to undertake this type of legal reform: if a significant incentive for appearance-based hiring is to maintain a competitive edge among businesses, states and localities will be more invested in protecting the interests of local businesses and in protecting their citizens from the harmful effects of discrimination.<sup>212</sup>

Despite the appealing logic of the state and local approach, some scholars advocate a third strategy that would bypass the inefficiency of battling lookism on a jurisdiction-by-jurisdiction basis; they propose the passage of new federal legislation aimed at the problem of appearance-based discrimination. Stanford law professor Deborah Rhode advocates a wholesale prohibition on discrimination “based on appearance in employment, housing, public accommodations, and related contexts[.]” in which appearance encompasses “not only physical characteristics but also grooming and dress[.]”<sup>213</sup> Her formulation would include a dispute resolution process and would draw from disability- and religious-based protections by requiring organizations to make reasonable accommodations for personal appearance.<sup>214</sup> Others have focused again on the gendered aspects of appearance; concluding that Title VII will not protect employees' freedom of gender expression, two labor lawyers suggested “[p]erhaps there ought to be a law protecting the right of individuals to express their own sense of identity through their personal appearance at work.”<sup>215</sup> In fact, given the judiciary's unwillingness to recognize sexual orientation under Title VII, such a law was proposed in

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<sup>208</sup> See, *e.g.*, Adamitis, *supra* note 152; Bello, *supra* note 193.

<sup>209</sup> Adamitis, *supra* note 152, at 219.

<sup>210</sup> *Id.* at 219-20.

<sup>211</sup> *Id.* at 220 (“Protection should be provided for discrimination that is based on (1) physical characteristics, (2) grooming and attire that is associated with some already-protected category, and (3) grooming and attire that has some other cultural or historical significance.”).

<sup>212</sup> Bello, *supra* note 193, at 504.

<sup>213</sup> Rhode, *supra* note 174, at 1098.

<sup>214</sup> *Id.*

<sup>215</sup> Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 LAB. LAW. 213, 234 (2006).

1999.<sup>216</sup> The proposed Employment Non-Discrimination Act (ENDA) would expressly prohibit discrimination on the basis of sexual orientation, defined as “heterosexuality, homosexuality or bisexuality, whether real or perceived.”<sup>217</sup>

The disparity in proposed solutions to the problem of appearance-based discrimination illuminates the thorniness of this particular issue. Each proposal highlights the shortcomings of a competing approach—an advocate of the state and local approach, for example, suggests that federal legal reform is unlikely and even unwieldy,<sup>218</sup> while an advocate of federal reform argues that a state-based initiative would result in inconsistent protections across the country.<sup>219</sup> More troubling still is courts’ persistent reluctance to liberalize their interpretations of federally protected categories and the failure of state and local jurisdictions to adopt appearance-based protections in the twenty years since the Santa Cruz ordinance was originally introduced. For these reasons and others discussed below, this Article concludes that legal reform is not the solution needed to address the problem of appearance-based discrimination.

#### IV. LEGAL REFORM: NOT ALWAYS THE ANSWER

Thus far, this Article has examined the various manifestations of lookism and corresponding arguments in favor of legal reform for appearance-based protections. Unlike those proposals, however, this Article will demonstrate that legal reform is not a viable option for the following reasons: (1) most elements of physical attractiveness are not capable of being confined to discrete, protectable criteria; (2) attractiveness is not one trait, but rather the composite of multiple social values and aesthetic signals—many of which are already protected by the current employment discrimination regime in some form; and (3) appearance-based judgments are predominantly subconscious and, therefore, beyond the law’s reasonable grasp. The following sections will discuss each of these limitations in turn.

##### *A. Attractiveness Resists Categorization*

Between the three statutes discussed above, employment discrimination on the following bases is currently impermissible: race, color, religion, sex, national origin, age, and disability.<sup>220</sup> These federally protected categories and physical [un]attractiveness differ in three salient respects: traits afforded federal protection are generally (1) immutable, (2) separable into discrete categories, and (3) immune to observer bias. Without delving into queer or critical race theories—which,

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<sup>216</sup> Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 127 (2000).

<sup>217</sup> *Id.*

<sup>218</sup> Adamitis, *supra* note 152, at 219.

<sup>219</sup> Zakrzewski, *supra* note 153, at 452.

<sup>220</sup> See 42 U.S.C.A. § 2000e-2; 29 U.S.C.A. § 623; 42 U.S.C.A. § 12112.

though insightful, are beyond the scope of this Article—a person practices one religion, claims a single country of origin, and is most often identified as either male or female. A woman is incapable of moving between categories at will. Her age or gender will not change when assessed by different observers or when compared to different subjects. Physical attractiveness, on the other hand, is an amalgamation of several traits, some of which are highly susceptible to manipulation and all of which may be valued differently by beholding eyes.

The immutability argument arose in the 1970s, shortly after the passage of Title VII, in response to cases about male hair length.<sup>221</sup> Adopting a decidedly pro-employer approach, courts of that era declined to extend Title VII's sex-based discrimination protections to litigious long-haired youths.<sup>222</sup> Rather than admit to being square, the courts defended their positions by emphasizing the grave imposition that antidiscrimination laws place upon employers' autonomy; this imposition, they suggested, is justified only when the characteristics at issue are immutable or constitute fundamental rights, as in the relatively mutable case of religious practice.<sup>223</sup> The U.S. Supreme Court echoed the lower courts' arguments in *McDonnell Douglas Corp. v. Green*, when it overturned a testing standard that disproportionately excluded blacks from advancement because, in that case, the disadvantage "result[ed] from forces beyond [the plaintiffs'] control."<sup>224</sup> Part I of this Article demonstrates that physical attractiveness—especially in women—can fall within an individual's control to a very large degree.<sup>225</sup> Minor changes to grooming and wardrobe or diet and exercise enable individuals to move up and down the scale of perceived attractiveness at will. Whether they should have to, as in the *Jespersen* case, is a separate matter.

The second problem with physical attractiveness as a candidate for legal protection is that attractiveness does not lend itself to discrete classifications. Whereas age and religion provide neat, distinct boxes for members to check, the infinite combinations of physical traits across the human race result in a spectrum of physical attractiveness, rather than discrete clusters. As discussed above, an individual's attractiveness is influenced by the ratios between certain body regions, the presence and extent of sexual dimorphism in facial features, hair length, and so on.<sup>226</sup> The relationship between these factors and their influence on each individual's perceived attractiveness are impossible to isolate and quantify. Indeed, even if they could be quantified, it is difficult to imagine that many aggrieved job

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<sup>221</sup> See Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 689 (2006).

<sup>222</sup> See *id.*

<sup>223</sup> *Id.*

<sup>224</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).

<sup>225</sup> See *supra* Part I.A and I.B.

<sup>226</sup> See *supra* Part I.A.

applicants would or could honestly answer the question, “How attractive are you, on a scale from one to five?”

Finally, and perhaps most obviously, we are told from childhood that beauty is in the eye of the beholder. Despite a general, cross-cultural consensus as to what is attractive,<sup>227</sup> studies indicate that private tastes exert as much influence over attractiveness judgments as collective tastes.<sup>228</sup> Thus, while an aggregated evaluation of judgments between cultures will yield comparable trends, the variation between individual judges’ tastes is considerable.<sup>229</sup> Moreover, attractiveness is subject not only to variations by judge but also to variations among the competition. In other words, an individual’s perceived attractiveness may move up or down the spectrum depending upon the other members of the relevant pool; in contrast, one does not become more or less Chinese when compared with others.

### B. Multivariate Attractiveness

In addition to the inherent difficulties in classifying attractiveness as a protectable category, appearance-based discrimination is ill-suited to legal restraint because judgments of one’s appearance reflect the simultaneous influence of multiple social values. Put differently, attractiveness is not purely a function of appearance; instead, our minds process the way people look and then glean from their appearances certain inferences with respect to race or ethnicity, gender (as distinct from sex), age, and socioeconomic status. As an illustration and as discussed above, obesity presents a significant detriment to job applicants and employees.<sup>230</sup> On a superficial level, this could be explained by classifying obesity under the umbrella of unattractiveness.<sup>231</sup> But studies show that obesity latently communicates more than aesthetic cues: because obesity is most prevalent among minorities and white individuals of lower socioeconomic status,<sup>232</sup> it carries racial and class implications as well.

Indeed, class consciousness permeates many aesthetic judgments. In Section I, this Article discussed the modern preference for tanned skin.<sup>233</sup> It is generally well-known, however, that pale skin was historically en vogue because it signaled

<sup>227</sup> See Grammer et al., *Darwinian Aesthetics*, *supra* note 35, at 388 (“[R]ecent studies suggest that the constituents of beauty are neither arbitrary nor culture bound.”).

<sup>228</sup> See Johannes Hönekopp, *Once More: Is Beauty in the Eye of the Beholder? Relative Contributions of Private and Shared Taste to Judgments of Facial Attractiveness*, 32 J. EXPER. PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 199 (2006).

<sup>229</sup> See *id.*

<sup>230</sup> See Dan-Olof Rooth, *Obesity, Attractiveness, and Differential Treatment in Hiring*, 44 J. HUM. RESOURCES 710 (2009).

<sup>231</sup> See Dalton Conley & Brian J. McCabe, *Body Mass Index and Physical Attractiveness: Evidence from a Combination Image-Alteration/List Experiment*, 40 SOC. METHODS RES. 6 (2011).

<sup>232</sup> See Melissa Scharoun-Lee et al., *Obesity, Race/Ethnicity, and the Multiple Dimensions of Socioeconomic Status During the Transition to Adulthood: A Factor Analysis Approach*, 68 SOC. SCI. & MED. 708 (2009).

<sup>233</sup> See Leary & Jones, *supra* note 29, and accompanying text.

affluence; prior to the twentieth century, tanned skin was associated with “manual labour, toiling in the fields, the life of poor people.”<sup>234</sup> The cultural shift in favor of tans is commonly attributed to Coco Chanel, who is said to have returned from a Mediterranean cruise in the 1920s with a suntan.<sup>235</sup> At that point, tanning became associated with affluence and leisure, overtaking paleness as the favored aesthetic. Thus, a corollary to Dion’s “what is beautiful is good” might be “what is affluent is beautiful.” Indeed, the attractiveness studies described above found that both men and women are rated most attractive when dressed in a manner that signals status.<sup>236</sup>

Returning to the workplace, a cursory glance at interview attire reveals another outlet for classist thought in appearance-based judgments. The studies discussed in Section II illustrate the advantages bestowed upon attractive job applicants, but occupational studies also reveal that physical attractiveness and “appropriateness” of dress independently influence hiring decisions.<sup>237</sup> As stated in an article in *Forbes* magazine entitled “The Perfect Interview Outfit,” “[y]our interview attire indicates your socioeconomic status and it can actually impact your salary offer[.] . . . If someone looks like they need a job they are probably not going to get it.”<sup>238</sup> From silk ties and leather shoes to professionally pressed suits,<sup>239</sup> it is clear that dressing professionally is a hegemonic standard meant to communicate a level of affluence among applicants seeking placement in wealth-producing jobs.<sup>240</sup> Notably for purposes of this Article, all of these signals are communicated simultaneously by one’s appearance.

In addition to the socioeconomic aspects of appearance, the visible elements of race and ethnicity influence individuals’ judgments of others as well. As one scholar has noted, the objective standard of aesthetics is influenced and, to a large extent, dictated by the dominant group.<sup>241</sup> Thus, “the ideology of White aesthetics places Whiteness as the paradigm of beauty.”<sup>242</sup> To illustrate this point, a multi-racial study of American college students discovered that all participants rated Caucasians as the most attractive group.<sup>243</sup> In the same vein, it has been observed

<sup>234</sup> Stephanie Northen, *Sun Tan Side-Effect*, THE TIMES EDUC. SUPP. (Feb. 20, 2004).

<sup>235</sup> *Id.*

<sup>236</sup> Hall et al., *supra* note 54.

<sup>237</sup> Bardack & McAndrew, *supra* note 94.

<sup>238</sup> Leah Bourne, *The Perfect Interview Outfit*, FORBES (July 30, 2009, 4:50 PM), [www.forbes.com/2009/07/30/interview-outfit-fashion-forbes-woman-style-budget.html](http://www.forbes.com/2009/07/30/interview-outfit-fashion-forbes-woman-style-budget.html).

<sup>239</sup> See *Career Planning Manual*, DUKE LAW, available at [www.law.duke.edu/career/pdf/2011careermanual.pdf](http://www.law.duke.edu/career/pdf/2011careermanual.pdf); *Business Attire*, PENN ST. LAW, available at [https://law.psu.edu/intranet/career\\_services/job\\_search/interviews/business\\_attire](https://law.psu.edu/intranet/career_services/job_search/interviews/business_attire).

<sup>240</sup> For example, junior associates at Goldman Sachs are occasionally initiated with the “Goldman handshake,” in which a senior associate extends his hand as if to shake, but instead overturns the associate’s tie to check the label.

<sup>241</sup> See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 313 (1997).

<sup>242</sup> *Id.* at 311.

<sup>243</sup> Jie Zhang, *Patterns of Physical Preference Among Races: A Preliminary Study with College*

that Asian-Americans undergo cosmetic procedures and black women straighten their hair to imitate whiteness, while white people's cosmetic procedures are meant to improve features natural to their race.<sup>244</sup> Relating once again to the workplace, even the standard for professional appearance is defined largely by whiteness: consider employment discrimination cases in which cornrows have been perceived as unprofessional.<sup>245</sup>

Age and gender also factor into appearance-based judgments. As discussed in Section II, attractiveness is composed almost entirely of biological and performed displays of masculinity and femininity. And aside from the already-damaging perceptions of age as a signal of diminished ability and even desirability, a number of studies confirm that age is negatively correlated with attractiveness; in fact, a reliable predictor of attractiveness in women is the youthfulness of their features.<sup>246</sup>

All of the above factors influence assessments of appearance or attractiveness simultaneously, and each carries its own stereotypical and inferential implications. The overwhelming amount of information that informs such decisions renders "attractiveness" more of an umbrella term than an independent judgment. This is not to say that attractiveness is incapable of isolation; the many studies that analyze the effects of attractiveness have accomplished this task by displaying only headshots or controlling such variables as hairstyle, wardrobe, and skin color. In reality, however, these variables are not standardized or isolated, and so protections on the basis of appearance would practically translate to some amalgamation of protections on the basis of race, age, gender, socioeconomic status, and other innumerable factors. In other words, appearance is not a legally protectable category because it is collinear with a number of other variables, many of which are independently protected by the existing employment discrimination regime.

### *C. The Unconsciousness of Appearance-Based Judgments*

More significant than the complexity of appearance-based judgments is the fact that they are made unwittingly.<sup>247</sup> While we embrace a legal system that punishes bad behaviors, we have yet to develop or approve of a legal mechanism that penetrates the unconscious. As one scholar has noted, "[o]ne of the most important discoveries in empirical social psychology in the twentieth century is that

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*Students*, 83 PERCEPTUAL & MOTOR SKILLS 901 (1996).

<sup>244</sup> Kang, *supra* note 241, at 333-38.

<sup>245</sup> See, e.g., *Rogers v. Am. Airlines*, 527 F.Supp. 229 (S.D.N.Y. 1983) (dismissing a black employee's discrimination claim when her employer refused to let her wear her hair in cornrows).

<sup>246</sup> See, e.g., Gillian Rhodes, *The Evolutionary Psychology of Facial Beauty*, 57 ANNU. REV. PSYCHOL. 199, 201 (2006); Ronald Henss, *Perceiving Age and Attractiveness in Facial Photographs*, 21 J. APP. SOC. PSYCHOL. 933 (1991).

<sup>247</sup> For a discussion of implicit bias, see the works of sociologist William Bielby, who has testified to such in numerous employment discrimination cases, including *Dukes v. Wal-Mart, Inc.*, 434 F.3d 1214 (9th Cir. 2007) and *EEOC v. Morgan Stanley & Co.*, 324 F.Supp.2d 451 (S.D.N.Y. 2004).

people's perceptions and behavior are often shaped by factors that lie outside their awareness and cannot be fully understood by intuitive methods[.]”<sup>248</sup> Certainly, it can be argued that employment discrimination laws already target the behavioral as well as the cognitive aspects of prejudice; stereotypes are, after all, “*cognitive* schemata that invariably influence how we process information about others.”<sup>249</sup> But there are two additional distinctions between attractiveness and currently protected categories that have not yet been addressed. The first is that the federal employment-discrimination regime reflects the extent to which we have attempted to constrain *outward* biases—conscious internal thoughts that have historically manifested themselves as visible and measurable prejudices. On the other hand, attractiveness-based judgments—not to be confused with judgments of attractiveness itself—are almost wholly internal and generally unknown even to the bearer.

The second distinction is more subtle. Berkeley professor Robert Post devoted a lecture to the impeccable logic of lookism as the natural extension of antidiscrimination laws.<sup>250</sup> His argument, however, was that “[a]lthough powerfully compelling when applied to race or gender, that same logic seemed to lose its footing when applied to appearance.”<sup>251</sup> Perhaps the difference is this: most would agree that legal protections on the basis of race, gender, ethnicity, and other characteristics reflect a general consensus that these traits would be illegitimate bases for judgment in *any* context—professional or otherwise. Consistent with this understanding, Congress drafted antidiscrimination laws with the goal of counteracting and, in time, eradicating people's innate prejudices through the exogenous force of the law. Thus, to the extent that we have used the law to curb unconscious aspects of discrimination, we have done so to further the collective goal of divorcing those judgments from particular traits anywhere and everywhere.

This model begs the question whether we as a society are similarly prepared or want to eliminate appearance-based judgments entirely. Unlike whiteness or maleness, attractiveness is still widely and overtly celebrated. It is perfectly acceptable to compliment someone by saying, “You are so beautiful.” It would be ill-advised and repugnant, on the other hand, to congratulate someone on her whiteness or lack of disability. Thus, the second cognitive distinction between attractiveness and legally protected traits is that, based on our current value system, the former is only objectionable in limited contexts. Employment discrimination laws work because they reflect widely held cultural beliefs about what we should

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<sup>248</sup> David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1404 (2008).

<sup>249</sup> William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 121 (2000) (emphasis added).

<sup>250</sup> Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

<sup>251</sup> *Id.* at 8.

and should not value. With respect to attractiveness, however, it is unreasonable to expect employers to act—and to think—differently in the workplace than they are encouraged to think everywhere else. To render such judgments illegal would, therefore, prove unreasonable and ineffective.

#### CONCLUSION

Numerous studies and the collective experience reveal a very real set of advantages bestowed upon the physically attractive. From childhood and throughout the life course, attractive individuals are afforded more favorable treatment, are assumed to possess more socially desirable traits, and enjoy better opportunities in virtually every aspect of life. Of particular interest to multiple disciplines are the advantages these individuals receive in the workplace. So abundant and well-established are these benefits that many scholars call for legal reform to even the professional playing field.

As this Article has demonstrated, however, attractiveness is not well-suited to legal protection for a number of reasons. Unlike the immutable characteristics currently protected by federal law, physical attractiveness is both biological and performed; in other words, individuals can exert significant influence over their own attractiveness from one day to the next. Additionally, appearance-based judgments are simultaneously influenced by multiple social values associated with gender, race, age, and socioeconomic norms. This interplay illustrates not only that an individual's appearance is highly subjective but also that many aspects of appearance and attractiveness already invite legal protection under existing antidiscrimination laws. Finally—and most significantly—judgments relating to an individual's appearance are predominantly subconscious. Against the historic backdrop of overt discrimination against other protected minority groups, it is difficult to conceive of a legal regime that punishes thoughts an individual does not even know he or she has.

Given the evidence that lookism results in markedly differential treatment and opportunities for the unattractive, however, it is a problem that deserves attention. If the law falls short as an exogenous force to individual thought and organizational action, perhaps the solution lies in internal reform. Interview protocols, hiring strategies, and compensation—the roots of organization inequality—all reside within the purview of human resources and management personnel. To aid and inform such individuals, those disciplines have developed a rich literature devoted to the complex issues associated with employment decisions. Within that discourse, appearance-based discrimination has already received some attention in managerial literature. *The International Journal of Management, Personnel Psychology*, and other periodicals have identified and discussed the effects of attractiveness across the spectrum of job-related outcomes.<sup>252</sup> The

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<sup>252</sup> See, e.g., Shahani-Denning et al., *supra* note 120; Hosoda, *supra* note 86; Heilman & Stopeck,

question, then, is how to facilitate the transition from literature observing the phenomenon of lookism to proposing solutions. Unlike legal discourse, which asks how to do a job fairly, internal management discourse asks how to do a job better. Accordingly, the question of lookism should be framed not as a fairness issue or as a directive to artificially disadvantage the attractive, but as a strategic challenge—*i.e.*, how to avoid missing out on superior candidates whose unattractiveness would otherwise cause them to be underestimated and overlooked. By reframing the issue in this way, organizations can internalize the harms threatened by appearance-based discrimination in a way that incentivizes reform. Moreover, this approach improves upon proposed legal reform by avoiding the overbreadth of legal intervention and addressing the problem at its source.

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*supra* note 114.