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## Looks Sell, But Are They Worth the Cost?: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination

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# LOOKS SELL, BUT ARE THEY WORTH THE COST?: HOW TOLERATING LOOKS-BASED DISCRIMINATION LEADS TO INTOLERABLE DISCRIMINATION

## I. INTRODUCTION

Abercrombie & Fitch (A&F) is a clothing retailer that markets its wares primarily to young adults.<sup>1</sup> A&F expects its sales staff—termed “brand representatives”—to represent the company with “natural, classic American style.”<sup>2</sup> Toward that end, like other employers staffing public contact positions,<sup>3</sup> A&F holds its employees to strict grooming standards for controllable aspects of their physical appearance.<sup>4</sup> A&F articulates these standards in its “Look Policy.”<sup>5</sup>

That Look Policy lies at the heart of *Gonzalez v. Abercrombie & Fitch Stores, Inc.*,<sup>6</sup> a class action lawsuit that culminated in late 2004 in an

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1. Abercrombie & Fitch is an Ohio-based retail chain that operates over 600 stores throughout the United States. In 2003, it reported annual sales of \$1.6 billion. Kristin Young, *A&F Denies Discrimination*, WOMEN’S WEAR DAILY, June 19, 2003, at 9; Monica Yant Kinney, *At Abercrombie ‘The Look’ Matters*, PHILA. INQUIRER, Dec. 7, 2003, at B1 (describing A&F’s “target customers” as teenagers and college students).

2. Steven Greenhouse, *Going for the Look, but Risking Discrimination*, N.Y. TIMES, July 13, 2003, at 12 [hereinafter Greenhouse, *Going for the Look*] (quoting A&F’s communication’s director, Tom Lennox). ABERCROMBIE & FITCH ASSOCIATE HANDBOOK, p. 28 (Revised Jul. 2003) [hereinafter ASSOCIATE HANDBOOK]. Additional expectations include: “look great while exhibiting individuality”; “project energy and enthusiasm—make the store a warm, inviting place that provides an exciting and energetic social experience for the customer”; “greet and assist customers”; “maintain the store presentation.” *Id.*

3. See *infra* note 62 (discussing brand image and discrimination charges at Polo Ralph Lauren).

4. Reasonable grooming standards, or employer regulations of employees’ dress and other controllable aspects of employees’ physical appearance, are permissible unless they discriminate by having a disparate impact on a protected class. See *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (upholding employer railroad’s restriction on male employees’ hair length because the grooming policy was reasonable and applied evenhandedly, compliance was easily within employees’ control, and the lack of a similar requirement for females had “only a negligible effect on employment opportunities”).

5. Answer of Defendant at ¶ 4, *Gonzalez v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. Jan. 26, 2004) (No. C03-2817 SI) [hereinafter Defendant’s Answer]. The “look policy” restricts hair to a “clean, natural, classic” style, makeup to a “fresh, natural” appearance, nails to a “clear or natural” color, and jewelry to a “simple and classic” style. ASSOCIATE HANDBOOK, *supra* note 2. It forbids facial hair but allows tattoos that “represent the Abercrombie look” as defined by a store manager. *Id.*

6. Third Amended Class Action Complaint, *Gonzalez v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. June 10, 2004) (No. 03-2817 SI) [hereinafter Plaintiffs’ Complaint]. The suit was filed in June 2003 in federal district court in California and settled in November 2004. See Steven Greenhouse, *Abercrombie & Fitch Bias Case is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16 [hereinafter Greenhouse, *Settled*]. Two additional suits based on the same facts were included in the settlement:

approximately \$50 million settlement<sup>7</sup> between A&F and fourteen named plaintiffs<sup>8</sup> who suggested the policy does more than permissibly regulate employees' appearance on the job.<sup>9</sup> The complaint charged A&F with race discrimination,<sup>10</sup> alleging that its Look Policy excludes individuals from sales floor positions when their natural physical features do not represent the A&F conception<sup>11</sup> of "natural, classic American style."<sup>12</sup> The plaintiffs contended that A&F conceives "classic American style" as "virtually all-white."<sup>13</sup> A&F denied the allegations both before<sup>14</sup> and after the settlement,<sup>15</sup> insisting that it "prides itself on diversity" and has "zero tolerance for discrimination . . . on the basis of race" or any legally protected characteristic.<sup>16</sup> It also, however, admittedly prides itself on its

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*West v. Abercrombie & Fitch*, (N.D. Cal. Nov. 8, 2004) (No. 04-4730), a gender discrimination suit, and *Equal Employment Opportunity Comm'n v. Abercrombie & Fitch*, (N.D. Cal. Nov. 8, 2004) (No. 04-4731), a federal suit based on A&F's alleged violation of Title VII. Consent Decree, *Gonzalez v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. April 11, 2005) (No. 03-2817 SI), at 6-7 [hereinafter Consent Decree].

7. The settlement includes a \$40 million restitution fund and an additional \$7.25 million for plaintiffs' legal fees, as well as various provisions designed to ensure that A&F actively cultivates a racially diverse workforce. Consent Decree, at 58; Julie Tamaki, *Judge Accepts Abercrombie Plan to Settle Hiring Lawsuits*, L.A. TIMES, Nov. 17, 2004, at C2.

8. Plaintiffs represented multiple minority groups including African Americans, Latinos, and Asian Americans. Plaintiffs' Complaint, *supra* note 6, ¶1. Some plaintiffs were former A&F employees alleging that they were terminated, constructively discharged after A&F "zeroed [them] out" by refusing to assign them any shifts despite their availability to work, or demoted from sales floor to stockroom positions. *Id.* ¶¶ 58, 62, 67, 70, 76, 81, 89-91. Other plaintiffs were applicants who were denied positions at A&F stores despite their prior retail experience. *Id.* ¶¶ 43, 48, 51, 54, 95-6, 100, 105.

9. The complaint alleged that A&F's Look Policy for employee grooming is but one aspect of a systematic effort to promote "the 'A&F Look.'" *See, e.g., id.* ¶7. This effort involves carefully cultivating the appearance of the A&F workforce, beginning with initial selection of applicants who "fit" the look and continuing through corporate "blitzes" where A&F managers visit various stores in order to assess the stores' success at implementing the A&F image through employees' appearance. *Id.* ¶¶ 7, 8. The complaint alleged that A&F collects photographs of a sampling of employees from all of its stores, selects those that provide "exemplary models" of individuals who "fit the 'Look,'" and distributes these examples to all stores for guidance in their efforts to achieve the look through employee appearance. *Id.* ¶9.

10. *Id.* ¶1.

11. *Id.* ¶¶ 4,6.

12. ASSOCIATE HANDBOOK, *supra* note 2.

13. Plaintiffs' Complaint, *supra* note 6, ¶4.

14. Defendant's Answer, *supra* note 5.

15. *Greenhouse*, *Settled*, *supra* note 6, at A16 (quoting A&F chairperson's statement that A&F has "and has always had no tolerance for discrimination" and that it settled to avoid the costs of protracted litigation).

16. *Young*, *supra* note 1, at 9 (quoting A&F statement in response to *Gonzalez* suit). In addition, the Look Policy portion of the A&F Associate Handbook includes the following diversity statement: "*Abercrombie associates represent American style. America is diverse, and we want diversity in our stores. We do not discriminate, and will not tolerate discrimination in hiring based on gender, age, race, color, religion, national origin, sexual orientation, marital status, veteran status, citizenship,*

good-looking sales force;<sup>17</sup> one of its affirmative defenses to the *Gonzalez* suit was business necessity.<sup>18</sup> Plaintiffs believe the settlement will change the face of A&F by requiring it to increase minority recruitment efforts for brand representative positions and to feature racial diversity in its marketing tools.<sup>19</sup>

The race discrimination claim set forth in the *Gonzalez* complaint was not novel,<sup>20</sup> yet the complaint and subsequent settlement sparked a flurry of media interest in A&F's looks-based employment policies and practices.<sup>21</sup> According to their own executives, A&F "brand representatives" are not just predominantly "blond" and "blue-eyed" but also "preppy," "pretty," and "handsome."<sup>22</sup> Such descriptions beg the question of whether A&F executives, its customers, and the law should accept the additional exclusions, beyond race, implied by A&F's careful efforts to cultivate such a good-looking sales force. The *Gonzalez* complaint itself subtly suggests that "the A&F Look" potentially affects, not only racial minorities, but anyone who does not "fit within the narrow confines" of a look defined by more than skin color.<sup>23</sup> These individuals

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ancestry, or disability." ASSOCIATE HANDBOOK, *supra* note 2.

17. A&F admits to closely regulating its employees' dress and style. When an interviewer asked A&F CEO Mike Jeffries whether A&F's focus on clothes that flatter a narrow range of figures unduly excluded some persons, he reportedly replied, "If I exclude people, absolutely, [I'm] delighted to do so." Jim Edwards, *Whitewash? Abercrombie & Fitch Says It Isn't Racist. Do Its Marketing and Hiring Tell a Different Story?*, ADWEEK, Oct. 6, 2003, at 14.

18. Defendant's Answer, *supra* note 5, ¶ 154. The answer does not elaborate on the rationale for its business necessity defense. Presumably it would rest on the need to perpetuate the A&F image described *supra* note 2.

19. Tamaki, *supra* note 7, at C2. Minimizing the significance of the marketing materials aspect of the settlement, an A&F spokesman reportedly stated that A&F's marketing materials were diverse even before the settlement. *Id.*

20. Interview by Tavis Smiley with Kimberly West-Faulcon, National Public Radio (Dec. 9, 2003). West-Faulcon, one of the *Gonzalez* plaintiffs' attorneys, characterized the *Gonzalez* suit as a "simple" race discrimination claim not invoking issues of looks-based discrimination or a company's right to market to target audiences. *Id.*

21. *See, e.g.*, Greenhouse, *Going for the Look*, *supra* note 2, at 12. A&F's efforts to promote its image through its hiring practices were also the subject of a segment on CBS's *60 Minutes* news program, which aired first on December 7, 2003.

22. Greenhouse, *Going for the Look*, *supra* note 2, at 12.

23. Plaintiffs' Complaint, *supra* note 6, ¶ 6. Before the settlement, A&F primarily drew employees from a narrow field of college students (Defendant's Answer, *supra* note 5, ¶ 10), allegedly focusing its efforts on specified fraternities, sororities, and athletic teams. Plaintiffs' Complaint, *supra* note 6, ¶ 10. The settlement precludes A&F from concentrating its recruitment efforts at predominantly white fraternities and sororities. Consent Decree, *supra* note 6, p. 29. A&F managers also reportedly recruit employees from their customer pool, offering positions to select shoppers who have "the look." *See* Greenhouse, *Going for the Look*, *supra* note 2, at 12 (reporting that 5'6" "striking" blond shopper was offered a job while shopping at A&F); Kinney, *supra* note 1, at B02 (reporting that a "petite" blond 18-year old was offered a job while shopping at A&F). The complaint alleged that when prospective sales associates inquire about available positions, managers sometimes

could include overweight people, short people, homely people, and others who are not categorically protected from employment discrimination under existing law.<sup>24</sup>

Looks-based employment discrimination is permitted in most jurisdictions.<sup>25</sup> It represents a long-important marketing strategy that is becoming even more prevalent in efforts to market products to fickle audiences<sup>26</sup> and is likely a natural psychological process.<sup>27</sup> Nonetheless, many are uneasy about the dominant role looks<sup>28</sup> play in an employment context where looks—much like race, sex, or age—are irrelevant to most core job duties.<sup>29</sup> Moreover, the story told in the *Gonzalez* complaint suggests that hiring sales associates by looks in order to market a “classic American” product may motivate racial employment discrimination, which is legally prohibited and condemned by society.<sup>30</sup> In doing so, this

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falsely tell those who “do not fit the ‘A&F Look’” that the store is not hiring. Plaintiffs’ Complaint, *supra* note 6, ¶ 5. Alternatively, managers may provide the individual with an application but later throw the completed application away without review after the applicant leaves the store. *Id.*

24. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040–42 (1987) [hereinafter Note, *Facial Discrimination*] (describing the lack of a legal remedy for unattractive, short, and overweight individuals who experience employment discrimination, in contrast to the protection afforded on the bases of sex, race, and disability).

25. Physical attractiveness is not a protected characteristic in the employment discrimination laws of most jurisdictions. See Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 209–11 (2000). Michigan prohibits discrimination on the basis of height and weight. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2202 (2001). The District of Columbia prohibits discrimination on the basis of “personal appearance.” D.C. CODE ANN. § 2-1401.11 (2001). Similar prohibitions exist by city ordinance in Santa Cruz, California; Urbana, Illinois; and Madison, Wisconsin. See Adamitis, *supra* (discussing statutes prohibiting looks-based discrimination); Lynn T. Vo, Note, *A More Attractive Look at Physical Appearance-Based Discrimination: Filling the Gap in Appearance-Based Anti-Discrimination Law*, 26 S. ILL. U. L.J. 339, 352 (2002) (listing state and local statutes and ordinances).

26. A good-looking workforce can be an important asset in the competitive retail industry. See Greenhouse, *Going for the Look*, *supra* note 2, at 12. Greenhouse quotes an industry analyst who describes the importance of “walking billboard[s]”—in the form of attractive salespeople with whom shoppers want to associate—in keeping the attention of a young market. *Id.*

27. See Karen Dion, Ellen Berscheid, & E. Walster, *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOL. 285 (1972).

28. Greenhouse quotes an Equal Employment Opportunity Commission attorney’s statement that “[t]he problem with all this image stuff is it just reeks of marketing for this white-bread, Northern European, thin, wealthy, fashion-model look,” and “[w]e all can’t be Anglo, athletic, and young.” Greenhouse, *Going for the Look*, *supra* note 2, at 12. Cf. Richard Roeper, *Some Say It’s Pretty Ugly: Real Life Is Full of “Lookism,”* CHI. SUN-TIMES, Dec. 8, 2003, at 11 (responding to a *60 Minutes* segment on A&F’s Look Policy by arguing that lookism is so pervasive in American society that no one should be surprised that physical attractiveness is a dominant hiring criterion for retailers). Some A&F employees’ reported treatment of applicants who do not fit the look suggests that even they have at least some misgivings about the role of looks as a hiring criterion. See *infra* Part V.

29. See *supra* note 2 for a discussion of job duties of described in A&F handbook, which include greeting customers and maintaining store displays.

30. See Edwards, *supra* note 17, at 14.

story adds a new dimension to old questions of the appropriate role of “lookism”<sup>31</sup> in American society and whether physical traits perceived as unattractive should be recognized as a protected class in antidiscrimination law.<sup>32</sup>

This Note will critique the asymmetry in the law presented by the existence of protected classes, such as race and sex, which are defined in part by their physical characteristics, without corresponding protection for individuals who endure employment discrimination based on looks, which similarly bears no relation to one’s ability to perform job duties.<sup>33</sup> Part II explores the goals and justifications of antidiscrimination law. It also discusses the link between looks-based discrimination and discrimination against protected classes, and summarizes previously asserted analogies between them. Part III will explain why looks-based discrimination historically has not been prohibited. It will argue that looks-based discrimination should be prohibited in principle but that previously asserted analogy-based rationales alone are insufficient to justify such a prohibition. Finally, Part IV will endorse the view that existing antidiscrimination law can be adapted to prohibit looks-based discrimination. It will propose that, to provide a complete justification for such a modification in the law, proponents of a prohibition on looks-based discrimination should focus their arguments on the heightened risk that “lookist” polices create for discrimination against decidedly protected classes.

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31. Lookism refers to the idea that a person’s appearance indicates his or her value, measured according to “society’s construction” of a standard of beauty. M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, The Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 87 (2003).

32. One author reported that one third of people interviewed felt that workers who are “unattractive, overweight or generally look or dress unconventionally should be given special government legal protection.” Maureen Milford, *If You Don’t Fit the Company Image—Watch Out*, NEWS JOURNAL, June 20, 2005, at 1F (writing on discrimination claims arising from a casino’s requirement that its “Borgata Babes” maintain their weight, a rule enforced by weigh-ins). See also Note, *Facial Discrimination*, *supra* note 24, at 2035 (proposing that disability law protection could encompass individuals discriminated against on the basis of unattractive looks).

33. See, e.g., Note, *Facial Discrimination*, *supra* note 24, at 2044–45 (asserting that legal protection for a job applicant with a disfiguring facial scar without corresponding protection for an applicant with a jutting chin “seems an arbitrary distinction”).

## II. OVERVIEW AND HISTORY OF THE TREATMENT OF PHYSICAL APPEARANCE IN AMERICAN ANTIDISCRIMINATION LAW

### A. *General Goals and Limits of Antidiscrimination Law in the Employment Context*

Scholars have applied a variety of theoretical approaches to explain American antidiscrimination law and its close connection to broad legal themes of justice and equality.<sup>34</sup> The traditionally understood goal of antidiscrimination law in the United States is fairness through the neutralization of “widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.”<sup>35</sup> Antidiscrimination laws represent a legislative judgment that certain attributes are unjustified bases for excluding individuals from social goods, including employment opportunities.<sup>36</sup> Protected attributes tend to be those that are understood as “essential or integral to a person.”<sup>37</sup> Race<sup>38</sup> is perhaps the most firmly socially and legislatively recognized<sup>39</sup>

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34. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 17, 57 (1996). Koppelman surveys process-based and result-based approaches to antidiscrimination law, including multiple theories under each approach. *Id.* In general, process-based rationales focus on the inappropriateness of the protected characteristic as a basis for decision-making and the state’s duty to be impartial. *Id.* at 55, 59. Result-based rationales focus on the harmful, unjustified stigmatization of various groups. *Id.* at 64. Koppelman asserts that these theories make the same “ethical claim”: a characteristic is protected when society rejects the idea that people “deserve less concern and respect” because they display that characteristic. *Id.* at 98.

35. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000). Antidiscrimination law accomplishes its goal by singling out certain “stigmatizing characteristic[s]” for protection from discrimination. *Id.* at 9. Post continues, “American antidiscrimination law understands itself as negating such prejudice by eliminating or carefully scrutinizing the use of stigmatizing characteristics as a ground for judgment.” *Id.*

36. See Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 568 (1998). The Supreme Court has explained that racial classifications are highly suspect because they usually represent the troubling “view that those in the burdened class are not as worthy or deserving as others.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Gender classifications are also suspect because of their likely basis in inaccurate, “outmoded notions of the relative capabilities” of the sexes. *Id.* at 441.

37. Post, *supra* note 35, at 9. This implies that, while immutability is sufficient to bring an attribute within the protection of antidiscrimination law, it is not necessary. Such a view is relevant to the issue of protection for looks, which are increasingly mutable with the new prevalence of cosmetic surgery. See *infra* note 156 and accompanying text.

38. Paul Brest describes the “antidiscrimination principle,” which strongly disfavors classifications, judgments, and practices that depend on a person’s race. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976). Rationales for the antidiscrimination principle include: preventing “irrational and unfair infliction of injury” inherent in judgments that “rest on assumptions of the differential worth of racial groups” or on “racially selective sympathy and indifference,” and preventing harms such as stigmatization and the denial of opportunities to acquire various benefits. *Id.* at 6–8.

example of a protection-worthy attribute, because of its history as an irrational basis for decision-making that has led to unfair results and stigmatization of groups of people.<sup>40</sup> The antidiscrimination principle conceivably allows for the expansion of legal protection to cover any disadvantaged trait.<sup>41</sup> In practice, however, the law does not, and perhaps cannot, neutralize every widespread prejudice.<sup>42</sup> Complete neutrality may not even be desirable.<sup>43</sup>

In an effort to understand how and why different attributes are selected for different levels of legal protection from discrimination,<sup>44</sup> some scholars interpret antidiscrimination law as a mechanism of social transformation.<sup>45</sup> For example, Robert Post's sociological theory views antidiscrimination law not as a codification of aspirations directed toward achieving an optimally rational and fair world, but as "a social practice, which regulates other social practices" that are influenced by the culturally-determined

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39. Congress considers race discrimination to be perhaps the most invidious kind of discrimination. This distinction is the most frequently offered rationale for the absence of a bona fide occupational qualification (BFOQ) defense to race discrimination. See Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 496 (2001). Congress considered but declined to adopt a BFOQ defense for race-based selection criteria because it found race discrimination to be "more prevalent and harmful" than other forms of discrimination. *Id.*

40. See *supra* note 34 for a discussion of both process- and result-based rationales.

41. Brest, *supra* note 38, at 11. Usually, the harm from discrimination must be particularly serious and unbalanced by its social utility before antidiscrimination law intervenes to offset the disadvantage. *Id.* Koppelman argues that this test is overprotective, given the massive cultural transformation that must occur for antidiscrimination laws to accomplish their goals. KOPPELMAN, *supra* note 34, at 115.

42. Practical problems prevent attempts to neutralize every widespread prejudice; for example, enforcing rules prohibiting discrimination on subtle characteristics could involve intensive state involvement in private affairs. Post, *supra* note 35, at 8. In addition, the high cost of prevention and enforcement often prohibits the expansion of antidiscrimination laws. Roderick M. Hills Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1608 (1997).

43. Post, *supra* note 35, at 4 (suggesting that complete equality could product a "nightmare dystopia"). Post asserts that attempting to equalize every difference among people would amount to a dehumanizing *reductio ad absurdum* of American antidiscrimination law and that the prohibition of looks-based discrimination is in this realm of the absurd. *Id.* at 8. Similarly, Koppelman questions whether eradicating the stigmatization of ugliness would also entail eradicating appreciation of beauty, which has great social value. KOPPELMAN, *supra* note 34, at 64.

44. On the issue of whether antidiscrimination law should protect any particular group, Koppelman proposes this question: "does the prevailing understanding of that group unjustifiably stigmatize or socially construct its members in a way that reduces the group's political power, material wealth, and autonomy?" KOPPELMAN, *supra* note 34, at 116.

45. Post, *supra* note 35, at 36. See also KOPPELMAN, *supra* note 34, at 8 (explaining the "antidiscrimination project" as a massive social effort to "reconstruct social reality to eliminate or marginalize the shared meanings, practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage").

significant differences among people.<sup>46</sup> Unlike traditional antidiscrimination theory, the sociological perspective explains that, because some differences carry connotations too socially useful to be disallowed as a basis for decision-making,<sup>47</sup> the law does not attempt to make life fair for everyone.<sup>48</sup> It also envisions antidiscrimination law as capable of effecting lasting change, not just in the way people treat each other in order to comply with the law, but in the way they perceive each other.<sup>49</sup>

Current antidiscrimination law protects individuals on the basis of race,<sup>50</sup> sex,<sup>51</sup> age,<sup>52</sup> and disabilities such as disfigurements<sup>53</sup>—visually identifiable groups for which society has misconceptions about ability to perform job duties.<sup>54</sup> Use of these characteristics as a criterion for employment decisions perpetuates the unjustified stigmatization of many individuals.<sup>55</sup> Moreover, because these qualities rarely relate to actual ability to perform job duties, these characteristics are usually an irrational

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46. Post, *supra* note 35, at 17. This is in contrast to “the dominant conception,” which views antidiscrimination law as stripping away irrational decision-making criteria in order to ensure that decisions are based on individual merit. *Id.*

47. “[T]he ambitions of the law vary depending upon the social practice at issue.” Post, *supra* note 35, at 36. For example, “antidiscrimination law seeks to exercise a far more sweeping transformation of race than of gender.” *Id.* at 37. See also *supra* note 39.

48. Post describes the law as “a practical, ramshackle institution, full of compromise and contradiction.” Post, *supra* note 35, at 16. While it aspires to fairness and equal opportunity, its actual operation is one of a mere social practice regulating other social practices. *Id.* at 17.

49. See *id.* at 17. This stands in contrast to the traditional view, which envisions the law as preventing people from acting on “the discriminatory impulse,” rather than changing the impulse itself. Rubin, *supra* note 36, at 573.

Another alternative view of antidiscrimination law is the institutional theory, which posits that antidiscrimination law is primarily concerned with the proper allocation of the responsibility for achieving society’s utopian ideals. Under this view, antidiscrimination law represents an acknowledgement that some private institutions are better able than others to “promote full, fair, and democratic deliberation on certain sensitive and divisive controversies.” Hills, *supra* note 42, at 1620. Its “core concern . . . is not to resolve disputes about whether some characteristic is worthy of respect; rather, antidiscrimination law merely bars certain suspect methods of conducting the debate.” Thus, a prohibition on employment discrimination against a certain class can be understood as expressing “a judgment about *jurisdiction*—a judgment that a particular private institution is not a proper forum in which to resolve controversies about the propriety of stigma.” *Id.*

50. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

51. *Id.*

52. Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000).

53. Americans with Disabilities Act, 42 U.S.C. § 12112 (2000).

54. See generally Adami, *supra* note 25. Other bases for protection, including religion and national origin, are outside the scope of this Note.

55. Koppelman asserts that stigma entails a “withholding of respect” that taints decision-making processes, including hiring decisions, and leads to unfair results for stigmatized individuals. KOPPELMAN, *supra* note 34, at 9.

basis for decision-making.<sup>56</sup> Under current law, even customer or coworker preference for, or animus against, these characteristics is insufficient to make them a rational basis for employment-related decision-making.<sup>57</sup> Individuals who have qualifications for the core job duties but lack the necessary looks—a physically apparent but less clearly categorized facet of appearance—suffer similar injuries when employers refuse to hire them because they do not fit the image the company seeks to project.<sup>58</sup> Nonetheless, current law allows employers to use looks as an employee selection criterion in most jurisdictions,<sup>59</sup> despite the sense that lookism is unfair and, consequently, should be prohibited under the traditionally understood purposes of antidiscrimination law.<sup>60</sup>

*B. The Relationship between Permitted Looks-Based Discrimination and Impermissible Discrimination against Protected Categories*

*1. Looks & Protected Categories Generally: The Attractiveness Bias as Motivator of Illegal Discrimination*

Employment discrimination issues embody a fundamental tension between employers' freedom to market an image and employees' rights to

56. *Id.*

57. See *infra* note 69 and accompanying text. For a general discussion of the history and purpose of the general refusal to recognize customer preference as a justification for discrimination, see Gina Browne, *Target Hiring to Reach a Target Audience*, 23 LOY. L.A. ENT. L. REV. 125, 136–39 (2002).

58. It is important to distinguish salesperson positions from model positions. Salesperson positions typically require employees to wear the company's product or a look-a-like at work but also involve duties of handling sales transactions, tracking inventory, maintaining store displays, and assisting customers. See Occupational Information Network Online, Summary Report for: 41-2031.00 Retail Salespersons, <http://online.onetcenter.org/link/summary/41-2031.00> (last visited Feb. 5, 2006). In contrast, model job duties are typically limited to representing the product on a national or international basis by displaying the product on the employee's body. See Occupational Information Network Online, Summary Report for: 41-9012.00 Models, <http://online.onetcenter.org/link/summary/41-9012.00> (last visited Feb. 5, 2006). For modeling positions, looks are clearly related to the core duties of the position. Salesperson positions, the primary duties of which can be performed successfully regardless of the employee's looks, are the entrypoint for this Note's examination of the legitimacy of looks-based discrimination. Although A&F calls its salespersons "Brand Representatives," their core job duties are typical of other retail positions. See *supra* note 2. Furthermore, a company cannot escape the mandates of antidiscrimination law simply by claiming that, according to its business strategy, a core duty of a sales position is to serve as a walking billboard. See *supra* note 26 and *infra* note 80.

59. See Adamitis, *supra* note 25, at 199. Adamitis notes that "[r]ecourse for appearance discrimination is limited," unless the affected individual sues in a jurisdiction that prohibits appearance-based discrimination or finds a way to frame the claim within a protected category. *Id.*; see also *supra* note 25.

60. See *supra* notes 34–35, 38, 46.

equality and autonomy.<sup>61</sup> In the retail industry, A&F has not been the only employer to face charges of impermissible discrimination in connection with its permissible use of looks-based employee selection criteria.<sup>62</sup> Moreover, permissible looks-based discrimination has occurred alongside or has underlain charges of illegal discrimination against protected classes in a variety of industries,<sup>63</sup> for a lengthy span of time.<sup>64</sup> Employers across industries share the business strategy of hiring employees whose “look” furthers the company’s marketing campaign or reinforces its image.<sup>65</sup> Looks-based discrimination also can be part of an effort to hire individuals with whom customers would like to interact.<sup>66</sup> Thus, an employee’s “look”

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61. Post, *supra* note 35, at 5.

62. Abercrombie & Fitch’s Look Policy is just one example of retailers’ common strategy of hiring attractive individuals for salesperson positions, and strictly regulating their appearance on the job thereafter, in order to market the company image. Polo Ralph Lauren stores, which offer items inspired by a “country club” lifestyle, reportedly utilize strict dress and grooming standards to incorporate employees into its efforts to market that image. See Teri Agins, *Color Line: A Fashion House with an Elite Aura Wrestles with Race*, WALL ST. J., Aug. 19, 2002, at A1. In 1999, the Equal Employment Opportunity Commission investigated Polo employees’ complaints of race discrimination, based on allegations similar to those in the complaint against A&F—minority salespersons claimed they consistently were assigned to the stockroom instead of the sales floor. *Id.*

63. The casino industry is one of the most recent to come under legal fire for allegedly discriminatory appearance policies. See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004); Suzette Parmley, *At Borgota, It’s Fit the Mold—Or Else*, PHILA. INQUIRER, May 31, 2005. For other industries where appearance policies were challenged under anti-discrimination laws, see *Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983) (television newscasting industry); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (airline industry); *Yanowitz v. L’Oreal USA, Inc.*, 131 Cal. Rptr. 2d 575 (Cal. Ct. App. 2003) (cosmetics industry); *Guardian Capital Corp. v. N.Y. State Div. of Human Rights*, 46 A.D.2d 832 (N.Y. App. Div. 1974); Kenneth L. Schneyer, *Hooting: Public and Popular Discourse about Sex Discrimination*, 31 U. MICH. J.L. REFORM 551 (1998) (restaurant industry); and Greenhouse, *Going for the Look*, *supra* note 2, at 12 (hotel industry).

64. Cases challenging airlines’ appearance standards for flight attendants were brought as early as 1968. See discussion of *Dodd v. American Airlines*, *infra* note 98. In addition, looks-based discrimination is likely widespread today. One journalist reported that 16% of workers interviewed claimed to be victims of looks-based discrimination—most commonly because of their weight or their hairstyle. Maureen Milford, *If You Don’t Fit In—Watch Out*, NEWS. J., June 20, 2005 available at <http://www.delawareonline.com/apps/pbcs.d11/article?AID=2005506200301>.

65. For a report on the increasing emphasis on “hiring by looks” for marketing purposes in “upscale businesses,” see Greenhouse, *Going for the Look*, *supra* note 2, at 12. Hiring by looks exposes companies to the potential for discrimination litigation, because courts find illegal discrimination even if appearance policies have an “unintended impact on employee demographics.” Edwards, *supra* note 17, at 14 (emphasis added).

66. See Greenhouse, *Going for the Look*, *supra* note 2, at 12 (quoting a retail industry analyst who stated that “a guy wants to go hang out in a store where he can see good-looking gals”). See also ELAINE HATFIELD & SUSAN SPRECHER, *MIRROR, MIRROR: THE IMPORTANCE OF LOOKS IN EVERYDAY LIFE* 55 (1986) (noting that hiring by looks “may be especially pervasive” for public contact positions because employers correctly expect the public to respond more favorably to attractive people); Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1174 (1994) (suggesting that job applicants are aware that physical attractiveness is one of the relevant, potentially valuable “attributes” they bring to the labor market).

is likely to be most crucial, and looks-based discrimination most likely to occur, for public contact positions.<sup>67</sup> In light of the gravity of the harm to victims of illegal discrimination, courts generally refuse to recognize either customer preference or company image<sup>68</sup>—the most common reasons for looks-based employment policies—as justifications for discrimination against members of protected categories.<sup>69</sup> Physical appearance is unprotected in most jurisdictions,<sup>70</sup> however, and hiring people who will both reinforce the company’s image and appeal to its customers makes good business sense.<sup>71</sup> When such practices include discrimination against a protected class, however, courts strike them down.<sup>72</sup> Furthermore, given the range of situations in which looks-based selection criteria co-occur with instances of discrimination against a protected class,<sup>73</sup> facially legal looks-based policies are often laden with illegal implications.<sup>74</sup> Because various aspects of physical appearance are

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67. Cf. Hamermesh & Biddle, *supra* note 66, at 1191. Hamermesh and Biddle found that the “productivity” associated with beauty varies by occupation and may be heightened in some occupations because of customer preferences, presumably as to the type of person with whom they want to interact. They note, however, that “there are earnings premia and penalties for looks independent of occupation.” *Id.* See also Browne & Giampetro-Meyer, *supra* note 31, at n.166 (citing a British study from 2000 finding that unattractive women faced an earnings penalty, when compared to attractive women, in clerical and craft occupations but, contrary to expectations, attractive women in customer-service jobs experienced an earnings penalty).

68. Harvard economics professor Robert Barro asserts that “the only meaningful measure of productivity is the amount a worker adds to customer satisfaction and to the happiness of coworkers.” Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WEEK, Mar. 16, 1998, at 18. He likens the high value placed on physical appearance in certain industries to the high value placed on intelligence in others and argues that eliminating looks as a valid employment selection criterion would “effectively throw away national product” by diverting the resource of looks from its most productive use. *Id.*

69. 29 C.F.R. § 1604.2(a)(1)(iii) (2005). Preferences of the employer, other employees, clients, or customers are not a basis for a bona fide occupational qualification (BFOQ), except for positions such as an actor or actress, where “authenticity or genuineness” requires hiring an individual of a certain sex. *Id.* and 29 C.F.R. § 1604.2(a)(2) (2005). *But see* Fernandez v. Wynn Oil Co., 1979 WL 290, \*4 (C.D. Cal. 1979) (holding that customer preference was a BFOQ in a rare situation where hiring a female “regardless of her qualifications would have totally subverted any business” the employer might conduct in a cultural setting that strongly disfavored female businesspersons).

70. See *supra* note 25.

71. See Greenhouse, *Going for the Look*, *supra* note 2, at 12. Rationalizing looks-based discrimination as a business strategy to appeal to public preference still involves prejudicial lookism, just on the part of customers, encouraged by the employer-company. *Id.*

72. See Adamitis, *supra* note 25, at 217 (noting that looks-related claims can succeed under Title VII or the ADEA if the plaintiff can allege that the “real reason or impact of the employment action” involved a protected category).

73. See *supra* note 63 (listing industries in which looks-based discrimination has co-occurred with discrimination against protected categories).

74. See E.E.O.C. Dec. No. 70–90, 1969 WL 2903, \*1 (1969) (discussing an African American woman’s rejection as an applicant for a flight attendant position because the interviewer deemed her “large” lips unattractive).

identifying characteristics of many protected categories,<sup>75</sup> permissible policies of looks-based discrimination often result in illegal discrimination.

## 2. *Looks and Sex*

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits sex discrimination in employment.<sup>76</sup> Discrimination on the basis of sex is excused only where an employer can establish that sex is a bona fide occupational qualification (BFOQ) that “relate[s] to ability to perform” job duties “that fall within the ‘essence’ of the particular business.”<sup>77</sup> A BFOQ is an “extremely narrow” defense to sex discrimination.<sup>78</sup> Unless sexual services or entertainment is the primary service the employer provides,<sup>79</sup> the mere desire to hire sexually appealing members of one sex for the purpose of drawing and pleasing customers is insufficient to establish a BFOQ defense to sex discrimination.<sup>80</sup>

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75. Physical attributes like skin color, build, and the size and shape of facial features signal a person’s “ancestry,” as they developed in response to the demands of various world climates. NANCY ETCOFF, *SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY* 134–35 (2000). Differences in facial features, such as jaw and brow size and shape, distance between the eyes, and nose protrusion, also help people distinguish between the sexes. *Id.* at 152.

76. 42 U.S.C. § 1981 (2004).

77. *Int’l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 204, 206 (1991). The Court held that the employer could not establish a BFOQ for sex to justify its policy prohibiting female employees from working in areas of high lead exposure, which posed a risk to female fertility. *Id.* at 206. The Court also stated that the employer’s concern that placing women in high lead exposure areas would increase its risk of exposure to expensive lawsuits did not justify the prohibition, as “the extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.” *Id.* at 210.

78. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

79. *See Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (asserting that a BFOQ for sex would be appropriate where the employer’s primary service is “sex or vicarious sexual recreation,” because sex and the essential service the employer provides “are inseparable”). Courts have held sexual entertainment to be a primary service in cases involving the New York Playboy Club. *See Schneyer, supra* note 63, at 557 n.30.

80. *See* discussion of *Wilson infra* note 88 and accompanying text. *See also Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (holding that the essence of the airline employer’s business was to transport passengers and that the “non-mechanical” customer relations functions of the flight attendant position, which the airline asserted women performed more effectively than men, were “tangential to the essence of the business”); *Guardian Capital Corp. v. N.Y. State Div. of Human Rights*, 360 N.Y.S.2d 937, 938 (N.Y. App. Div. 1974) (holding that essence of restaurant business was to serve food, and restaurant’s marketing strategy of staffing waitperson positions with females in “alluring costumes” did not establish a BFOQ for sex); Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 208–09 (1985) (reasoning that, even if viewers aesthetically prefer to watch younger anchorwomen, the primary function of a news program is to transmit information, and thus no BFOQ

An employer's effort to harness sex appeal requires not only hiring members of a particular sex, but hiring good-looking members of that sex<sup>81</sup> and accentuating their looks on the job, most likely through grooming standards.<sup>82</sup> Courts find illegal discrimination in this situation, not because an employer has an appearance policy, but because the policy imposes unequal burdens on the sexes. In *Gerdom v. Continental Airlines, Inc.*,<sup>83</sup> the Ninth Circuit found impermissible sex discrimination where the employer airline imposed "special appearance rules"—in the form of strict weight requirements—on female employees and applicants for the purpose of building a reputation as an airline with thin, good-looking flight attendants.<sup>84</sup> Similarly, the court in *Wilson v. Southwest Airlines Co.*<sup>85</sup> found sex discrimination where the employer airline limited its flight attendant and ticket agent positions to attractive women who met the airline's height and weight standards.<sup>86</sup> In *Wilson*, these hiring practices were part of the employer airline's effort to court its primary market of male business travelers with an image as the "Love" airline.<sup>87</sup> When a male applicant challenged the airline's hiring policy, the court held that neither customer preference for attractive female flight attendants nor the airline's assertion that it had a significant financial stake in hiring only individuals who fit with its "Love" campaign justified the sex-based discrimination.<sup>88</sup> The court reasoned that the predominant duties of the

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exists for sex for the position of television news anchorperson because "sexual identification" is not "essential to the artistic integrity of a news program").

81. See *Diaz* 442 F.2d at 388 (acknowledging that female flight attendants provided a "cosmetic effect" that enhanced a "pleasant" flying environment).

82. See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 n.12 (8th Cir. 1985) (citing cases in support of proposition that appearance standards may constitute sex discrimination when they involve "demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness or use of female sexuality to attract business"). For employers to use female sexuality for marketing purposes they have to select employees with this in mind and regulate employee looks.

83. 692 F.2d 602 (9th Cir. 1982).

84. *Id.* at 606. Female flight attendants were required to weigh in each month. *Id.* at 604. If a flight attendant exceeded the maximum weight, she was placed on a "weight reduction program" designed to result in a weight loss of two pounds per week. *Id.* If she was still over the weight limit after a specified period of time, she was suspended, and later terminated. *Id.*

85. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

86. *Id.* at 293. The finding of sex discrimination was based on the disparate impact of these standards on male applicants.

87. *Id.* at 294. Its advertising campaign promised customers "feminine spirit, fun and sex appeal" in the flying experience. *Id.*

88. *Id.* at 302-04. The court rejected the airline's assertion that feminine sex appeal was necessary for the business functions of "attracting and entertaining male passengers" and "fulfilling customer expectations for female service" based on its advertising campaign. *Id.* at 302. The airline sought to establish a BFOQ for sex as a defense to the discrimination claim, but the court held neither customer preference nor a desire to maximize profits is sufficient to establish a BFOQ for sex. *Id.* at 303. To succeed in its BFOQ defense, the airline would have had to show that only females could

position of flight attendant involved “mechanical” tasks such as reciting safety instructions and serving drinks to passengers<sup>89</sup>—tasks that had no relation to the employee’s sex appeal.<sup>90</sup> Most recently, in *Jespersen v. Harrah’s Operating Co.*,<sup>91</sup> a female server who was terminated for failing to wear makeup pursuant to the defendant casino’s “Personal Best” program<sup>92</sup> sued the casino on the theory that the makeup rule violated Title VII as disparate treatment sex discrimination.<sup>93</sup> While the panel awarded summary judgment to the employer, reasoning that the program imposed similar burdens on male and female employees, the Ninth Circuit will review that decision *en banc*.<sup>94</sup> Thus, for decades, courts have grappled with sex discrimination claims rooted in an employer’s regulation of looks in the workplace.

### 3. Looks and Age

The Age Discrimination in Employment Act of 1967 prohibits age-based discrimination in employment.<sup>95</sup> In addition, discrimination on the basis of age-related appearance may be prohibited less directly under Title VII where an employer imposes significantly more burdensome physical

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perform a job function that went “to the ‘essence’ of the employer’s business.” *Id.* at 299. Where a job requires several abilities, only some of which are related to sex, the “sex-linked aspects of the job must predominate.” *Id.* at 301. While the court acknowledged that “employee sexuality” served a function in the airline’s business, it was insufficient to establish a BFOQ because the dominant function of the business was to “transport passengers safely and quickly from one point to another.” *Id.* at 302. The court also cited surveys conducted by the airline that showed that several factors, not just the sexual allure of female flight attendants, contributed to customer satisfaction with the airline. *Id.* at 303.

89. *Id.* at 302. The court further stated that “Love [was] the manner of job performance, not the job performed.” *Id.*

90. See also *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971). *Diaz*, like *Wilson*, rejected an airline’s argument that its female-only hiring policy for flight attendant positions was justified by business goals. *Id.* at 389.

91. 392 F.3d 1076 (9th Cir. 2004). Another casino is defending gender discrimination charges, in state court in New Jersey, because of its weight policy. See *Parmley*, *supra* note 63.

92. The program required all servers to be “well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform.” 392 F.3d at 1077. It also required female servers to wear stockings, nail polish, styled hair, and makeup. *Id.* The program prohibited male servers from wearing makeup and colored nail polish and required them to wear short haircuts and trimmed nails. *Id.* Harrah’s enforced the “Personal Best” program by taking portrait and full-body pictures of each employee for his or her file after the completion of “Personal Best” training. *Id.* at 1078. These pictures were used as an “‘appearance measurement’ tool” to determine whether the servers looked their “Personal Best” on a “daily basis.” *Id.*

93. *Id.* at 1061.

94. *Jespersen v. Harrah’s Operating Co.*, 409 F.3d 1061 (rehearing *en banc* granted May 13, 2005).

95. 29 U.S.C. § 623 (2000).

appearance requirements on one sex than on the other.<sup>96</sup> Age discrimination claims often “implicitly involve” the plaintiff’s age-related appearance.<sup>97</sup> Furthermore, looks, age, and sex may combine into an employment discrimination cocktail.<sup>98</sup>

In *Craft v. Metromedia, Inc.*,<sup>99</sup> a female anchorwoman on a television news program sought relief for employment discrimination when her employer reassigned her to a reporter position after viewer surveys indicated dissatisfaction with her looks and performance relative to other local anchorwomen.<sup>100</sup> The plaintiff proceeded on the legal theory of sex discrimination, arguing unsuccessfully that her employer’s appearance standards for females, which were more detailed and demanding than those for males, were impermissibly based on customer preferences for stereotypically feminine and fashionable anchorwomen.<sup>101</sup> Age discrimination might have provided an alternative claim for the plaintiff, if such a claim had been supported by stronger evidence than her employer’s disputed statement that she was reassigned in part because she looked “too old.”<sup>102</sup>

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96. See Buchman, *supra* note 80, at 203 (explaining how a television news station’s requirement that female, but not male, anchors display the “immutable or semi-immutable physical characteristic” of youthfulness may constitute impermissible “sex plus” discrimination).

97. Adamitis, *supra* note 25, at 206–07. See also HATFIELD & SPRECHER, *supra* note 66, at 58 (suggesting that looks-based discrimination may be the true mechanism underlying age discrimination); GORDON L. PATZER, THE PHYSICAL ATTRACTIVENESS PHENOMENA 148 (1985) (citing psychology findings, which demonstrate that the face is a central aspect of physical attractiveness and that age may be “predominantly displayed in the face”). Given these findings, it may be impossible to distinguish whether employment discrimination against older individuals is looks-based, age-based, or both—yet that distinction makes all the difference as to whether a claimant has a valid cause of action.

98. See, e.g., *Dodd v. Am. Airlines, Inc.*, CCH EEOC Decisions (1973) ¶ 6001 (finding airline employer’s mandatory retirement policy for flight attendants in their early-to-mid-thirties an impermissible aspect of its sex discrimination policies), cited in *Gerdom v. Cont’l Airlines, Inc.*, 692 F.2d 602, 607 (9th Cir. 1982). For further discussion of such “compound discrimination,” see Elaine Shoben, *Compound Discrimination*, 55 N.Y.U. L. REV. 793 (1981).

99. 766 F.2d 1205 (8th Cir. 1985).

100. *Id.* at 1208–09.

101. *Id.* at 1214. The station required female anchorpersons to adhere to a “clothing calendar” designed to ensure that they wore a wide variety of fashionable yet conservative clothing on camera. *Id.* at 1209. Male anchorpersons were allowed to wear the same suit more frequently as long as they rotated ties. *Id.* at 1214. The court rejected the plaintiffs’ argument that these appearance standards were overly burdensome on females as compared to males and were impermissibly based on customer preference. *Id.* The court found the station’s appearance requirements to be “shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images.” *Id.* at 1215–16. It also acknowledged the district court’s assertion that, due to the visual nature of the television medium, “reasonable appearance requirements were ‘obviously critical’” to the station’s financial success. *Id.* at 1215.

102. *Id.* at 1212. The district court accepted the employer’s testimony on this point, and the appellate court deferred to that factual finding on appeal. *Id.*

#### 4. Looks and Physical Disabilities

The Americans with Disabilities Act (ADA)<sup>103</sup> prohibits discrimination against individuals on the basis of actual or perceived disabilities.<sup>104</sup> The Rehabilitation Act of 1973<sup>105</sup> provides similar protection for individuals with real or perceived handicaps in the context of federally funded jobs.<sup>106</sup> Of existing antidiscrimination statutes, the perceived disability provisions of these statutes come the closest to offering protection from looks-based discrimination.<sup>107</sup> First, these statutes include “cosmetic disfigurement” in their definitions of “physical impairment” giving rise to a disability.<sup>108</sup> Second, these statutes explicitly target employer misconceptions, often based on an individual’s physical appearance, about the individual’s ability to perform job duties.<sup>109</sup>

Thus far, plaintiffs have made successful employment discrimination claims under perceived disability provisions<sup>110</sup> where they had dramatic distortions of physical appearance, in the form of cosmetic disfigurement or morbid obesity. In *Hodgdon v. Mt. Mansfield Co.*,<sup>111</sup> a Vermont state court found that, because the employer regarded the toothless plaintiff as

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103. Americans with Disabilities Act (ADA), 42 U.S.C. § 12102 (2000).

104. The ADA requires an “individualized inquiry” as to whether the individual’s “real or imagined” impairment “substantially limit[s] a major life activity” to determine whether that impairment qualifies as a disability within the meaning of the Act. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 490 (1999). In addition to protecting individuals with actual physical or mental disabilities, the ADA protects individuals who are “regarded as” having impairments that substantially limit major life activities. 42 U.S.C. § 12102(2)(A)(C); *Sutton*, 527 U.S. at 489. If the impairment does not rise to the level of a “disability” within the ADA, the impairment is a legitimate criterion for employers to consider in employment decisions. *Sutton*, 527 U.S. at 490–91.

105. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000).

106. *Id.* Like the ADA, the Rehabilitation Act protects an individual as “handicapped,” even where he or she is perfectly capable of performing the job, if the attitudes of others toward the impairment affect his or her major life activities. *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 282–83 (1987).

107. See Note, *Facial Discrimination*, *supra* note 24, at 2042. Scholars also have advocated the use of disability antidiscrimination law to prohibit discrimination against the obese; this is perceived as a less drastic step than extending antidiscrimination law to looks-based discrimination. See, e.g., Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 28 (1997).

108. See 29 C.F.R. § 1630.2(h) (2005) (ADA regulations); 34 C.F.R. § 104.3(j) (2005), 45 C.F.R. § 84.3(j) (2005) (Rehabilitation Act regulations).

109. See Note, *Facial Discrimination*, *supra* note 24, at 2045. Perceived disability protection results from “Congress’[s] acknowledg[ment] that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” *Arline*, 480 U.S. at 284.

110. See *supra* note 106.

111. *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122 (Vt. 1992). A Vermont state court allowed the plaintiff to recover under a state statute that defines “handicapped person” identically to the federal Rehabilitation Act when her employer terminated her from its housekeeping staff because her upper teeth were missing and she refused to wear dentures. *Id.* at 1130, 1124.

unfit for customer contact, the plaintiff was “substantially limited in her ability to work” and thus should prevail on her perceived disability theory.<sup>112</sup> In *Cook v. Rhode Island, Dep’t of Mental Health, Retardation, and Hospitals*,<sup>113</sup> the obese plaintiff prevailed on a perceived disability theory because her employer’s refusal to hire her was based on the misconception that an aspect of her physical appearance—her weight—affected her ability to work.<sup>114</sup> Implicitly tying weight-as-disability to looks and acknowledging the power of looks in employment opportunities, the *Cook* court remarked that a person’s obesity can severely diminish his or her employment opportunities “[i]n a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good’ . . .”<sup>115</sup>

### 5. Looks and Race

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race.<sup>116</sup> Like other protected categories previously discussed, race is closely associated with, if not largely defined by, certain physical characteristics.<sup>117</sup> Disfavoring a particular aspect of

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112. *Id.* at 1132. The court reasoned that the Vermont Statute’s definition of “physical impairment” included “cosmetic disfigurement” in holding that “the attitudes of others toward such impairment” can substantially limit a major life activity. *Id.* at 1131. The federal Rehabilitation Act also contemplates an actionable perceived disability claim where a party seeks to exclude an able individual because of concern that the individual’s abnormal physical appearance will have a negative impact on others. See *Arline*, 480 U.S. at 283 n.9 (discussing legislative history of the Act and citing Representative Vanik’s example of impermissible handicap discrimination where a public school sought to exclude an intellectually capable, non-physically threatening child with cerebral palsy because of concern that his physical appearance “produced a nauseating effect” on classmates).

113. *Cook v. R.I. Dep’t of Mental Health, Retardation, and Hosps.* 10 F.3d 17 (1st Cir. 1993). An obese plaintiff recovered for employment discrimination under the Rehabilitation Act after the court upheld a jury’s finding that the defendant “regarded” her as “substantially impaired,” despite her actual ability to perform the work. *Id.* at 25. As part of the application process for the position of attendant at an institution for the mentally retarded, the plaintiff underwent a physical examination where a nurse found her “morbidly obese” but not limited in her ability to perform the duties of the position. *Id.* at 20–21. The employer refused to hire the plaintiff out of fear that “[her] morbid obesity compromised her ability to evacuate patients” and placed her at greater risk for health complications that might result in costly workers compensation claims for the employer. *Id.* at 21.

114. *Id.* at 28.

115. *Id. Cf. Hein v. All Am. Plywood Co.*, 232 F.3d 482 (6th Cir. 2000). In *Hein*, the overweight, truck-driver plaintiff brought age and disability discrimination charges against his employer and presented evidence that his supervisor had created and circulated a cartoon depicting him as “Big Boy” and a magazine cover depicting him as a gorilla with the caption “Wayne Hein Ponders Weight Limits.” *Id.* at 485. He also noted that his coworkers called him various nicknames, including “Buffet Boy,” inspired by his weight. *Id.* Though Michigan is one of the few jurisdictions that prohibits weight-based discrimination, the court held that the plaintiff failed to connect the supervisor’s “alleged prejudice against heavier individuals” with his termination. *Id.* at 489.

116. 42 U.S.C. § 2000(e) (2000).

117. See *supra* notes 74 and 75. However, racial definitions are predominantly understood as

looks has a disproportionate impact on any racial or cultural group that commonly displays that feature.<sup>118</sup> The *Gonzalez* complaint<sup>119</sup> emphasized the “all-white” aspects of “the A&F Look”<sup>120</sup> and theorized that a causal relationship exists between the retailer’s permissible use of looks-related criteria in selecting and managing salespeople and impermissible employment discrimination against racial minorities.<sup>121</sup> An early unnamed E.E.O.C. decision<sup>122</sup> from the airline industry similarly illustrates how easily employment policies utilizing permissible looks-based selection criteria may slip into impermissible race discrimination.<sup>123</sup> The African American plaintiff was denied employment after an interviewer described her as “unattractive” with “large lips.”<sup>124</sup> The court found that this constituted illegal race discrimination because “a substantial factor” in the

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“arbitrary social creatures,” not real, inherent biological differences. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1982, 1988 (2000). As a practical matter, social constructions of a given race often are defined largely by the physical characteristics thought to comprise it—most commonly skin color, but potentially including other physical attributes such as height and facial characteristics. See *Craig v. County of Los Angeles*, 626 F.2d 659, 667 (9th Cir. 1980) (holding employer’s minimum height standards discriminated against Mexican-Americans, whose average height tends to be less than other racial groups). Some rationales for racial stereotypes have their roots in Western anxiety toward the color black in symbolic contexts. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 n.153 (1988) (citing writings on the relationship between racial stereotypes and real or perceived differences, i.e., in color, to which value is attached).

118. See *Craig*, 626 F.2d at 666 n.6 (finding discrimination in violation of Title VII where sheriff’s department imposed minimum height requirements for deputies that eliminated 41% of Mexican-American males but only 14% of all other males).

119. Plaintiffs’ Complaint, *supra* note 6.

120. *Id.* ¶ 4. Plaintiffs asserted that A&F’s pursuit of hiring employees who fit “the A&F look” results in a “disproportionately white” sales force. *Id.* ¶ 6. One plaintiff charged that he was denied the opportunity to apply for a sales position at A&F because “too many Filipinos” worked at that location already. *Id.* ¶ 48. Five Asian American plaintiffs charged that they were terminated from their sales positions at A&F after a corporate A&F group toured the store, showed store managers a picture of a white model, and told them that it represented the “A&F Look” and that they should “make [the] store look more like this.” *Id.* ¶ 62. An African American plaintiff charged that, while her official assignment was to the sales floor, her primary tasks were “dusting and cleaning windows,” while white employees assigned to the same position received more favorable “daytime hours and floor time.” *Id.* ¶ 89.

121. Plaintiffs alleged that A&F’s Look Policy governs systematic employment practices and policies that have “an adverse disparate impact on minority applicants and employees.” *Id.* ¶ 117.

122. E.E.O.C. Dec. No. 70–90, 1969 WL 2903, \*1 (1969).

123. *Id.* The airline prescreened prospective flight attendants strictly according to requirements for “height, weight, and other measurements.” Interviewers assessed prospective employees on dimensions including “complexion,” “make-up,” “hands,” “teeth,” “hair style,” “posture,” “appearance,” “poise,” and “attitude.” *Id.*

124. *Id.*

airline's refusal to hire her was the size of her lips, a race-linked physical trait.<sup>125</sup>

Complicating a racial minority individual's ability to recover when an employer uses physical characteristics as selection criteria, members of the same race vary in the extent to which they display physical characteristics common to their race.<sup>126</sup> Race discrimination law typically does not reach looks-based discrimination within a minority group.<sup>127</sup> In *Sere v. Bd. of Trustees of the Univ. of Illinois*,<sup>128</sup> the African American plaintiff was denied relief for race discrimination when his supervisor declined to renew his employment contract and hired, in his place, a lighter-skinned, less qualified African American individual.<sup>129</sup> The court recognized that skin color-based discrimination may happen among individuals of the same race but stated that this type of intra-race discrimination is not actionable under the civil rights statute.<sup>130</sup> The court suggested that it would be impractical for courts to attempt to draw fine distinctions based on varying skin pigmentations within one race.<sup>131</sup>

*C. Existing Analogy-Based Application of Rationales Asserted for Protecting Race, Sex, Age, and Disability to Looks*

*1. Stereotyping as the Mechanism for Discrimination Against Protected Categories and Looks-Based Discrimination*

Discrimination occurs in part as a result of a natural cognitive mechanism—stereotyping—turned to prejudice, or judgments based on

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125. *Id.*

126. For a discussion of a similar problem in national origin discrimination claims, see Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985). Where an employer denies a position to a member of a certain cultural group and fills the position with another member of that group, the denied applicant probably has no claim for discrimination, even if the employment decision was motivated by cultural bias. *Id.* at 1174. Cutler notes that national origin groups are heterogeneous, allowing employers to hire those applicants who are most "like" them—i.e., most assimilated—over those who are not. *Id.* at 1166–67. Cutler proposes discrimination tests based on trait-defined subgroups of the broad national origin group. *Id.* at 1174.

127. See Note, *Facial Discrimination*, *supra* note 24, at 2057 n.95. Cf. Cutler, *supra* note 126, at 1171 (citing decision that plaintiff had a valid cause of action for discrimination where employer chose a "light-skinned, caucasian-featured black applicant" over the plaintiff, who was "qualified but dark-skinned" with African American features).

128. *Sere v. Bd. of Trs. of the Univ. of Ill.*, 628 F. Supp. 1543 (N.D. Ill. 1986).

129. *Id.* at 1546.

130. *Id.* The statute was codified at that time as 42 U.S.C. § 1981.

131. *Sere*, 628 F. Supp. at 1546. In the court's language, it did not wish to enter "the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit." *Id.*

negative stereotypes about a group.<sup>132</sup> Stereotyping is an everyday mental task by which people assign an individual, about whom they know nothing, to a category, about which they have gathered a lot of information.<sup>133</sup> In their innocent form, stereotypes are energy-savers that help people accomplish the overwhelming task of processing “an almost incomprehensibly complex social world.”<sup>134</sup> Stereotyping has costs,<sup>135</sup> however, and the risk of inaccuracy is foremost among them.<sup>136</sup> Because stereotyping occurs on an unconscious level, its inaccuracies can be particularly difficult to combat.<sup>137</sup> Stereotypes associated with race, sex, and other protected characteristics are understood to be a major mechanism in the various forms of discrimination these groups face.<sup>138</sup>

Similarly, scholars have argued that employers’ dependence on looks as an employee selection criterion likely stems from an “attractiveness stereotype.”<sup>139</sup> The attractiveness stereotype leads individuals to assume

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132. See Adamitis, *supra* note 25, at 213. Adamitis notes that a central purpose of antidiscrimination law is to fight prejudice that results in unfair disadvantage for members of negatively stereotyped groups. *Id.*

133. In his article on antidiscrimination law, Professor Rubin notes that generalizing about a person on the basis of his or her characteristics is both a routine and necessary part of functioning in a social world where people participate in many interactions every day. Rubin, *supra* note 36, at 572. Psychologists agree and have explained how stereotype categories are formed from knowledge gathered in the past which supplies a set of characteristics that people then ascribe to unknown individuals based on their group membership. See C. Neil Macrae, Alan B. Milne & Galen V. Bodenhausen, *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37 (1994).

134. Macrae et al., *supra* note 133, at 37.

135. *Id.* at 45.

136. See Alan Feingold, *Good-Looking People Are Not What We Think*, 111 PSYCHOL. BULL. 304, 333 (1992). Contrary to the assumptions of the attractiveness stereotype, psychology professor Alan Feingold found “no notable relationships between physical attractiveness and basic personality traits,” but personality traits having to do with social behavior were linked to physical attractiveness. *Id.* He also found negligible correlation between physical attractiveness and cognitive measures. *Id.*

137. KOPPELMAN, *supra* note 34, at 129 (explaining that unconscious prejudices, associated with natural categorizing, can affect even neutrally-structured decision-making processes).

138. *Id.* Moreover, stereotypes are self-perpetuating because people go beyond merely assuming that group members possess the stereotypical characteristics of the group and proceed actively to *treat* them as if they possess those qualities, resulting in a “self-fulfilling prophecy” by which group members may actually develop these qualities. The “self-fulfilling prophecy” phenomenon was first named in a classic study in which experimenters randomly selected certain children from a grade school class and informed their teachers that a test had revealed that these children were “late bloomers” whose IQs could be expected to improve dramatically within the year. The teachers’ expectations for IQ-improvement turned into a reality, not as a result of the students’ intellectual ability, but more likely as a result of the greater attention teachers paid to those students who happened to be labeled as “late bloomers.” ROBERT ROSENTHAL & LENORE JACOBSEN, *PYGMALION IN THE CLASSROOM* (1968). For a similar, classic study in the context of the attractiveness stereotype, see Mark Snyder, Elizabeth D. Tanke, & Ellen Berscheid, *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOL. 656 (1977).

139. See Adamitis, *supra* note 25, at 197; Alice H. Eagly et al., *What Is Beautiful Is Good, but. . .*

that those who possess physical beauty also possess a host of other positive characteristics,<sup>140</sup> including intelligence<sup>141</sup> and social competence.<sup>142</sup> At the same time as attractive individuals benefit from positive stereotypes, unattractive people are negatively stereotyped in various ways; people may attribute psychological disturbance to them, and, in general, may think that “what is ugly is deviant.”<sup>143</sup> Human bias in favor of attractive individuals may be innate.<sup>144</sup>

Stereotypes often have an element of accuracy,<sup>145</sup> either because they are properly founded or because they have created a self-fulfilling prophecy.<sup>146</sup> Despite their potential accuracy in some circumstances, stereotypes are an improper basis for employment decisions about members of protected categories because of their general danger of inaccuracy and their potential to foster stigmatization of the excluded group.<sup>147</sup> Proponents of extending antidiscrimination law to cover looks-based discrimination have asserted that negative stereotypes associated with looks<sup>148</sup> are perpetuated by the same process and carry the same dangers as those associated with race and sex.<sup>149</sup>

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*A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 PSYCHOL. BULL. 109 (1991).

140. Eagly, *supra* note 139.

141. Margaret M. Clifford & Elaine Walster, *Research Note: The Effect of Physical Attractiveness on Teacher Expectations*, 46 SOC. OF EDUC. 248 (1973).

142. Eagly, *supra* note 139, at 109–10.

143. HATFIELD & SPRECHER, *supra* note 66, at 82. *See also* PATZER, *supra* note 97, at 44 (citing study finding that a person’s likelihood of being perceived as psychologically disturbed increases as the person’s physical attractiveness decreases). Rubin asserts that, where nonmembers of a protected group argue that antidiscrimination law unfairly creates “special rights” for that group, their sense of unfairness may be based in the feeling that the protected group is contaminated or corrupt. Rubin, *supra* note 36, at 588. Thus, “special rights” arguments against antidiscrimination provisions often confirm the existence of the very “irrational prejudice” that justifies legal protection for these groups. *Id.* at 591.

144. Judith H. Langlois et al., *Facial Diversity and Infant Preferences for Attractive Faces*, 27 DEVELOPMENTAL PSYCHOL. 79, 84 (1991). Langlois found that infants gazed longer at photographs of attractive faces than photographs of unattractive faces, regardless of the race, gender, or age of the person in the photograph. *Id.* at 84. Her findings suggested that the preference for attractive individuals is “either innate or acquired with only minimal experiences with faces in the environment,” rather than learned from prolonged exposure to culture. *Id.* The infants’ consistent preference for the same attractive faces also rebuts conventional wisdom that beauty is wholly subjective, or “in the eye of the beholder.” *Id.*

145. *See* Rubin, *supra* note 36, at 573 (noting that generalizations may be accurate in certain social situations).

146. *See supra* note 138 (discussing self-fulfilling prophecy).

147. For example, Title VII prohibits an employer from “refus[ing] to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.” *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

148. Assuming that “excess weight” can be a form of unattractiveness, for example, Adamitis notes that inaccurate work-related stereotypes associated with obesity include “laziness, lack of

## 2. *Irrational Decision-Making as the Process for Discrimination Against Protected Categories and Looks-Based Discrimination*

Scholars have argued that allowing looks-based discrimination is inconsistent with antidiscrimination law's commitment to equal opportunity through merit-based decisions by employers.<sup>150</sup> The idea that employers should focus on internal qualifications rather than external appearances permeates antidiscrimination law.<sup>151</sup> Race, sex, age, and disability, like looks, are overwhelmingly physical, readily apparent attributes<sup>152</sup> that cannot predict ability to perform most job duties.<sup>153</sup> The use of non-performance-related criteria in selecting employees is irrational and could diminish productivity.<sup>154</sup>

## 3. *Unfair Stigma and Diminished Opportunities as the Products of Discrimination Against Protected Categories and Looks-Based Discrimination*

A major tenet of antidiscrimination law is that individuals should not suffer employment penalties for unchangeable aspects of their person.<sup>155</sup>

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discipline, incompetence, lack of productivity, and slovenliness." Adamitis, *supra* note 25, at 197.

149. See Note, *Facial Discrimination*, *supra* note 24, at 2035.

150. See, e.g., Adamitis, *supra* note 25; Note, *Facial Discrimination*, *supra* note 25. Antidiscrimination law attempts to require employers to focus on "individual merit." Post, *supra* note 35, at 13. Through Title VII, Congress directs that employee selection tests "must measure the person for the job" rather than the person abstracted as a member of a particular stereotyped group. *Id.* at 14 (quoting *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971)).

151. Adamitis, *supra* note 25, at 212 (arguing that the "ideal" hire is the person best qualified for the job).

152. Patzer asserts that looks are such a powerful variable in human interactions because, like race and sex, looks are an "obvious and immediately accessible trait." PATZER, *supra* note 97, at 9.

153. See Adamitis, *supra* note 25, at 195–96. Describing how physically unattractive people experience many of the same hardships as minority groups, one scholar writes, "[a]lthough our society professes a commitment to judge people by their inner worth, physically unattractive people often face differential and unequal treatment in situations in which their appearance is unrelated to their qualifications or abilities." Note, *Facial Discrimination*, *supra* note 24, at 2037. See also Adamitis, *supra* note 25, at 212–13 (asserting that there is "no correlation" between appearance and job performance in most jobs and citing a study showing that employee weight does not impact most job duties).

154. Even if it would increase profits, however, Adamitis notes that "customer preference" is generally rejected as a justification for discrimination. Adamitis, *supra* note 25 at 213. She suggests that legislatures should extend this level of protection to looks-based discrimination. *Id.*

155. There are exceptions to this principle, most notably intelligence. Barro analogizes looks and intelligence and argues that the law should not interfere with the market in these attributes. Barro, *supra* note 68, at 18. If society determines that poor looks are unfairly and irrationally stigmatized, however, such a finding could justify bringing looks within the protection of antidiscrimination law. It would be consistent for intelligence to remain a valid employment selection criterion, if core job duties require a certain level of intelligence, and particularly if no similarly severe stigma attaches to low

Race, sex, age, disability, and looks can be classified as immutable and interlinked characteristics.<sup>156</sup> Proponents of prohibiting looks-based discrimination have noted that looks, like protected categories, involve immutable or semi-immutable traits that are irrelevant to job duties and for which individuals should not be penalized in the labor market.<sup>157</sup> Due to scientific advances, however, it is not always clear what traits are mutable.<sup>158</sup> Consequently, mutable physical traits associated with protected categories and looks both raise the common question of how to allocate the burdens between employers and employees when procedures are available to change one's appearance but pose various degrees of cost, invasion, and risk to the individual.<sup>159</sup>

A related justification for extending legal protections to various categories is that their members face a legacy of discrimination<sup>160</sup> that continues to restrict their field of opportunities.<sup>161</sup> Scholars have

intelligence. See *supra* notes 41 and 44 for alternative formulations of the social calculus that may explain when and why protection should extend to any given characteristic.

156. See, e.g., Buchman, *supra* note 80, at 197 (noting that race and age are both “virtually unalterable” facets of a person’s physical appearance).

157. See, e.g., Note, *Facial Discrimination*, *supra* note 24, at 2035. “Generalizations based on immutable personal traits . . . are especially frustrating because we can do nothing to escape their operation.” Brest, *supra* note 38, at 10.

158. See Buchman, *supra* note 80, at 198. Buchman notes that the availability of cosmetic surgery may make physical signs of age “[s]emi-[i]mmutable [c]haracteristics.” *Id.* Similarly, the debate over the degree to which weight is within an individual’s control renders its mutability status unclear. *Id.*

159. This raises several questions that are beyond the scope of this Note: To what extent may an employer require an employee to take steps to alter his or her appearance in order to fit the job description? The possibilities range from requiring the employee to use cosmetics, or take prescription medication (e.g., for acne), or undergo prolonged medical treatment (e.g., orthodontics), or agree to surgery. Similarly, this Note does not address the extent to which job descriptions should be broad enough to encompass variations in appearance.

Some argue that even mutable characteristics should be protected where they are closely tied to group identity. See, e.g., Cutler, *supra* note 126, at 1177–78 (stating that allowing discrimination on the basis of mutable national-origin traits is “antithetical to our notion of equality” because forcing group members to assimilate is stigmatizing and sends the message that the person’s identity “has no place in American society”). This argument can be extended to personal identity or self-expression. The Santa Cruz ordinance prohibiting discrimination on the basis of “physical characteristic” refused to go so far, over the protestation of locals seeking to protect their ability to control their self-presentation “through choices of hair color, tattoos, or clothing.” Post, *supra* note 35, at 6.

160. African Americans, for example, have suffered the ill effects of a deeply entrenched race consciousness in America. Crenshaw, *supra* note 117, at 1374–76 (tracing the history and power of “politicized racial categories” in America from slavery through the 1980s).

161. The “psychological injury” individuals suffer when they are judged by generalizations about a group to which they belong are “compounded by the frustrating and cumulative nature of . . . material injuries” such as lost job opportunities. Brest, *supra* note 38, at 10. Arguing that the harms of race discrimination have been uniquely severe because blacks suffered a historical legacy of being “denied virtually all opportunities,” he asserts that “[a] person who is denied one opportunity because he or she is short or overweight will find other opportunities, for in our society height and weight do not often serve as the basis for generalizations determining who will receive benefits.” *Id.* (emphasis in

documented the individual and social damage attributable to looks-based discrimination.<sup>162</sup> Studies demonstrate that unattractive individuals suffer significant harm in the labor market due to stereotypes associated with their appearance.<sup>163</sup> Given the firmly entrenched and possibly innate<sup>164</sup> nature of the attractiveness stereotype,<sup>165</sup> the harm is long-standing and likely to continue.<sup>166</sup> It is particularly damaging for women.<sup>167</sup> Finally, exacerbating this problem, people tend to deny that lookism exists and do not believe that physical appearance affects their judgment.<sup>168</sup> Thus, members of already protected categories and victims of looks-based discrimination experience a similar type and degree of harm. The complex, cyclical nature of that harm arguably makes it an appropriate subject for legal intervention.

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original). *But see* Note, *Facial Discrimination*, *supra* note 24, at 2041 (reporting State of Maryland's Commission on Human Relations's finding that employers' biases against overweight persons are so strong "that it may well be easier to place a thin black person on a job than a fat white person").

162. *See, e.g.*, Adamitis, *supra* note 25, at 198–99. This Note would not pretend to weigh the harms suffered by members of protected groups against those suffered by individuals who have experienced looks-based discrimination, only to draw attention to the similarities between the two.

163. Hamermesh & Biddle, *supra* note 66. *See also* Browne & Giampetro-Meyer, *supra* note 31, at 92–96 (discussing findings that attractive women receive higher salaries, better performance evaluations, and more earnings over time as compared to unattractive women, and in particular noting that attractive people tend to be favored over people with a better work record at promotion time); Adamitis, *supra* note 25, at 198 (citing several studies that show correlations between attractiveness and earnings, widespread employment discrimination against overweight individuals, and lower incomes for shorter men).

164. Psychologist and Harvard Medical School professor Nancy Etcoff argues that humans' "extreme sensitivity to beauty is hard-wired," because physical attributes we call "beautiful" emerged as signals of reproductive success through the process of natural selection. ETCOFF, *supra* note 75, at 24. *See also supra* note 144 (discussing infants' preference for attractive faces). Etcoff notes, however, that the "economically dominant group" of a country establishes its "own ethnic features as the standard of beauty" in that country, so that the features considered attractive in any given society vary depending on who "holds the reins of power" in that society. ETCOFF, *supra* note 75, at 117.

165. *See supra* note 139 and accompanying text.

166. The "cycle of discrimination" against individuals with attributes that carry negative social stereotypes continues in part because qualified individuals may expect to be unable to find employment and thus are deterred from trying, leading to underachievement in other aspects of their lives. Adamitis, *supra* note 25, at 214.

167. *See generally* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991). In describing how pressure to meet the cultural ideal of beauty increases women's susceptibility to eating disorders, one author reports survey findings that a majority of American women claimed they felt less afraid of dying than of "getting fat." DEBRA L. GIMLIN, *BODY WORK: BEAUTY AND SELF-IMAGE IN AMERICAN CULTURE* 4 (2002).

168. PATZER, *supra* note 97, at 43. Contrast this resistance to acknowledge the role of "superficial" characteristics in human interactions to the large amounts of time and money many Americans spend in efforts to improve their looks. *Id.* at 10. *See also* Browne & Giampetro-Meyer, *supra* note 31, at 91–92.

#### 4. *Feasibility of Prohibiting Discrimination Against Protected Categories and Looks-Based Discrimination*

While folk wisdom asserts that “beauty is in the eye of the beholder,” scholars and scientists have attacked the idea that beauty is inherently subjective and immeasurable.<sup>169</sup> Studies show that assessments of physical attractiveness are remarkably consistent across raters, even when raters are from different cultures, suggesting that beauty is in large part an objective quality.<sup>170</sup> Whether this consistency is due to a common social judgment,<sup>171</sup> biological preference,<sup>172</sup> or a combination of both, the objectivity of attractiveness makes it measurable. Because looks, like race, sex, age, and disability, are measurable and outwardly apparent,<sup>173</sup> some have argued that legal protection against lookism is feasible.<sup>174</sup>

### III. ANALYSIS

#### A. *Drawing Lines: Why Current Antidiscrimination Law Protects the Disfigured but Not the Homely*

Existing antidiscrimination law fails to reach looks-based discrimination, even though this is inconsistent with the policies of rationality and fairness that underlie legal protection for other stigmatized characteristics unrelated to ability to perform key job duties.<sup>175</sup> In principle, and consistent with utopian aspirations, looks-based discrimination should be prohibited.<sup>176</sup> However, principle alone has

169. See Note, *Facial Discrimination*, *supra* note 24, at 2048; see also Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN'S STUD. 221, 229–30 (1994) (describing a “universal concept of physical beauty for the human body” that includes symmetry of features).

170. See Michael R. Cunningham et al., “*Their Ideas of Beauty Are, on the Whole, the Same as Ours*”: *Consistency and Variability in the Cross-Cultural Perception of Female Physical Attractiveness*, 68 J. PERSONALITY & SOC. PSYCHOL. 261–62 (1995).

171. Social scientists theorize that “social consensus” defines beauty. Feingold, *supra* note 136, at 304.

172. Evolutionary psychologists suggest that people tend to find the same physical traits beautiful because, over the course of evolution, these traits emerged as signals of “reproductive success.” ETCOFF, *supra* note 75, at 24.

173. Among the measurable determinants of physical attractiveness are dimensions of the physique and face. See PATZER, *supra* note 97, at 154, 159–60. (citing studies that consistently find high physical attractiveness ratings for certain face, nose, and lip shapes, hair colors, skin tones, and components of physique such as weight distribution and build).

174. See Note, *Facial Discrimination*, *supra* note 24, at 2048 (noting that expert witnesses could use the measurability of facial features and consensus on attractiveness ratings to support a factual finding that an individual's looks constituted an impairment).

175. See *supra* Part II.A.

176. See discussion *supra* Part II.C.1–4 (recounting the most commonly asserted rationales for

proven insufficient grounds to establish a protected status for looks,<sup>177</sup> given the burdens such a prohibition would entail.<sup>178</sup>

Under theories that envision antidiscrimination law as socially transformative,<sup>179</sup> a legal prohibition needs firmer grounding than the fact that generalizations based on a certain attribute are irrational or lead to unfair results for those individuals who display them.<sup>180</sup> Rather, society must decide that a certain attribute warrants legal protection from discrimination despite the costs—cultural and financial—that the extension of such protection entails.<sup>181</sup> Scholarship, as well as public expressions of distaste for looks-based employment policies, such as those alleged in the *Gonzalez* complaint, suggest that physical appearance may be such an attribute.<sup>182</sup> To date, however, these arguments have not inspired any widespread legislative movement to elevate lookism from its current position of questionable taste to a legally protected category.<sup>183</sup> The social transformation-based theories of antidiscrimination law explain that lookism in employment is legal because of a social determination that the cultural practice of looks-based discrimination has value that outweighs the costs elucidated by its critics to date.<sup>184</sup>

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prohibiting looks-based discrimination, based on analogies between looks-based discrimination and discrimination against various protected categories).

177. See *supra* note 25 (explaining that only a few jurisdictions have prohibited looks-based discrimination in employment).

178. Note, *Facial Discrimination*, *supra* note 24, at 2037. Burdens of definition include the lack of a “cohesive” class of “unattractive” individuals. *Id.* Burdens of enforcement are common to other protected categories. For example, an employer’s discriminatory motive is difficult to prove because it exists as a state of mind. See Rubin, *supra* note 36, at 582–83. Moreover, even the employer may not be aware of all the motives underlying his or her decisions. See *supra* Part II.C.1 (discussing the unconscious nature of stereotypes).

179. See *supra* Part II.A (discussing Koppelman’s and Post’s theories).

180. See *supra* note 44.

181. See *supra* note 45 (describing scope of “antidiscrimination project” according to Koppelman).

182. See *supra* note 28 and accompanying text. Some scholars have argued the same. See Adamitis, *supra* note 25, and Note, *Facial Discrimination*, *supra* note 24.

183. See Adamitis, *supra* note 25, at 209–11 (finding statutory or local prohibitions on looks-based discrimination in only three jurisdictions). The current failure to prohibit looks-based discrimination can also be explained under the institutional theory. Under this view, antidiscrimination law’s failure to protect looks is a decision to let a range of social institutions, including employers, resolve the “social dispute[]” about fairness among the beautiful, the homely, and the average. See Hills, *supra* note 42, at 1615.

184. “Antidiscrimination law always begins and ends in history, which means that it must participate in the very practices that it seeks to alter and to regulate.” Post, *supra* note 35, at 17. Under Post’s “sociological” view of antidiscrimination law, the law transforms other social practices “by reconstructing the social identities of persons.” *Id.* at 31.

### 1. *The Administrative Value of Permitting Looks-Based Discrimination*

Because looks vary so widely among people and because of the widespread (if incorrect) idea that attractiveness involves subjective judgments,<sup>185</sup> it is difficult to define protected categories of looks for the purposes of antidiscrimination law.<sup>186</sup> Lawmakers could minimize these difficulties, however, by treating unattractiveness as a perceived disability under the case-by-case analysis used in disability litigation.<sup>187</sup> Nonetheless, discriminatory motives are often difficult to detect and prove even in cases where the plaintiff's membership in a protected category is undisputed;<sup>188</sup> this difficulty could be compounded if the law recognized claims for looks-based discrimination.<sup>189</sup> Ultimately, limiting legal relief to current categories minimizes complication in the law.<sup>190</sup>

### 2. *The Social Value of Permitting Looks-Based Discrimination*

A legal prohibition on looks-based discrimination would prompt a major change in how people think about and relate to each other.<sup>191</sup>

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185. See *supra* notes 170–74 and accompanying text.

186. These include the conceptual difficulty of grouping the “physically unattractive” into a “cohesive” class and the idea that physical attractiveness “exists on a continuum.” Note, *Facial Discrimination*, *supra* note 24, at 2037.

187. See *id.* at 2042 (asserting that handicap discrimination law is the “legal rubric most likely to afford general protection for appearance discrimination victims”). Among the benefits to using this existing legislation to remedy the harms of looks-based discrimination are its “individualized inquiry,” which avoids the difficulty of defining various types of unattractiveness. *Id.* at 2047. Under the language of the Rehabilitation Act of 1973, courts would employ a test of “whether the person’s appearance constituted ‘a physical or mental impairment that substantially limits major life activities’ or leads him or her to be treated as if this were so.” *Id.* Adamiotis similarly argues that “[c]oncerns of overinclusiveness, excessive litigation, and difficulty of proof are dispelled by requiring” alleged victims of looks-based discrimination to “follow existing formulas” to establish their claims. Adamiotis, *supra* note 25, at 222.

188. An employer’s discriminatory motive is difficult to detect and easy to hide, presenting a challenge for plaintiffs who must prove discriminatory intent in order to recover. See Harris, *supra* note 117, at 2010; Note, *Facial Discrimination*, *supra* note 24, at 2046–48.

189. See Vo, *supra* note 25, at 355.

190. Brest asserts that protecting all stigmatized or disadvantaged individuals would “affect an enormously wide range of practices important to the efficient operation of a complex industrial society.” Brest, *supra* note 38, at 11. Of course, efficiency is not always a sufficient decision-making rationale, either for employers or for legislators. See Note, *Facial Discrimination*, *supra* note 24, at 2051.

191. Post questions whether anyone really has any “idea what it would mean physically to encounter a person and nevertheless to treat him in a way that renders irrelevant his face, voice, body, and gestures. In what sense does a person without an appearance remain a person?” Post, *supra* note 35, at 12. He argues that the Santa Cruz ordinance, which prohibited discrimination based on personal appearance, was so “severely” abstracted from “everyday social life” as to be impossible to imagine in

Society depends on certain embedded stereotypes in order to function, so it is reluctant to give up looks as a measure of value.<sup>192</sup> Private institutions have an economic incentive to discriminate in favor of good-looking employees, as the power of the stereotype and the value attached to good looks are lucrative.<sup>193</sup> Furthermore, adding looks to the list of attributes employers must ignore in their decision-making process could lead to the negative moral consequence of removing a degree of humanity from individuals' interactions.<sup>194</sup> Thus, employers are allowed to use looks-based selection criteria because society derives considerable value from the schema in which looks, as a proxy for other attributes, help define and distinguish individuals as they meet and interact with each other every day.<sup>195</sup>

### *B. Blurring Lines: Recognizing the Interconnections Between Looks and Protected Characteristics*

Of necessity, the law protects discrete categories of persons from discrimination.<sup>196</sup> In reality, however, discrimination frequently occurs because of multiple, interconnected, mutually reinforcing motives.<sup>197</sup> The

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practice. *Id.* at 31.

192. Deciding to protect a certain group or characteristic from discrimination is no small matter, as it removes from the established set of decision-making criteria a characteristic that may "form the basis for an accurate generalization." Rubin, *supra* note 36, at 573. Post similarly asserts that the "logic of American antidiscrimination law" forces employers to disregard certain "socially powerful and salient attributes" of their employees. Post, *supra* note 35, at 11–12.

193. See PATZER, *supra* note 97, at 187. Empirical data supports employers' inclination that it pays to use attractiveness as a selection criterion for public contact positions. See, e.g., Eagly, *supra* note 139, at 121–22 (finding that good-looking people are more likely to be perceived as socially competent, especially by strangers). Physically attractive people have more social influence than others; they are better liked and are perceived to have a host of positive characteristics unrelated to looks, and they are more likely to elicit positive responses from, and persuade, other people. PATZER, *supra* note 97, at 187 (citing studies).

194. Post reasons that, with each attribute employers are forced to ignore, they come to see employees less as humans and more as instruments. Post, *supra* note 35, at 15. See also *supra* note 43. Protecting one category can also cause resentment among those nonmembers who perceive an unfair creation of "special rights" for the newly protected group. See Rubin, *supra* note 36, at 564.

195. Consider Hills's argument that society is "committed to tolerating a lot of stigma based on involuntary traits, because we value the attitudes that underlie such stigma": to eliminate appearance-based discrimination would entail the sizable, costly task of ridding ourselves "of innumerable attitudes about beauty, health, intellect, and human merit generally—attitudes that have higher value than the cost of the injustice that we incur on their behalf." Hills, *supra* note 42, at 1605.

196. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2) (2004) (prohibiting discrimination on the basis of "race, color, religion, sex, or national origin").

197. See Note, *Facial Discrimination*, *supra* note 24, at 2051 (asserting that a "significant aspect of prejudice" against racial minorities, the elderly, or disabled people is "a negative reaction to the way they look").

casino server and flight attendant sex discrimination cases exemplify the co-occurrence of discrimination on multiple dimensions: sex, weight, height, and physical attractiveness.<sup>198</sup> *Gerdom*<sup>199</sup> and *Wilson*<sup>200</sup> show the difficulty of establishing a business-related link between an employee's physical characteristics, including but not limited to sex, and job duties—even in a service industry where the aesthetic effect of the staff enhances customer satisfaction and reinforces company image.<sup>201</sup> The cases also demonstrate courts' willingness to subordinate an employer's desire to market its image by hiring only attractive members of a protected class to plaintiffs' right to equal employment opportunities.<sup>202</sup> In short, the discrimination in these cases was not just about the protected category of sex. Similarly, the A&F Look Policy, and the *Gonzalez* suit and settlement arising from it, are not just about race. More deeply, they demonstrate the extent of the troubling connection between lookism, (or culturally shaped definitions of attractiveness), sex discrimination, and race discrimination (legislatively determined to be the most invidious form of differential treatment).<sup>203</sup>

Social transformation-based theories of antidiscrimination law envision a goal of achieving fairness by eliminating stigma: not only on the superficial level of hiring decisions made with an eye toward legal compliance, but on the deeper level of how individuals perceive each other.<sup>204</sup> The law will accomplish this ambitious goal most effectively by identifying the true impetus, however complex, behind discrimination.<sup>205</sup> Legal tolerance for looks-based discrimination permits employers to adopt

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198. See *supra* Part II.B.1–2.

199. *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602,609 (9th Cir. 1982).

200. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 303 (N.D. Tex. 1981).

201. See *supra* note 88.

202. *Gerdom*, 692 F.2d at 609; *Wilson*, 517 F. Supp. at 294. See also *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

203. See *supra* note 39 and *supra* Part II.B.5.

204. See *supra* note 45 and accompanying text. The social transformation occurs through a fake-it-till-you-make-it process. At first, employers may have a strong discriminatory impulse but are disciplined to make nondiscriminatory decisions for the sake of complying with the law. Through repetition, the legally coerced nondiscriminatory behavior erodes the impulse. Meanwhile, consistently seeing diverse individuals fill a variety of positions causes third parties, such as customers, to question and eventually abandon their own discriminatory presuppositions. Cf. Rubin, *supra* note 36, at 571, 573 (asserting that antidiscrimination laws are a “second-best solution” because their power is limited to stopping employers from giving effect to the “discriminatory impulse”).

205. See Post, *supra* note 35, at 33. The “doctrinal structure of the law” works best when judges can “explain the actual justifications for their decisions.” *Id.* (writing in the context of “sex plus” discrimination claims and judges’ unwillingness to use Title VII to prohibit gender-specific grooming codes). Judges cannot do this if they find for plaintiffs where the facts indicate discriminatory motives that overlap with, but are not directly articulated in, the list of recognized discrimination claims.

policies that risk giving rise to forms of decidedly condemned discrimination.<sup>206</sup> If suits by protected plaintiffs, most recently manifested in *Gonzalez* and in the casino cases, persist in suggesting that looks-based discrimination intertwines with forms of discrimination that society decidedly condemns, the cost-benefit analysis of the lookism schema may need to be revised. The mounting evidence that lookism may not be worth it, after all, may lead to a serious reconsideration of its unprotected status in antidiscrimination law.

#### IV. PROPOSAL

##### A. *Grounding a Prohibition of Looks-Based Discrimination on Observed Associations, in Addition to Analogies*

To date, proponents of a prohibition on looks-based discrimination in employment have relied on drawing analogies between impermissible forms of discrimination and lookism.<sup>207</sup> In order to justify the prohibition more convincingly, proponents should focus instead on the observed association between looks-based discrimination and decidedly condemned forms of discrimination.

First, eliminating looks-based discrimination is a crucial component of eliminating other forms of discrimination. Even if the current social consensus is that the value of lookism in employment exceeds the damage it causes,<sup>208</sup> society has vested the law with responsibility for combating other forms of discrimination, especially race discrimination.<sup>209</sup> Future race discrimination claims may face an obstacle as American society's increasing heterogeneity makes courts less willing to demarcate the contours of various minority groups.<sup>210</sup> If, as a practical matter, race is identified largely by aspects of physical appearance,<sup>211</sup> a prohibition on looks-based discrimination may provide a more precise way to combat race discrimination.<sup>212</sup>

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206. See discussion *supra* Part II.B.1.

207. See *supra* Part II.C.1–4.

208. See *supra* Part III.A.1–2.

209. See *supra* note 35 and accompanying text.

210. See Harris, *supra* note 117, at 2013 (citing Supreme Court's assertion in *McCleskey v. Kemp*, 481 U.S. 279, 316 n.39 (1987), that "the national 'majority' is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals" and that providing a remedy for all might prove too complicated).

211. See *supra* notes 75, 117.

212. This could be true for looks and sex discrimination, as well. Cases involving "sex plus" discrimination have proven problematic for courts applying Title VII. See Post, *supra* note 35, at 33–

Second, distinct legal protection against looks-based discrimination would facilitate more precise definitions of plaintiffs' claims and would characterize defendants' motive more accurately. Looks-based discrimination motivates and facilitates other forms of discrimination.<sup>213</sup> Many instances of race, sex, age, and disability discrimination involve significant underlying looks-based stereotypes.<sup>214</sup> Moreover, when an employer uses looks-based criteria in evaluating employees and applicants, the same lookist mindset leads to very different legal results depending on the fortuity of whether or not a plaintiff belongs to a protected class<sup>215</sup> or, in the case of race discrimination, where a plaintiff falls along the continuum of extremity of attributes of the protected class.<sup>216</sup> Current law forces plaintiffs to contrive looks-based discrimination incidents into claims that fail to reach the root of the harm. Where the application of an antidiscrimination provision does not reflect "the real nature of the prejudice," it risks leaving vulnerable some class members whom the law should protect.<sup>217</sup> Recognizing claims for looks-based discrimination would be more accurate than the current practice, and accurate characterization of the motive and the harm is important to both

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213. For example, given the asserted business goals of providing a pleasant environment for customers in the flight attendant sex discrimination cases, it is logical to assume that looks were the primary employee selection criterion. *See supra* Part II.B.2. *See also supra* note 197.

214. Cases involving looks-based discrimination and discrimination against a protected category frame it the other way around, and assert looks-based discrimination as a manifestation of illegal discrimination, for the purpose of constructing an actionable claim. It is equally plausible that looks-based discrimination is the underlying practice, and illegal discrimination is a manifestation or byproduct of that practice. For example, Schneyer suggests that opponents of Hooters, a restaurant with scantily clad, large-chested (and thus predominately female) waitstaff, "couch their arguments in terms of 'sex discrimination in employment'" only because laws prohibiting sex discrimination are "all they have to work with" in their attack on the restaurant's perceived commodification of female sexuality. Schneyer, *supra* note 63, at 569, 571–72. The "commodification of sexual display" is not illegal, but is a subject of cultural debate because some people find it highly offensive or unethical. *Id.* at 571. American law, however, "pretends not to speak on cultural issues." *Id.* at 572. According to Schneyer, the "language" writers use in discussing the Hooters sex discrimination claim of males who were denied waitstaff positions is "couched in technical terms such as employment discrimination, about which we can pretend that we do not have a cultural or spiritual attachment." *Id.* at 572–73.

215. *See Note, Facial Discrimination, supra* note 24, at 2044–45. It is incongruous for the same intent to be legally prohibited when used against one applicant or employee but merely socially questionable when used against another.

216. *See supra* Part II.B.5 (discussing *Sere*, the Illinois case in which a court held that a prohibition on race discrimination does not prohibit intra-race discrimination against darker skin pigmentation).

217. *See Cutler, supra* note 126, at 1165 (arguing that national origin discrimination law fails to protect the less assimilated members of any given ancestry by allowing employers to prefer more assimilated members of that ancestry).

effective jurisprudence<sup>218</sup> and the socially transformative goals of antidiscrimination law.<sup>219</sup>

In reality, several types of discrimination often co-occur in the same incident.<sup>220</sup> Plaintiffs may proceed on multiple and alternate theories of recovery; however, when looks-based discrimination is the underlying mental process and motive, two troubling events occur. First, plaintiffs who happen to be members of protected categories attempt to couch their claim within that category.<sup>221</sup> Second, plaintiffs who are not members of protected categories suffer the same harm at the hands of the same stigma but have no remedy. Both *Jespersen* and *Craft* illustrate the difficulties a plaintiff may encounter in trying to recover for looks-based discrimination through a claim for discrimination against a protected category.<sup>222</sup> Even if the plaintiff succeeds in recovering as a member of a protected class where the discrimination involves significant elements of lookism, his or her need for justice remains at least partly unsatisfied when the court's opinion fails to articulate and condemn the employer's primary discriminatory motive.<sup>223</sup>

### *B. Emphasizing the Social Benefits of a Legal Prohibition on Looks-Based Discrimination*

In addition to focusing on observed associations and drawing analogies between looks-based discrimination and discrimination against protected categories, proponents of a prohibition on looks-based discrimination should emphasize the social benefits of legal protection from lookism.

First, a prohibition on looks-based discrimination would diminish individuals' feelings of inadequacy and thereby increase their productivity.

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218. See *supra* note 205.

219. Under the transformational theory of antidiscrimination law, the motivation for the discrimination matters. See *supra* Part II.A. While they operate by the same cognitive mechanisms, looks-based discrimination relies on different stereotypes and social norms than race-based discrimination. See *supra* Part II.C.1.

220. See *supra* Part IV.B.

221. See *supra* note 214.

222. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (rejecting plaintiff's sex discrimination claim where casino employer required female servers to wear makeup and styled hair); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985) (rejecting plaintiff's sex discrimination claim where television station employer demoted her after viewer surveys rated her appearance less favorably than other anchorwomen). The *Jespersen* decision, however, is set for rehearing *en banc*. See *supra* note 94. While the *Craft* court felt that the employer television station placed an "overemphasis" on appearance, it insisted that the court was "not the proper forum" to determine the proper balance of "substance" and "image" in the industry. *Id.* at 1215.

223. See *supra* note 205.

An individual's self-assessment of his or her physical attractiveness may affect the way that individual experiences and interacts with the world.<sup>224</sup> An individual who sees herself as physically attractive is likely to cultivate a host of other positive traits.<sup>225</sup> Women in particular often experience their looks as "symbolic of their characters."<sup>226</sup> On the other hand, an employment system that requires individuals to attempt to mold their physical appearance into a narrowly defined look takes a financial, physical, and emotional toll.<sup>227</sup> Prohibiting looks-based discrimination would lead to a broader conception of beauty, giving individuals the confidence to apply themselves to any occupation where their strengths will be utilized. In time, the development of new norms would deemphasize the importance of looks as a measure of value, freeing resources formerly devoted to personal appearance analysis for other uses.

Second, a prohibition on looks-based discrimination would increase diversity in the workplace, further contributing to individuals' self-acceptance and productivity. A diversity of persons in public contact positions has a positive impact, not only on employees' self-concept, but also on customers' self-concept when they see similarly situated others in desirable positions.<sup>228</sup> Diversity also offers a commercial advantage to companies, allowing them to tap into the "purchasing power" of various groups.<sup>229</sup> Finally, for the entire society, diversity increases access to the strengths of individuals who otherwise might have been excluded from or would be hesitant to seek a range of productive opportunities.<sup>230</sup>

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224. Feingold, *supra* note 136, at 304 (reporting that "[s]elf-ratings of physical attractiveness" have been "correlated with affective, cognitive, and social measures").

225. Feingold's meta-analysis of studies on the physical attractiveness stereotype and characteristics actually associated with physical attractiveness revealed that "[s]elf-rated physical attractiveness was positively and appreciably related" to traits including "extraversion, mental health, self-esteem, social comfort, popularity with the opposite sex, and sexual experience." *Id.* at 333.

226. Identity and body are intimately linked for women. See GIMLIN, *supra* note 167, at 4.

227. See *id.* at 75 (listing costs and recent proliferation of plastic surgery procedures); Adamitis, *supra* note 25, at 215 (describing how looks-based employment discrimination places particular pressure on women to control their weight and take various steps to enhance their beauty).

228. American media and culture exalt an ideal of beauty that most women cannot attain. GIMLIN, *supra* note 167, at 5. At the same time, "deficiencies" in a woman's looks may be seen as "evidence of moral weakness." Retail marketing efforts that invoke the unattainable ideal reinforce the perceived unworthiness of the average woman. A prohibition on looks-based discrimination in employment could make retailers a mechanism in the social transformation of that beauty ideal. See *supra* Part II.A. By displaying a broader range of looks, a retailer presumably could reduce the power of that ideal.

229. Browne & Giampetro-Meyer, *supra* note 31, at 84. Indeed, A&F's looks-based policies may be backfiring in terms of profits. When A&F sales declined in 2003, some in the industry attributed the decline to its self-presentation "as an elite brand that attracts the beautiful people, not a label that looks for the masses." Edwards, *supra* note 17, at 14. CEO Jeffries reportedly characterizes A&F as an "aspirational brand" that does not "want to be on every street corner." *Id.*

230. Many Americans value pluralism, which makes the society "richer in breadth and diversity—

*C. The Mechanics of Extending Existing Antidiscrimination Law to Protect Looks*

Proponents of a prohibition on looks-based discrimination appropriately argue for an expansion of existing law, rather than the creation of a new legally protected category for the “unattractive.” A trait-based or categorical approach would be insufficient and burdensome because trait categories are difficult to define, posing problems of both under and over inclusiveness.<sup>231</sup> The most feasible avenue for such a prohibition is disability-based antidiscrimination law, which targets employer misconceptions about an individual’s ability to perform job duties without requiring the individual to fit into a strictly defined category of protection.<sup>232</sup> Because employers’ lookist motives are often blatantly apparent in their practices and policies,<sup>233</sup> looks-based discrimination claims might present even fewer proof challenges than other discrimination claims.

Antidiscrimination law always involves tension between employers’ freedom to create a certain image and employees’ freedom to pursue a range of career opportunities. An effective antidiscrimination provision should further employees’ interests without being overly burdensome to employers.<sup>234</sup> For these reasons, a prohibition on looks-based discrimination should apply only to immutable or semi-immutable physical traits.<sup>235</sup> At the same time, individuals should not be required to take drastic measures<sup>236</sup> to change their natural features or traits.<sup>237</sup> A

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a society built upon the contributions and assets of the many rather than the few.” Cutler, *supra* note 126, at 1178.

231. See *supra* note 186.

232. See *supra* Part II.B.4. The particulars of how and under what circumstances existing disability or handicap antidiscrimination statutes could be adapted to include looks as a perceived disability are beyond the scope of this Note, but one alternative is detailed in Note, *Facial Discrimination*, *supra* note 24, at 2043–48, which this Note endorses.

233. See, e.g., *supra* note 5 (describing articulation of A&F’s Look Policy in employee handbook).

234. See KOPPELMAN, *supra* note 34, at 31 (responding to the theory that antidiscrimination law intolerably imposes on individual freedom by “interfer[ing] with people’s private desires”).

235. See *supra* note 157 and accompanying text (explaining the role of immutability in justifying protection for an attribute and highlighting the unfairness of stigmatizing an individual on the basis of a trait that the person cannot control or that is crucial to his or her identity). An alternative that values employed autonomy more than employer choice would protect even mutable aspects of personal appearance. See Post, *supra* note 35, at 6.

236. Perhaps the most drastic is cosmetic surgery, which poses health risks. Color contacts and hair dye are available to change the otherwise immutable traits of hair and eye color and pose minimal health risks.

BFOQ allowance should exist for narrow situations<sup>238</sup> in which looks have direct bearing on ability to accomplish core job duties.<sup>239</sup> Overall, however, if the law is to accomplish socially transformative goals, the antidiscrimination principle refusing to recognize customer preference or economic interest as a justification for discrimination should extend to looks-based discrimination.<sup>240</sup>

## V. CONCLUSION

The *Gonzalez* complaint, as well as interviews with former A&F sales associates and managers, reported a frequent practice in A&F stores when unattractive individuals inquired about employment.<sup>241</sup> Managers commonly either told such applicants that the store was not hiring or accepted their applications but threw them in the trash when the individuals left the store.<sup>242</sup> That looks were the key selection criteria, and that the applicant fell short, were never mentioned.<sup>243</sup> Some A&F employees themselves felt the same unease as the company's critics with its Look Policy and, more deeply, the pervasive social lookism that made that policy an effective marketing tool.

That unease has proven insufficient to justify a prohibition on looks-based discrimination, given the highly valued functions looks-based judgments serve in our society. The *Gonzalez* lawsuit, however, features an idea that previous cases suggested more subtly: the lookism we tolerate and the discrimination we condemn are connected. The costs of lookism should be reassessed in light of the probability that looks-based considerations are an important underlying motive for many instances of illegal discrimination. These costs always included faulty decision-

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237. Allowing employers to avoid a looks discrimination charge by hiring dark hair and dark eyed individuals but requiring color contacts or hair dye as part of its appearance policy would subvert the antidiscrimination goal of increasing diversity in public contact positions.

238. For example, looks would be a legitimate employee-selection criterion for modeling positions. In contrast, though serving as a "walking billboard" may be one component of a retail sales position (*supra* note 26), a BFOQ defense to looks-based discrimination would be unavailable to employers filling such positions because the key duties involve providing information to customers, completing sales transactions, and maintaining inventory and store display. *See supra* note 58.

239. Looks-based antidiscrimination law could borrow the narrow BFOQ defense developed through sex discrimination litigation. *See supra* notes 69, 79, 88 and accompanying text.

240. *See supra* note 151 and accompanying text.

241. Plaintiffs' Complaint, *supra* note 6, ¶ 5; Interview by Morley Safer with Andrea Mandrick, former A&F store manager, 60 Minutes (Dec. 7, 2003), <http://www.cbsnews.com/stories/2004/11/24/60minutes/main657604.shtml> (stating that applications were sorted into "yes" and "no" piles "based on looks"). *See also supra* note 23.

242. Plaintiffs' Complaint, *supra* note 6, ¶ 5.

243. *Id.* ¶¶ 3, 10.

making, unfair outcomes, and diminished productivity for “unattractive” individuals. If looks-based discrimination also facilitates discrimination against categories we are committed to protecting, lookism appears too expensive to tolerate anymore.

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