

## LOOKISM: PUSHING THE FRONTIER OF EQUALITY BY LOOKING BEYOND THE LAW

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*This Note analyzes the legal climate of lookism: discrimination or prejudice on the basis of an individual's appearance. Appearance-based discrimination is difficult to identify in the real world and few jurisdictions protect against this form of prejudice, although it is often compartmentalized with sexism and racism which are guarded by Title VII of the Civil Rights Act of 1964. The District of Columbia Human Rights Act and a Santa Cruz, California City Council ordinance are some practicing examples of anti-lookism laws. Supporters of these local laws have suggested expanding Title VII to include lookism protection for immutable characteristics, such as height, weight, and natural physical qualities.*

*This Note argues that Title VII should be amended to include such immutable traits and simultaneously attempt to create sociological change toward greater appearance acceptance. The author states that such a revision would simply require courts to apply Title VII as it currently exists, thus creating no extra burdens on the judicial system. The author further asserts that in order to minimize anti-lookism-protection backlash and the difficulties of capture, the socio-legal world would have to expose the problems of this prejudicial form in order to promote an anti-lookism mentality. Thus, this Note advocates for lookism prevention and greater appearance-based acceptance through the expansion of Title VII protection.*

### I. INTRODUCTION

“Don’t judge a book by its cover”—the timeless adage resonates to discourage individuals from forming cursory judgments from appearances alone. After all, “covers” can be deceiving, and they rarely relay the full story. Such a virtuous maxim derives its momentum from fundamental concepts of equality; people ideally operate in a meritocracy where they are neither limited nor unjustly enriched in valuable opportunities by right of their aesthetic or perceived attractiveness. Pausing

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reality for the moment, envision a society in which “[n]obody was better looking than anybody else,” one where every person’s distinguishing, value-laden physical features were completely effaced.<sup>1</sup> This extreme fictive universe no doubt strains the outer bounds of one’s imagination. How would we express ourselves? How would we pique one another’s interest and attempt courting? So the queue of difficult questions proceeds.

The example of a completely anti-lookist culture illustrates the basic functionality of appearances, especially in spheres of social interaction. Some even argue that it is our right to be so discerning; appearances convey certain cues, informing us of messages individuals are projecting and promoting personal exchanges.<sup>2</sup> Even further, appearances are the foundation of personhood for many people.<sup>3</sup> The rational utility of some appearance-based determinations in American society is appreciable; however, in a society that prides itself on civility, allowing such determinations to rise to the level of discrimination is intolerable. Specifically, labor and employment is one sector of everyday life that the law appropriately targets to effectuate values of equality and fairness.<sup>4</sup> To think that outside of industries that primarily thrive off of its employees’ appearances—e.g., modeling and acting—one’s success at obtaining or bettering a means for subsistence is contingent upon the possession of an immutable characteristic evokes a strong sense of offense.

The unsettling recognition of appearance-based inequality in the workplace has garnered the attention of a growing number of legal scholars and a few legislatures in recent years.<sup>5</sup> Accordingly, there is an increasing amount of scholarship that proposes new laws to protect against appearance-based discrimination or analyzes the few instances of experimental state and local anti-lookist legislation.<sup>6</sup> The majority of the articles examining lookism and proposing resolutions model their statutory recommendations off of Title VII of the Civil Rights Act of 1964 (Title

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1. KURT VONNEGUT, JR., *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7, 7 (1970).

2. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 5 (2000).

3. *Id.* (“A person’s capacity to control the presentation of himself, through choices of hair color, tattoos, or clothing, is certainly an important form of self-expression, too precious, it was argued, to be controlled by employers or landlords.”); see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982) (“If it makes sense to say that one owns one’s body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one’s personhood.”).

4. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 203 (1979). But see Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WK., Mar. 16, 1998, at 18.

5. See Louis Tietje & Steven Cresap, *Is Lookism Unjust?: The Ethics of Aesthetics and Public Policy Implications*, 19 J. LIBERTARIAN STUD. 31, 31–32 (2005).

6. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

VII)<sup>7</sup> or the Americans with Disabilities Act of 1990.<sup>8</sup> Such a starting point is logical and effective. Limited or disjointed discussions about the current socio-legal landscape in this area of transformative law, however, tend to underestimate the potential practical barriers to the enactment and enforcement of such policies.<sup>9</sup>

This Note endeavors to provide a pragmatic, yet holistic analysis of lookism in law. Part II situates lookism through a socio-legal lens, exploring the concepts that are packed into lookism and examining current federal antidiscrimination law to equip the reader with the necessary tools to engage in thoughtful criticism of any proposal regarding the treatment of lookism. Part III deconstructs several forms of antidiscrimination law which mostly correct lookism, paying special attention to the ways in which they either corroborate or differentiate one another. Part III also examines the viability of a proposal to amend our federal antidiscrimination law to protect against appearance-based discrimination. Finally, Part IV locates the problems of transformative law at large in the specific context of lookism—providing the nexus of practicality that is wanting in this area of scholarship. This Note cautions against a top-down remedial approach to lookism and proposes that discussions of lookism go beyond the framework of the law.

## II. BACKGROUND: LOOKISM, THE WORKPLACE, AND ANTIDISCRIMINATION LAW

Lookism presents a myriad of complex subissues on which multiple disciplines appropriately focus. This Part provides a working background for a discussion of lookism with an exploration of its sociological context before developing a more definable legal analysis. It first defines lookism, then contributes dimension to the definition with some examples of how lookism materially permeates and impacts the workforce. Finally, this Part concludes with a review of current federal antidiscrimination law to expose the reader to the legal features necessary for a synthesis of proposals for and embodiments of antidiscrimination laws that protect against appearance-based discrimination.

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7. 42 U.S.C. § 2000e-2 (2006); see Karen Zakrzewski, Comment, *The Prevalence of “Look”ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 432 (2005) (arguing “that federal law should be amended to include protections for height, weight, and appearance” because appearance discrimination impairs employment opportunities).

8. 42 U.S.C. § 12101(b). See generally Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476 (2000) (observing how backlash poses a barrier to proper enforcement of the American with Disabilities Act).

9. See Krieger, *supra* note 8, at 497–98.

### A. *Defining Lookism*

Lookism is the experience of discrimination or prejudice on the basis of an individual's appearance.<sup>10</sup> Usually, lookism works to advantage people perceived as attractive through preferential treatment, disadvantaging those perceived as unattractive through the denial of opportunities in tandem.<sup>11</sup> Lookism is especially injurious in the labor industry, as it creates a sort of undistributed, and arguably indistributable, aesthetic capital.<sup>12</sup> Consequently, it creates demeritorious value and deficiencies that significantly affect the success of individuals in the workforce.<sup>13</sup> Some might consider lookism a mere proxy for other widely recognized forms of discrimination, namely sexism and racism. While it is true that other forms of discrimination collapse into lookism, lookism is distinct because it occurs both inside and outside of classes of sex and race. At this junction, it is important to note that because the discourse of lookism is so akin to discussions of other discrimination, the cases and examples referenced herein necessarily breach these other topics. This point is taken up with more depth later in this Section.

Ultimately, while somewhat nuanced, lookism does go beyond past forms of cognizable discrimination and captures traditionally indefinable or underappreciated biases that are nevertheless real and harmful.<sup>14</sup> Furthermore, lookism is distinguishable from other forms of discrimination because it is a more normative concept and thus particularly subject to individual sensitivities. While race and sex are fairly easy to discern, instances of lookism are less rigid and conform to the respective values of various cultures, subcultures, and individuals. For a better understanding of lookism, imagine the following hypothetical scenario. A white, heterosexual male of average height and size (Manso Wellkempt) enters a tattoo parlor in search of employment. Mr. Wellkempt has years of technical training from a respectable tattoo studio and has a sizeable, devoted clientele that this parlor looks to gain should it accept his employment application. Mr. Wellkempt has no tattoos or piercings of his own, is wearing his hair combed in the style of the fictional Clark Kent, and happens to be wearing pressed khakis, a tucked-in polo shirt with matching cardigan tied about his neck, and brown loafers, which his grandmother purchased for him two Christmases ago. The parlor manager looks Mr. Wellkempt up and down jeeringly before rejecting him. "I

10. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1032 (4th ed. 2000).

11. Tietje & Cresap, *supra* note 5, at 31 ("People we find attractive are given preferential treatment and people we find unattractive are denied opportunities. According to recent labor-market research, attractiveness receives a premium and unattractiveness receives a penalty.")

12. Aesthetic capital cannot be distributed in the sense that people cannot exchange their looks. It is true, however, that in this day and age individuals can significantly alter their physicalities with increasing facility as aggressive technological advances in cosmetic surgery make achieving normative ideals less impractical and cost prohibitive. See, e.g., Davis Bushnell, *Personal Image as Business Strategy*, BOSTON GLOBE, Mar. 21, 2004, at G1.

13. *Id.*

14. See Tietje & Cresap, *supra* note 5, at 31–32.

don't think you're quite what we're looking for," the manager says without even glancing at his application. As many critical race feminists would readily recognize, Mr. Wellkempt is the ultimate beneficiary of privilege by virtue of his whiteness, maleness, and heterosexuality.<sup>15</sup> Nevertheless, Mr. Wellkempt has just experienced profound discrimination. The discrimination that Mr. Wellkempt suffers from is not racism, sexism, nor heteronormativity. Instead, it is best captured by lookism: Manso Wellkempt does not appeal to the tattoo parlor manager's aesthetic sensitivities and is therefore denied a valuable work opportunity.

On a spectrum of clarity for instances of lookism, the above hypothetical presents an extreme: a scenario where one strongly infers lookism from circumstantial evidence, completely apart from other forms of discrimination. In reality, lookism is usually not so neatly identified or compartmentalized and frequently encroaches upon other themes of injustice. Compare the aforementioned hypothetical with the following synopsis of a possible watershed case for lookism.

In 2004, the popular retailer Abercrombie & Fitch (Abercrombie) settled a case alleging racism on its face for \$40 million.<sup>16</sup> A former employee of an Abercrombie store in Costa Mesa, California, of Asian descent, along with several other minorities, brought the action.<sup>17</sup> The complaining class alleged that they were not employed or employable in the visible positions of the store because they did not fit the "All-American" Abercrombie image.<sup>18</sup> Ironically, the "All-American" look of Abercrombie is underinclusive in the sense that it notoriously touts an image of mostly white, sporty males and females, with blonde hair and blue eyes—a classification that few Americans fit into.<sup>19</sup> One of the complaining parties stated that she was fired after visiting corporate officials disliked the composition of her store's workforce: "A corporate official had pointed to an Abercrombie poster and told our management at our store,

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15. See Devon W. Carbado, *Men, Feminism, and Male Heterosexual Privilege*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 525, 530 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) ("[I]dentify privilege lists represent the very early stages in a complicated process of dismantling male heterosexual privilege. . . . [O]ur privileges are legitimized through the personal choices we make every day. . . . [T]he cumulative effect of these micropolitical choices is the entrenchment of the very social practices—racism, sexism, classism, and homophobia—we profess to abhor.").

16. Rebecca Leung, *The Look of Abercrombie & Fitch: Retail Store Accused of Hiring Attractive, Mostly White Salespeople*, Nov. 24, 2004, <http://www.cbsnews.com/stories/2003/12/05/60minutes/main587099.shtml> ("The image of Abercrombie & Fitch is now party-loving jocks and barenaked ladies living fantasy lives. But all that fair hair and skin has made it a juicy target. It's being taken to court, accused of racial discrimination in their hiring.").

17. *Id.*

18. The minorities that were employed at Abercrombie had jobs that kept them in the back of the store, like retail stocking. Conversely, all of the store's characteristic greeters—functional models—were white. *See id.*

19. Douglas Belkin, *Don't It Make My Blue Eyes Brown: Americans Are Seeing a Dramatic Color Change*, *BOSTON GLOBE*, Oct. 17, 2006, at E1 (citing a 2002 Loyola University study that found that only one in six Americans has blue eyes); Evelyn Jones, *How to Accept Your Looks*, <http://www.helium.com/items/176180-how-to-accept-your-looks> (last visited Jan. 5, 2010) (citing a 2005 Allure Magazine article which stated that only five percent of American adults are naturally blonde).

‘You need to have more staff that looks like this.’ And it was a white Caucasian male on that poster.”<sup>20</sup>

While in the Abercrombie case one can argue that the discriminatory policies were motivated by racism, in practical effect the policies were more motivated by the aesthetic values of the retailer: lookism. Had Abercrombie brazenly subjected itself to bad publicity and pursued the litigation, its counsel would have presumably stated an affirmative defense that it was not racist because it did in fact hire minorities and its policies were designed to employ people in accordance with their attractiveness—the socially constructed ideal image it sold to its customers. Should a court completely divorce the racial component from the issue, Abercrombie might have stated a successful defense of lookism-not-racism in most jurisdictions. In most jurisdictions there is no protection against lookism, therefore individuals who cannot attach their particular form of discrimination to a traditionally protected class of persons (e.g., race or sex) have no remedy in law.<sup>21</sup> One observes the limitations of federal antidiscrimination law more clearly with an examination of Title VII of the Civil Rights Act of 1964.

### B. *Title VII of the Civil Rights Act of 1964*

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII) to prevent employers from discriminating against current and prospective employees on the basis of “race, color, religion, sex, or national origin.”<sup>22</sup> In enacting the prohibition against employment discrimination, Congress was primarily concerned with “the plight of the Negro in our economy.”<sup>23</sup> While the historicity of Title VII identifies the transformative law as one motivated by a desire to correct racial discrimination, the actual language of the statute captures the spirit of antidiscrimination generally in the way that it includes other classes of people for protection.<sup>24</sup>

A Title VII claim is usually a question of fact to be determined by a jury,<sup>25</sup> presenting shifting burdens of proof.<sup>26</sup> The plaintiff first has to prove, by a preponderance of the evidence, that she experienced discrim-

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20. Leung, *supra* note 16 (quoting Jennifer Lu).

21. See discussion *infra* Part III.A.1–2 (discussing the District of Columbia Human Rights Act and the Santa Cruz antidiscrimination ordinance).

22. 42 U.S.C. § 2000e-2(a)(1)–(2) (2006).

23. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979) (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

24. 42 U.S.C. § 2000e-2(a)(1)–(2); see, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

25. Determining whether a person is entitled to a Title VII claim—that is, whether they fit within the protected classes—is a question of law. Most Title VII cases, however, involve a factual determination of whether employment discrimination existed. See, e.g., *Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53, 70 (2006) (finding that the question of whether there was material adversity in transferring an employee from a forklift position to a standard railroad track laborer presented a question of fact for a jury).

26. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

ination due to her belonging to a protected class—the prima facie case.<sup>27</sup> After the plaintiff meets this initial burden, the burden then shifts to the defendant to provide a legitimate, nondiscriminatory excuse for the discrimination.<sup>28</sup> If the defendant meets the shifted burden of proof, it reverts back to the plaintiff to undermine the legitimacy of the defendant's proffered defense.<sup>29</sup>

Establishing the prima facie case for discrimination requires a plaintiff to show that “(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination.”<sup>30</sup> The first two prongs of the test tend to be less problematic than the third and fourth prongs.<sup>31</sup> To prove that one has suffered an adverse employment action, an individual must prove that he materially suffered from certain experiences; mere disruption stemming from the inconvenience of job alteration will not suffice.<sup>32</sup> For example, “[a] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities.”<sup>33</sup> Furthermore, an adverse employment action must be considered so by the proverbial reasonable employee standard,<sup>34</sup> thus somewhat disregarding the inherent subjectivity of perceived discrimination that can work against individuals' feelings of entitlement to protection.<sup>35</sup>

Somewhat contrary to the spirit of antidiscrimination, Title VII includes a clause that provides an exception for certain types of employment discrimination against those included in the protected classes. Excluding race,<sup>36</sup> an employer can engage in discriminatory practices regarding its employees' religion, sex, or national origin if such action constitutes “a bona fide occupational qualification [BFOQ] reasonably

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27. *Lore v. City of Syracuse*, 583 F. Supp. 2d 345, 361 (N.D.N.Y. 2008).

28. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000).

29. *Id.*

30. *Id.*

31. See generally *Lore*, 583 F. Supp. 2d at 361.

32. *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993).

33. *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (quoting *Crady*, 993 F.2d at 136).

34. *Lore*, 583 F. Supp. 2d at 361 (“[A]n adverse employment action will be considered material if it is ‘of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse.’” (quoting *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997))).

35. See, e.g., Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 693 (2007) (“[B]eliefs about *entitlement* are a critical determinant of how members of social groups react affectively, evaluatively, and behaviorally to their socially distributed outcomes.” (quoting Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 293, 293–94 (1994) (emphasis in Major article))).

36. While race is excluded, some courts have allowed employers to successfully use the bona fide occupational qualification (BFOQ) exception for situations that involved racial issues. See, e.g., *Miller v. Tex. State Bd. of Barber Exam'rs.*, 615 F.2d 650, 653–54 (5th Cir. 1980) (finding that race was a BFOQ for a position that called for an undercover investigator to infiltrate a black barber shop).

necessary to the normal operation of that particular business or enterprise.”<sup>37</sup> After a preliminary reading of this exception to Title VII, one’s intuition might foresee great potential for abuse. Of particular concern, the phrase “reasonably necessary” could suggest excessive and undermining leniency with this exception as an employer may construe many policies to be *reasonably* necessary to the normal operation of their business. The Supreme Court of the United States, however, has read the provision narrowly, viewing the qualifying terms of the clause as favoring objective measures.<sup>38</sup> Furthermore, prescribing that discrimination be attributable to the “normal operation” of a business to be allowable provides another safeguard to abuse.<sup>39</sup> In effect, the action must be pertinent to the primary purpose of a business, severely curtailing the availability of tenuous or convoluted rationalizations.<sup>40</sup> Hence, an employer can discriminate so long as such conduct is objectively material to its essential business operation.

It is important to remember that objective standards are only absolutely true in name, as subjectivity imbues all values at some abstraction. Objectivity is essentially subjectivity on a generalized level; thus, objective judgments are also somewhat susceptible to bias.<sup>41</sup> Such biases and generalized conceptions exert influence on the interpretation of a BFOQ exception with courts’ recognized deference for certain customer preferences.<sup>42</sup> Within a very narrow scope, courts have allowed customer preference to determine the validity of a BFOQ when it involves national origin, religion, and gender.<sup>43</sup> At this point, one might wonder why there is any discussion of gender with a BFOQ because Title VII does not explicitly list gender as a protected class of persons.<sup>44</sup> Although unlisted for protection, Title VII nevertheless protects gender because courts interp-

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37. 42 U.S.C. § 2000e-2(e)(1) (2006).

38. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (“The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. . . . Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement.”).

39. Post, *supra* note 2, at 14 (“[T]he Court has held that the test is whether the proposed BFOQ relates ‘to the essence . . . or to the central mission of the employer’s business.’” (alteration in original) (quoting *UAW*, 499 U.S. at 203)).

40. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329–33 (1977) (holding that height and weight minimum requirements disproportionately exclude women from eligibility for employment by the Alabama Board of Corrections and do not qualify for the BFOQ exception).

41. See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1286–92 (1984).

42. See, e.g., *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978) (permitting a nursing home to refuse to hire male nurses when a majority of the home’s clients were females who objected to male nurses); see also *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1417–24 (N.D. Ill. 1984) (permitting an employer’s restriction of female attendants working in female restrooms upon a showing that building occupants would object to members of the opposite sex entering the restrooms to perform maintenance during the day). But see *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302–04 (N.D. Tex. 1981) (rejecting BFOQ exception for female stewardesses).

43. *Zakrzewski*, *supra* note 7, at 438–40.

44. See Megan Bell, Comment, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1716 (2004) (“[S]ex can be defined as physical/anatomical/biological features, denoted as ‘male’ and ‘female,’ with gender defined as the visible cultural and social attributes, denoted as ‘masculine’ and ‘feminine.’”).

ret the sex classification to be inclusive of gender.<sup>45</sup> Considering gender, for example, customer preference is particularly salient in the zone of health care. In these types of situations, courts are generally concerned with whether the employment duties affect customers' physical modesty interests.<sup>46</sup> Courts have held that it is a legitimate BFOQ that the preferences of the clientele in nursing homes take precedence.<sup>47</sup> Thus, a nursing home that boards mostly women could legitimately, in the eyes of the law, discriminate against male nurses when employing for services that require dressing, disrobing, and assisting the clients in bathing.<sup>48</sup>

In addition to providing certain classes of people protection from more intentional discrimination, Title VII also protects individuals from employment practices that are facially neutral but nevertheless have a discriminatory impact.<sup>49</sup> Similar to making the prima facie case for the intentional discrimination claims described above, once the plaintiff successfully alleges that an employer has engaged in practices that have a discriminatory effect on her protected class, the burden then shifts to the employer.<sup>50</sup> These disparate impact claims differ from other Title VII claims, however, because once the burden shifts to the employer, she must prove a business necessity instead of a BFOQ to escape liability.<sup>51</sup> Unlike the statutorily defined BFOQ exception, the business necessity rule sprang from common law developments and applies to all the protected classes.<sup>52</sup> Straightforwardly, the business necessity requirement calls for an employer to prove that its practices are *necessary* to its business, which is a higher burden than proving the existence of a legitimate business purpose for discriminatory action.<sup>53</sup> Should an employer meet the burden of proving business necessity, the plaintiff may still successfully state a cause of action if she proves the existence of alternative practices that could achieve the same business purpose without the discriminatory effect.<sup>54</sup>

Appearance-based discrimination is problematic in the realm of labor and employment because it undermines merit-based decision mak-

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45. See Zakrzewski, *supra* note 7, at 443.

46. *Id.* at 440. Some other scholars propose that courts favor a three-pronged test to determine whether "a privacy BFOQ exists: (1) the customer preference is for same-gender service, (2) the employment at issue implicates privacy or therapeutic interests that are gender related, and (3) the preference for same-gender service does not derive from harmful stereotypes." *Id.* at 440 n.46 (citing Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357, 363-64 (2004)).

47. *Fesel*, 447 F. Supp. at 1354.

48. See *id.* ("[T]he Masonic Home has shown that it had a factual basis for believing that the employment of a male nurse's aide would directly undermine the essence of its business operation.").

49. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

50. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

51. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

52. The BFOQ, unlike the business necessity requirement, does not except employers for discrimination based on race. Cf. Zakrzewski, *supra* note 7, at 437 & n.30 (citing *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 nn.10-11 (5th Cir. 1968)).

53. See *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

54. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009).

ing. One's appearance should not limit her ability to earn a living with jobs for which looks are neither part of the job description nor central to its performance. Lookism is distinct from other forms of discrimination because it captures traditionally indefinable or more amorphous forms of discrimination and is the product of highly variable subjective valuations. Lookism is also distinguishable from other forms of discrimination because of its treatment under our federal antidiscrimination law. While Title VII is an appreciably noble antidiscrimination law because it champions a spirit of equality and attempts to strike a balance with employer discretion in appropriate scenarios, it does not address lookism. The following Part analyzes some successful attempts and a proposal to directly enact anti-lookism legislation.

### III. ANALYSIS: TITLE VII'S PROGENY

There is no justice for all so long as there is no federal law to protect people from lookism. There are, however, a few state statutes and local ordinances that provide such protection, and there is a swelling movement that urges our federal law to follow suit.<sup>55</sup> Many proposals for a federal law model their structure off Title VII.<sup>56</sup> This Part examines some instances of the anti-lookist mentality manifest in more localized legislation and concludes with an analysis of a proposal to enact similar legislation at the federal level.

#### A. *Experiments in Democracy*

Certain legislative bodies took it upon themselves to address the reality of lookism with laws designed to remove appearance-based considerations from employment. Some scholars opine that these state laws can serve as a model for the structure and application of a federal law designed to protect against appearance-based discrimination.<sup>57</sup> Specifically, this Section posits the District of Columbia Human Rights Act and an ordinance passed by the Santa Cruz, California City Council as examples of what appearance-based antidiscrimination law could look like in practice.

##### 1. *The District of Columbia Human Rights Act*

In 2001, the District of Columbia enacted the District of Columbia Human Rights Act (DC-HRA),<sup>58</sup> which prohibits appearance-based discrimination, discrimination against the protected classes of Title VII, and

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55. See discussion *infra* Part III.A.1–2 (comparing Title VII to antidiscrimination law in the District of Columbia and the City of Santa Cruz, California, and examining a proposal for the expansion of Title VII's protected classes).

56. See, e.g., Zakrzewski, *supra* note 7, at 432; see also *supra* Part I.

57. Zakrzewski, *supra* note 7, at 445.

58. D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2001).

even discrimination against individuals for their height and weight, among other progressive classifications.<sup>59</sup> The stated purpose of the DC-HRA is “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit.”<sup>60</sup> The statute captures appearance-based discrimination with the inclusion of “personal appearance” as an illegitimate basis for employment decisions.<sup>61</sup> The statute defines unacceptable “personal appearance” employment practices as those that consider “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”<sup>62</sup> The DC-HRA does not protect against the requirement of cleanliness and employer “prescribed standards” so long as they are uniformly applied for the “admittance to a public accommodation” or “to a class of employees for a reasonable business purpose.”<sup>63</sup>

The DC-HRA is like Title VII because it too presents a burden-shifting analysis.<sup>64</sup> Accordingly, the ultimate burden of proof lies with the plaintiff in the sense that she must prove that an employer intentionally discriminated against her,<sup>65</sup> while the intermediate evidentiary standards shift between plaintiff and employer.<sup>66</sup> Under the DC-HRA burden-shifting analysis, the plaintiff must first establish the prima facie case of discrimination, which creates a rebuttable presumption that the employer did engage in discriminatory practices.<sup>67</sup> The employer can defeat that presumption and shift the burden back to the plaintiff so long as she shows that there was “some legitimate, nondiscriminatory reason” for the employment action at issue.<sup>68</sup> With the burden reverted back to the plaintiff, she must directly prove that discrimination is the motivation for the reason proffered by the employer, or indirectly demonstrate that the employer’s explanation is incredible to successfully litigate the cause of action.<sup>69</sup>

Further exploring the exceptions of the DC-HRA introduced above, the “prescribed standard” exception is much like the BFOQ ex-

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59. For example, this statute protects against both gender and gender expression discrimination, recognizing that there may be dissonance between the two. For more understanding, see generally RIKI WILCHINS, *QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER* (2004).

60. D.C. CODE ANN. § 2-1401.01.

61. *Id.*

62. *Id.* § 2-1401.02(22).

63. *Id.*

64. See *Atl. Richfield Co. v. D.C. Comm’n on Human Rights*, 515 A.2d 1095, 1099 (D.C. 1986) (“[T]his court has adopted the Supreme Court’s approach with respect to the allocation of the burdens of proof under Title VII of the Civil Rights Act of 1964 . . .”).

65. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (“The nature of the burden that shifts to the defendant should be understood in light of the plaintiff’s ultimate and intermediate burdens.”).

66. *Atl. Richfield*, 515 A.2d at 1099.

67. *Id.* at 1099–1100.

68. *Burdine*, 450 U.S. at 253 (internal quotation marks omitted).

69. *Id.* at 256.

ception of Title VII because it too allows an employer to discriminate against its employees among the protected classes of the DC-HRA in certain circumstances, and it seems a bit at odds with the spirit of the statute. To qualify for the “prescribed standard” exception, an employer must meet three criteria: “(1) the existence of prescribed standards; (2) uniform application of the standards to a class of employees; and (3) a reasonable business purpose for the prescribed standards.”<sup>70</sup> While intuitively susceptible to abuse, the District of Columbia legislature limited the exception in its scope and application, requiring defendants who invoke it to meet some objective measures. For example, for a standard to qualify as acceptable it must be appreciably specific; unwritten standards will not suffice.<sup>71</sup> On the other hand, there is some leniency to the specificity component to a prescribed standard, as some appearance-based rules are acceptably inferred from other explicit policies if such an inference is reasonable and foreseeable.<sup>72</sup> For example, an employer may extend a written “[n]eat hair style” policy to the unwritten prohibition of ponytails because such an interpretation is “not an unreasonable or unforeseeable interpretation of [the written] policy.”<sup>73</sup> Furthermore, the requirement of a reasonable business purpose to support the legitimacy of a prescribed standard also imbues the interpretation of that standard with objectivity in much the same way the BFOQ exception of Title VII does.<sup>74</sup>

The “business necessity” exception is the only other exception to the DC-HRA that affords an employer any room for discrimination.<sup>75</sup> This standard is more demanding with its requirements than those of the “prescribed standard” exception, as can be inferred from the language “necessity.”<sup>76</sup> “[A] ‘business necessity’ exception cannot be justified by the facts of increased cost to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person.”<sup>77</sup> A fair reading of the statutory definition of “business necessity” suggests that to qualify for this exception, the level of necessity is exceedingly high, perhaps approaching absolute necessity.<sup>78</sup> Considering the heightened scrutiny a “business necessity” claim is subject to in comparison to the “prescribed standard” exception, one might wonder why an employer would invoke the necessity defense. The necessity defense captures situations where the plaintiff brings claims that indicate unintentional discrimina-

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70. *Turcios v. U.S. Servs. Indus.*, 680 A.2d 1023, 1027 (D.C. 1996).

71. *Id.* at 1027–28.

72. *Id.*

73. *Id.*

74. *See supra* Part II.B (explaining the application of the BFOQ defense).

75. D.C. CODE ANN. § 2-1401.03(a) (LexisNexis 2001) (internal quotation marks omitted).

76. *Id.*

77. *Id.*

78. *See id.*

tion.<sup>79</sup> Thus, there is a higher standard for unintentional actions or policies on the part of the employer that nevertheless have a discriminatory effect—a statutory embodiment of the notion that there is no need for unintentional discrimination absent near absolute necessity.

## 2. *The Santa Cruz Effect?*

In 1992, nearly three decades after the enactment of the Civil Rights Act of 1964, the Santa Cruz, California municipality enacted legislation that expanded the scope of Title VII.<sup>80</sup> The city designed the ordinance to protect its constituents from discrimination on the traits of the traditionally protected classes of Title VII,<sup>81</sup> while also indentifying new traits that merited protection: “sexual orientation, height, weight, or physical characteristic.”<sup>82</sup> It is worth mentioning that the relevant legislators feared that the ordinance would have been more far-reaching had the statutory language “physical characteristic” not supplanted the phrase “personal appearance.”<sup>83</sup> The legislators successfully advocated for such a substitution, motivated by a parade of horrors if “personal appearance” were protected generally.<sup>84</sup> In general, the legislators believed that the protection of personal appearance would too liberally avail extreme volitional aberrations from the status quo to legal entitlement.<sup>85</sup> As such, the intent behind the language “physical characteristic” is that it protects uncontrollable aspects of a person’s physical presentation.<sup>86</sup> The 1992 Santa Cruz city antidiscrimination ordinance is still notably progressive for it recognized newer or, at the time, “untraditionally” oppressed groups that include manifestations of appearance.<sup>87</sup> The statutory legacy of the 1992 Santa Cruz municipal ordinance survives today, although a

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79. There need only be a “discriminatory effect” to give rise to a necessity defense, not intentional discrimination by the employer. *See id.*

80. SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (2009), available at <http://www.codepublishing.com/CA/SantaCruz/> (PDF download of 2007 statute available).

81. Recall that Title VII protects “race, color, religion, sex, [and] national origin.” 42 U.S.C. § 2000e-2(a) (2006).

82. SANTA CRUZ, CAL., MUN. CODE § 9.83.010. The ordinance is designed “to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic.”

83. Post, *supra* note 2, at 2–4 (explaining the adverse response evoked by the proposed amendment when it included the language “personal appearance”).

84. *Id.*

85. *Id.*

86. SANTA CRUZ, CAL., MUN. CODE § 9.83.020(13) (“‘Physical characteristic’ shall mean a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms. Physical characteristic shall not relate to those situations where a bodily condition or characteristic will present a danger to the health, welfare or safety of any individual.”).

87. The term “untraditionally” is used to locate these enhanced protected classes of the Santa Cruz ordinance as those outside of conventional thought. To be sure, sexual orientation, height, weight, or physical characteristic groups were always discriminated against, but their oppression was not fairly represented in the public discourse and therefore not as pertinent to an average person.

1998 Santa Cruz county ordinance arguably pulled back the spirit of equality in the area.<sup>88</sup>

The City of Santa Cruz comprises approximately one-fifth of the greater county's residents.<sup>89</sup> One would think that the attitudes towards the issue of lookism would be fairly consistent within such a small geographic area because of the likelihood for cultural influence. The development of antidiscrimination law within this small group, while admittedly not the best statistical sample, may provide a lesson about the strength of reflexive attitudinal barriers to the anti-lookism movement—a point for consideration when expounding a viable recommendation for the treatment of lookism. The stated purpose and intent of the county ordinance is “to protect and safeguard the right and opportunity of all persons to be free from *all forms of arbitrary discrimination*, including discrimination based on age, race, color, creed, religion, national origin, ancestry, disability, marital status, pregnancy, gender or sexual orientation.”<sup>90</sup> A quick reading of the 1998 Santa Cruz county ordinance suggests that it is more progressive than the city's ordinance in the way that it aims to protect individuals from “all forms of arbitrary discrimination.”<sup>91</sup> While this statement implicates a broader application of the antidiscrimination ordinance when read separately, the definition of discrimination that appears later in the code indicates a more limited application.<sup>92</sup> Compared to the city code, the 1998 amendment to the Santa Cruz County Code maintains sexual orientation as a trait for a protected class, but most notably precludes the appearance groups: height, weight, and physical characteristic.<sup>93</sup>

Some of the variance between the 1992 and 1998 Santa Cruz city and county antidiscrimination ordinances may be attributable to the recognition of disability as a trait for protection.<sup>94</sup> That is, there is increasing diversity in the conception of disability as called for by the Americans with Disabilities Act.<sup>95</sup> Still, others argue that relying on disability-based

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88. Compare SANTA CRUZ, CAL., MUN. CODE § 9.83.010, with SANTA CRUZ, CAL., COUNTY CODE § 8.52.010 (2009), available at <http://codepublishing.com/ca/SantaCruzcounty> (PDF download of statute available).

89. California Department of Finance & Economic Data, [http://www.dof.ca.gov/HTML/FS\\_DATA/profiles/pf\\_home.php](http://www.dof.ca.gov/HTML/FS_DATA/profiles/pf_home.php) (follow “Santa Cruz” hyperlink) (last visited Jan. 6, 2010).

90. SANTA CRUZ, CAL., COUNTY CODE § 8.52.010 (emphasis added).

91. *Id.*

92. *Id.* § 8.52.020(E) (“‘Discriminate,’ ‘discrimination’ or ‘discriminatory’ means any act, policy or practice which, regardless of intent, has the effect of subjecting any person to differential treatment as a result of that person’s age, race, color, creed, religion, national origin, ancestry, disability, marital status, pregnancy, gender or sexual orientation.” (emphasis added)).

93. *Id.*

94. *Id.* § 8.52.020(D) (interpreting “disability” as defined in the Americans with Disabilities Act); see also 42 U.S.C. § 12102(2) (2006).

95. See Krieger, *supra* note 8, at 490–92. “[B]y the time the ADA was passed, very little popular consciousness-raising around disability issues had occurred. Few Americans outside a relatively small circle were familiar with the notion that the obstacles confronting persons with disabilities stemmed as much from attitudinal and physical barriers as from impairment *per se*.” *Id.* at 491 (first emphasis added).

discrimination law to correct the injury caused by appearance-based discrimination is inadequate as tried cases suggest that it is a more exacting standard for height and weight to qualify as disabilities.<sup>96</sup> At the least, it is a significantly different psychological process to identify discrimination and disability, which may have implications for the outcome of cases in court.<sup>97</sup> One is more willing to commit to the idea of a physical trait being discriminated against, whereas labeling something a disability arguably requires one to more deliberately overlook stigmas attributed to a particular physical trait.<sup>98</sup> Consider weight, for example. A person who recognizes that genetics and volitional lifestyle choices contribute to obesity might have a difficult time labeling it a disability with the opinion that the condition is partly self-induced.<sup>99</sup> On the other hand, these same people would probably be less reluctant to admit that obese individuals are unfairly subjected to discrimination for their weight.<sup>100</sup>

The 1998 Santa Cruz county antidiscrimination ordinance also varies from the 1992 Santa Cruz city ordinance with its exceptions. In the City of Santa Cruz, an employer can discriminate against employees with its various policies so long as a “reasonable business purpose” exists to support such conduct.<sup>101</sup> A “reasonable business[person]” is not one who discriminates against its employees “based upon the comparative characteristics of one group in contrast to another, or a stereotyped characterization of one group in contrast to another.”<sup>102</sup> Comparatively, as stated in the Santa Cruz county version of the antidiscrimination ordinance, an employer may discriminate against employees so long as there is a “bona fide occupational qualification.”<sup>103</sup> To successfully invoke the defense, an employer must prove “(1) [t]hat the discrimination is in fact a necessary result of such a bona fide condition; and (2) [t]hat there exists no less discriminatory means of satisfying the bona fide requirement.”<sup>104</sup> On the other hand, the employer exceptions of both antidiscrimination ordinances are analogous to those in Title VII of 1964 in how they logically provide a burden of proof that shifts between the litigants.<sup>105</sup> That is, after a plaintiff alleges discrimination, an employer has the opportunity to overcome legal liability if such discrimination is the least discriminatory

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96. *See id.* at 516–19.

97. *See id.* at 511–12.

98. *See id.*

99. *See id.* (citing Linda J. Skitka & Philip E. Tetlock, *Allocating Scarce Resources: A Contingency Model of Distributive Justice*, 28 J. EXPERIMENTAL SOC. PSYCHOL. 491 (1992)) (“[R]esearch shows that people are generally less willing to help and less supportive of needs-based distributions if they view stigmatized claimants as responsible for their own predicament.”).

100. *See id.*

101. SANTA CRUZ, CAL., MUN. CODE § 9.83.080(1) (2009).

102. *Id.*

103. SANTA CRUZ, CAL., COUNTY CODE § 8.52.080(F) (2009).

104. *Id.*

105. *See supra* Part II.B (explaining the burden shifting analysis presented by a BFOQ).

means for achieving a “reasonable business purpose” or BFOQ.<sup>106</sup> The BFOQ exception in the Santa Cruz county ordinance, however, differs somewhat from that built into the federal statute because it puts the onus of proving a least discriminatory means for a BFOQ on the employer, instead of the discrimination claimant.<sup>107</sup>

### B. *Expanding Title VII*

A few years ago, Karen Zakrzewski responded to the proposition that “creating state laws would [best] achieve the goal of preventing appearance discrimination.”<sup>108</sup> Zakrzewski recognized that reliance on state laws to correct the problem of appearance-based discrimination would necessarily produce inconsistent results.<sup>109</sup> Thus her proposal to amend Title VII to include appearance as a protected class came to pass.<sup>110</sup> Specifically, the proposal calls for the protection of immutable appearance traits, including height and weight.<sup>111</sup> This is a supportable proposal because it helps to correct a genuine form of oppression, it is workable under the current framework of Title VII, and it withstands the strong criticisms of its opponents.

Title VII could be expanded to protect against appearance-based discrimination without undermining its integrity. That is, Title VII should only serve to protect against discrimination based on immutable appearance traits like height, weight, and physical characteristics.<sup>112</sup> To otherwise extend legal protection to mutable appearance traits—e.g., hairstyle or style of dress—would be a perversion of the law because it could force employers to maintain hiring practices or work policies that create conflict in the workplace. For example, in a fictive society in which Title VII protection goes to mutable appearance traits, a Ku Klux Klan member could have a legal entitlement to employment at a black-owned grocery store. Furthermore, if the black business owner had no employee dress code, she might have difficulty preventing the Ku Klux Klan member from wearing his organization’s symbolic garb.<sup>113</sup> Surely,

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106. SANTA CRUZ, CAL., MUN. CODE § 9.83.080(1); SANTA CRUZ, CAL., COUNTY CODE § 8.52.080(F).

107. SANTA CRUZ, CAL., COUNTY CODE § 8.52.080(F).

108. Zakrzewski, *supra* note 7, at 452.

109. *Id.* “For example, although an unattractive person may be protected from employment discrimination in the District of Columbia, this person would not be protected in Michigan unless the alleged discrimination relates to height, weight, or Title VII protections.” *Id.*

110. *Id.*

111. *Id.*

112. See, e.g., SANTA CRUZ, CAL., MUN. CODE § 9.83.080 (2009); see also Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (“Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity.”).

113. While one can think of a few situations where a Ku Klux Klan member could invoke this fictional Title VII protection, there is a strong argument for a black business owner not permitting a

this is not the intended result of a proposal to amend Title VII to include appearance in its protected classes?

Any amendment to Title VII<sup>114</sup> should build upon the best of the localized examples of anti-appearance-based discrimination law.<sup>115</sup> An enhancement of the protected classes would be a safe and reasonable development of tried law, not a radical overhaul of tradition. An expansion of Title VII to include appearance as a protected class would also be a positive response to the Santa Cruz, California county antidiscrimination ordinance; it would counteract the backlash that the municipal ordinance encountered in light of the enactment of the 1998 county ordinance to exclude the explicit representations of the appearance trait—height, weight, and physical characteristics—from its protected classes.<sup>116</sup>

The proposed amendment to Title VII is more akin to the DC-HRA.<sup>117</sup> Although the DC-HRA includes “personal appearance” in its protected classes<sup>118</sup> and some may see this protection as going to mutable characteristics, courts interpret the protection more narrowly.<sup>119</sup> Hence, Zakrzewski’s proposal allows an employer to discriminate against an employee’s mutable personal appearances provided the policy reflects a reasonable business purpose, applies to all employees uniformly, and is part of written policies or reasonably inferred therefrom.<sup>120</sup> The proposed amendment to Title VII is consistent with the spirit of equality that currently inheres in the statute, and any application of the statute to appearance-based discrimination would protect traits insofar as they are beyond an individual’s control.

Should Congress expand Title VII to include appearance in its protected classes, the exceptions to Title VII<sup>121</sup> would also continue to operate in much the same way without undermining the intent behind the proposal. Employers would not too easily assert lookism as a bona fide occupational qualification. For appearance to be a BFOQ, an employer would have to prove that an employee’s appearance is central to the performance of a job.<sup>122</sup> An employer is likely incapable of successfully stating a BFOQ related to its discriminatory practices regarding its employees’ appearance outside of industries that directly capitalize on their

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Ku Klux Klan member from wearing a white tunic and hood out of business necessity. For example, if the bulk of a business’s clientele is comprised of black people, many of the patrons would foreseeably demonstrate their disgust for interactions with a costumed Klan member by taking their business elsewhere.

114. 42 U.S.C. § 2000e-2 (2006).

115. SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5); SANTA CRUZ, CAL., COUNTY CODE § 8.52.020; D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2001).

116. Compare SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5), with SANTA CRUZ, CAL., COUNTY CODE § 8.52.020(E).

117. See D.C. CODE ANN. § 2-1402.11(a).

118. *Id.*

119. See *supra* Part III.A.1 (addressing the immutability of the protected classes).

120. See Zakrzewski, *supra* note 7, at 452–60.

121. 42 U.S.C. § 2000e-2(e)(1), (k)(1)(A)(i) (2006).

122. See *id.*

employees appearances (e.g., modeling).<sup>123</sup> One can think of few common jobs in which being attractive or unattractive is a requirement for successful job performance.<sup>124</sup> Furthermore, for facially neutral policies that nevertheless have a discriminatory effect, an employer would have to prove that its lookism is a business necessity.<sup>125</sup> It is unlikely that appearance-based discrimination would be *necessary* to any business operation that could not already invoke the less-stringent BFOQ exception. Thus, under the proposed amendment, the business necessity exception for disparate impact claims becomes practically extinct in the context of appearance-based discrimination—a small, but logical, efficiency.

To be sure, lookism is necessarily a uniquely subjective experience on multiple levels.<sup>126</sup> One's sensitivity to discrimination attributable to his appearance may be underdeveloped or overdeveloped depending on one's sense of worth, self-image, or membership to another historically oppressed group.<sup>127</sup> Similarly, an employer may have policies that implicate lookism, but nevertheless have valid and separate reasons for their discriminatory effect.<sup>128</sup> Most importantly, should Congress implement the proposed amendment to Title VII, a court or jury would be charged

123. Zakrzewski, *supra* note 7, at 457–58 (“In the context of the Abercrombie salesperson, it is highly difficult to argue that only an attractive person is capable of performing . . . job responsibilities. For example, the Abercrombie website lists the qualities they are looking for in a ‘Brand Representative.’ . . . [The] job description fails to mention the necessity of hiring attractive people.” (citing Jobs, Abercrombie & Fitch, [http://www.abercrombie.com/anf/lifestyles/html/jobs\\_stores\\_part.html](http://www.abercrombie.com/anf/lifestyles/html/jobs_stores_part.html) (last visited Jan. 22, 2005))). The retailer has received a lot of flack in the socio-legal community for its past policies. To be fair, the current website proudly boasts a commitment to diversity webpage—a small, even if pretentious, victory for anti-appearance-based discrimination. Abercrombie & Fitch, Careers, Diversity, <http://www.abercrombie.com/anf/careers/diversity.html> (last visited Jan. 6, 2010) (“At Abercrombie & Fitch we are committed to increasing and leveraging the diversity of our associates and management across the organization” “so that we better understand our customers, enhance our organizational effectiveness, capitalize on the talents of our workforce and represent the communities in which we do business.”).

124. For example, a teacher's attractiveness does not lend to her ability to teach, a bus driver's attractiveness does not lend to her ability to transport people safely and on time, and a garbage person's attractiveness does not lend to her ability to pick up trash. “[A]pppearance, like race and gender, is almost always an illegitimate employment criterion, and . . . it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit.” Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987).

125. See 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also *supra* Part II.B.

126. See *supra* Part II.A (framing the uniquely subjective nature of lookism).

127. See Brake, *supra* note 35, at 680–82.

We live in a world where [appearance,] gender, race and sexuality form a complex web of identity that subtly affects, in myriad ways, how people respond to us. As we know from life experience and the study of law, facts are messy and causation is tricky to pin down. . . . Social psychologists use the term ‘attributional ambiguity’ to refer to the ‘uncertainty about whether the outcomes you receive are indicators of something about *you* as an individual, or indicators of social prejudices that other people have against you because of your stigma.

*Id.* at 681 (quoting Brenda Major et al., *Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 220, 220 (2003)).

128. For example, an unattractive salesperson may be fired for poor performance. Her poor sales performance, however, may be attributable to her unattractiveness. Yet the employer in this scenario would not be lookist herself, as he was merely responding to the business success of his employee, which is affected by the embedded lookism of society *qua* the consumer habits regarding that salesperson.

with the delicate task of identifying whether an appearance-based discrimination occurred in the circumstances surrounding the claim of a plaintiff.<sup>129</sup> Having the ultimate burden of proof, would an individual ultimately be arguing that she is part of an unattractive class of people? Would a court view the legal arguments separately from its assessment of whether a person is unattractive, or even consider the legal arguments salient?

The proper enforcement of a Title VII expansion that protects society from appearance-based discrimination requires a court or jury to focus predominantly on the legal merits of a claim—a beauty contest is a far cry from the equality sought to be achieved by the proposed expansion. A person may be considerably attractive and nevertheless experience appearance-based discrimination in the form of exploitation when such attractiveness has nothing to do with her job. A jury would merely be ascertaining whether a person, attractive or unattractive, experienced discrimination due to their appearance that is not warranted by a BFOQ or business necessity. This is not too much to ask of a court or jury, as tackling these sorts of subjective issues is no novelty in the law. Take, for example, negligence in tort law.<sup>130</sup> Proving negligence requires a demonstration of action falling below the “reasonable person” standard.<sup>131</sup> Likewise, when reducing murder to manslaughter in a criminal case, a court must consider evidence that goes to a defendant’s reasonableness when invoking the mitigating crime of passion defense.<sup>132</sup> These pre-existing legal processes are analogous to the subjective assessment called for by the proposal to expand Title VII to include appearance as a protected class. In all of these scenarios a jury must place itself in the position of another and consider what it would do or feel in a given set of circumstances.

Despite the aforementioned, reasonable portrayals of anti-appearance-based discrimination law in practice, critics oppose the amendment for a few popular reasons: (1) an underappreciation of appearance-discrimination;<sup>133</sup> and (2) an unfounded, insuperable differen-

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129. Cf. *Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53, 70 (2006) (elucidating the fact-finding role of a jury in the processing of a Title VII claim).

130. “In negligence, the plaintiff must prove, as an essential element of the claim, that she has sustained actual harm that is legally protected, such as bodily injury or property damage. She must also prove a causal connection between the injuries and the defendant’s unreasonable conduct.” DOMINICK VETRI ET AL., *TORT LAW AND PRACTICE* 17 (3d ed. 2006).

131. See, e.g., *T.J. Hooper*, 60 F.2d 737, 739–40 (2d Cir. 1932) (finding negligence when sea men unreasonably traveled without the proper receiver equipment on their tug boats).

132. MODEL PENAL CODE §§ 210.1–.3 (1962).

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is *reasonable* explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

*Id.* § 210.3(1)(b) (emphasis added).

133. Cf. Heather R. James, Note, *If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employers’ Discretion*, 42 VAL. U. L. REV. 629, 666–68 (2008) (arguing the legitimacy of lookism for employers). “[T]he unattractive have not suffered the same, or even sim-

tiation between appearance and the other protected classes.<sup>134</sup> First and foremost, unattractive people have experienced discrimination just as people representing the other protected classes have. Analogous to the overt discrimination of the Jim Crow laws observed in America's history of an apartheid South,<sup>135</sup> "ugly laws" existed in several larger American cities to discourage malformed individuals from appearing in public.<sup>136</sup> The struggle of individuals who, through no fault of their own, deviate from acceptable standards of physicality is extant, however quiet or uncelebrated.<sup>137</sup> Secondly, the opponents of Title VII expansion overlook the fact that Title VII already includes protected classes that are treated differently—a congressional statement that although some forms of discrimination are more intolerable, "lesser" forms of discrimination are nevertheless offensive to a civil society.<sup>138</sup> Consider, for example, how race may never qualify as a BFOQ, whereas discrimination related to one's religion or sex might.<sup>139</sup> There is a difference between analyzing lookism in terms of degrees of oppression and analyzing lookism as de minimis oppression. Lookism is far beyond trivial. Even if one subscribes to the viewpoint that lookism is less severe than racism, religious persecution, or sexism, it is still no reason not to extend Title VII protection to appearance.

There exists no federal law to protect individuals from appearance-based discrimination beyond and unattached to the listed traits of Title VII.<sup>140</sup> Since 1964, some states and municipalities have experimented with antidiscrimination laws to protect against appearance-based discrimination.<sup>141</sup> Scholars have similarly proposed an amendment to Title VII to include immutable appearance amongst its protected classes.<sup>142</sup> The

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ilar, injustices as minorities and women, and appearance based rights are not firmly entrenched or recognized in American Law." *Id.* at 667. There is also a legitimate resistance to enact laws that are excessively burdensome—a cautionary view about the exertion of governmental power. See Lynn T. Vo, *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, 341 (2002). "[A]lthough appearance discrimination in hiring practices is prevalent, there is also a need to protect, to some extent, an employer's right of discretion." *Id.* Far reaching ordinances tend to infringe on employers' rights and take away any discretion they have." *Id.* at 356.

134. See James, *supra* note 133, at 672 ("This Note has shown that appearance discrimination is in a different league from other forms of discrimination, thus explaining why employers should be given such discretion. . . . [T]he importance of appearance in American society shows that employers that discriminate based on attractiveness should not be held to the strict standards for protected classes.").

135. See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 55 (2007).

136. Note, *supra* note 124, at 2035 n.2.

137. See *id.* at 2035.

138. The author does not mean to imply that aside from race, all other forms of discrimination are inferior. Rather, there is an implicit congressional statement of various levels of sensitivity to different forms of discrimination with its varying treatment of the protected classes.

139. See *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978) (finding that discriminating against males in mostly female occupied nursing is a legitimate BFOQ).

140. 42 U.S.C. § 2000e-2(a) (2006).

141. D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2001); SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5) (2009).

142. See *supra* Part III.B.

process of these actual or proposed laws mirrors Title VII with their exceptions and shifting burdens of proof between the litigants generally. Thus, these enactments and proposed amendments reasonably protect immutable characteristics, are workable within the framework of Title VII, and serve as model starting points to address lookism with law. These manifestations of the anti-lookist mentality, however, are limited because they largely elide the socially remedial components to correcting lookism and, in doing so, provide only a partial remedy. A viable recommendation requires more appreciation of the attendant social complications of an amendment to Title VII to protect against appearance-based discrimination.

#### IV. RECOMMENDATION: BEYOND THE LAW

A basic examination of how Title VII would operate if it included appearance as a protected class quells most of the criticisms of proposals to have a law that combats appearance-based discrimination. As illustrated in the Part above and throughout this Note, an expansion of Title VII to include appearance in its protected classes is not highly impractical and appropriately addresses the important issue of lookism. Such a proposal does not ask courts or juries to do more than they are accustomed to doing, and does not undermine the integrity of the statute if courts and juries interpret the proposed amendment to Title VII narrowly. In light of the reasonableness of such a proposal, this Note both supports and incorporates it into its own proposal. This Note proposes that Title VII be expanded to include immutable appearance traits as a protected class, while further proposing a more holistic approach to the issue in calling for an active social mobilization designed to change attitudes and raise consciousness about lookism. This Part briefly reiterates the legal recommendation analyzed above and here adopted before more thoroughly developing a sociological recommendation.

##### *A. Expanding Title VII: A Reasonable Starting Point*

To correct the historically underappreciated injuriousness of lookism directed towards individuals in the workforce, the proposed legal treatment is to expand Title VII to protect against appearance-based discrimination. The protection would cover appearance traits insofar as they are immutable characteristics. For example, immutable characteristics would include height, weight, and any other physical characteristics of natural design. Title VII would not protect superficialities that are within the scope of individuals' control, such as piercings and tattoos that can temporarily be removed or covered up for the duration of a work day.<sup>143</sup>

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143. While it is conceded that having piercings and visible tattoos may not have any bearing on job performance and, thereby, merit, these controllable superficialities are subsumed by dress codes which fairly fall within the scope of employers' discretion.

The application of the law would also remain the same as before the proposed amendment, maintaining the shifting burdens of proof and exceptions.<sup>144</sup> Thus, the amended law is workable under the current Title VII framework, achieving gains in efficient administration through courts' familiarity with the process and application of the law. Standing alone, this part of the proposal addresses a purely legal remedy, one which is insufficient if we neglect to address the underlying social problems as they can prevent any amendment to Title VII or frustrate its proper application if enacted. Beyond an analysis of the law, backlash<sup>145</sup> and capture<sup>146</sup> are two issues worthy of special attention in expounding a viable proposal to amend Title VII to protect against appearance-based discrimination; these concepts present problems for enactment and enforcement.

### B. *Resolving Foreseeable Enactment Problems*

Realizing the call of the proposal to expand Title VII requires a notable mobilization. Society needs priming to make the called-for amendment to Title VII effectively stick and to minimize a foreseeable, if not inevitable, "backlash."<sup>147</sup> Similarly, as history maybe informs us with the development of the antidiscrimination law in Santa Cruz County, a too quickly forgotten movement leaves room for the possibility of a reversal of any achieved success.<sup>148</sup> Proponents of enhancing Title VII protection should consider the success of the civil rights movement, which preceded and accompanied the enactment of the Civil Rights Act of 1964.<sup>149</sup> Furthermore, because of the commitment to the movement and its strength, it left behind a legacy that supported the proper enforcement of Title VII.<sup>150</sup> Title VII's legacy maintained the spirit of equality as

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144. See *supra* Part II.B (exploring the burden shifting analysis and the BFOQ and business necessity exceptions).

145. See Krieger, *supra* note 8, at 477 ("[B]acklash is about the relationship between a legal regime enacted to effect social change and the system of existing norms and institutionalized practices into which it is introduced. Specifically, backlash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance.").

146. *Id.* at 492 ("Capture . . . can usefully be understood as the subtle re-assertion of pre-existing norms, social meanings, and institutionalized practices into a formal legal regime intended by its promoters to displace them.").

147. Title VII has also experienced resistance. "Over the course of the 1980s and 1990s, courts progressively heightened standards of proof for plaintiffs asserting Title VII claims. . . . This in turn has made hiring and promotion discrimination harder to redress in a systematic way." *Id.* at 494.

148. Recall the analysis of antidiscrimination law being narrowed in a span of just six years, in a sense, considering the likelihood for attitudinal consistency within a small geographic area. See *supra* Part III.A.2.

149. MASSEY, *supra* note 135, at 51–64.

150. See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (finding that while uniforms are not per se discriminatory, requiring only women to wear them is); see also *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) ("Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability.").

demonstrated by the volume of the relevant case law. Antidiscrimination case law also provides examples of Title VII claims that forced us as a society and legal system to define just how far we are willing to go in the interest of fairness to the end of having a respected and effective law to counterbalance discrimination.<sup>151</sup>

Legal scholars and activists should take a page out of history and analogously invoke, or reinvigorate and revamp, the civil rights movement to publicize the issue of lookism. The incipency of any movement involves a framing<sup>152</sup> or reframing<sup>153</sup> of the issue, and the endurance of a movement requires continuous dialogue. Thus, to actualize the proposal to expand Title VII and preserve its integrity if enacted, proponents need to promote lookism as a serious societal issue and consistently work to remedy or positively influence appearance-based discrimination wherever it may appear.

### C. *Resolving Foreseeable Enforcement Problems*

The inherent subjectivity in the performance of the proposed amendment to include appearance in Title VII's protected class also poses a concern for its efficacy. To be clear, subjectivity problems in this context speak to the practicality in the application of the proposed law, which is a different question from whether to have the law in the first place as some scholars argue.<sup>154</sup> Subjectivity does not present an insuperable defect for the application of the proposed amendment, but it nevertheless poses a hurdle: capture in a jury.<sup>155</sup> Without a social movement to change attitudes towards lookism, subjectivity problems may undermine the corrective purpose of the proposed antidiscrimination law. As such, this Note also posits social mobilization as a way to thwart or minimize subjectivity-turn-capture problems with a jury.

Although analogized to the reasonable person standard earlier in this Note, the application of the proposed amendment to Title VII varies

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151. See *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (finding that a policy that requires men to wear ties is not unreasonably burdensome to an employee to amount to discrimination); see also *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (“As television is a visual medium, television networks and local stations clearly have a right to require both male and female anchors to maintain a professional appearance while on camera.” (quoting Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 201 (1985))).

152. See M. BAHATI KUUMBA, *THE GENDER LENS: GENDER AND SOCIAL MOVEMENTS* 3–9 (2001).

Movement organizations and participants have belief systems and/or ideologies that explain the nature of the social condition they seek to change, justify particular strategies of action, and outline the anticipated outcomes or objectives. Movements often frame their grievances and claims of legitimacy within a language or system of thought that already has support and with which potential participants can relate.”

*Id.* at 5.

153. “Reframing” refers to the act of refocusing a discourse surrounding an issue to warrant different treatment. See *id.* at 2.

154. See James, *supra* note 133, at 660–63.

155. See Krieger, *supra* note 8, at 492.

in one significant way that carries implications for the practical success of the proposed law: identification. With a reasonable person test, a jury must identify with the proverbial reasonable person and accordingly impose its ideal, collective judgment on the issues presented to it. A jury addressing lookism, however, would have the challenge of disidentifying with a tradition of normativity as lookism is not currently, popularly perceived as an actionable injury in the law and morality. It is arguably easier to identify with what we believe to be a reasonable person because it reflects our inherent goodness and righteousness, whereas identifying lookism calls for a personal examination of our own biases that we have heretofore deemed acceptable. Jurors might be reticent to identify lookism where they too would similarly act as a defendant in the given set circumstances as a preservation function of their sense integrity; a finding of lookism in these situations creates a sort of self-condemnation.

In extreme scenarios involving overtly discriminatory jurors, the jury selection process would mostly mitigate the injuriousness of capture to the proposed law. That lookism is a unique experience/perception to everyone and such a prejudice may not be readily apparent during the jury selection process, however, undermines the efficacy of the jury selection process. For example, a juror may be facially fit during the selection process but susceptible to his or her lookism when viewing the claimants and witnesses at trial.<sup>156</sup> The best way to respond to this capture trap is to raise society's moral consciousness about lookism generally. If society is adequately primed through successful social mobilization,<sup>157</sup> the attitudinal barriers to the proper enforcement of the proposed amendment to the law become less prevalent and largely unproblematic.

Times change, and we as a society need to be receptive to examining ourselves and revisiting our laws to promote justice with legal currency. This Note proposes that we do just that and expand Title VII to protect against appearance-based discrimination, while also emphasizing the necessity of social mobilization efforts to address extant and foreseeable social problems for enactment and enforcement in this area of transformative law—a socio-legal recommendation. Backlash and capture are two significant, attendant social concerns about the application of an amendment to include appearance in Title VII's protected classes which are often underappreciated or unexplored. Any remedial action directed at lookism must seek to correct these attitudinal barriers in addition to advocating for legal reform.

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156. See generally David L. Wiley, Comment, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193 (1995). “[J]urors tend to base their decisions on the physical appearance of the defendant and the victim in simulated jury trials. Moreover, simulated juries tend to recommend lighter sentences for physically attractive defendants and harsher sentences for physically unattractive defendants, regardless of the severity of the crime.” *Id.* at 212–14 (footnotes omitted).

157. KUUMBA, *supra* note 152, at 5 (“[Successful] [m]obilization is dependent on a delicate balance between the existence of objective conditions that stimulate the emergence of protest movements and, on a more individual level, the subjective awareness and interpretation of these conditions.”).

## V. CONCLUSION

Lookism is about appearance-based discrimination at its core, not just ugly discrimination—though this is an admittedly common manifestation of lookism. Our federal antidiscrimination law largely ignores the issue of lookism, although victims of appearance-based discrimination are worthy of redress. Title VII should be amended to protect against appearance-based discrimination and such a proposal, while limited, is not completely off-base. This Note responds to critiques of the proposal, that an expansion of Title VII is unfairly restrictive to employers' discretion or a sort of perversion of the law, by demonstrating that the proposal is workable and reasonable, simultaneously contributing some practicality into the surrounding discourse by examining the issue through an interdisciplinary lens.

Lookism is purposively addressed as a socio-legal issue throughout this Note because appearance-based discrimination is not just a social issue, and legal scholars need to go beyond the myopic trap of only analyzing it in terms of the law. Lookism is a complex form of discrimination that presents an inseparable marriage of equally complex social and legal issues. This Note advocates for a truly socio-legal treatment and analysis of lookism. Accordingly, this Note also posits a forward-looking, hypothetical analysis with immediate implications, reminding us that we can—and still need to—work on improving the conditions for all members of our society now, while simultaneously addressing the foreseeable issues that would arise should the enactment of this transformative law come to fruition. We need to address the societal issues that inform our perception of lookism to successfully effectuate any positive change. Thus, to achieve the goal of expanding Title VII and counteracting lookism, we need to seriously look beyond the law and collaboratively attack the issue from all angles.

