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Unlocking the Beauty From Within Title VII: Arguing for An Expansive Interpretation of Title VII to Protect Against Attractiveness Discrimination

Michael Conklin

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UNLOCKING THE BEAUTY FROM WITHIN TITLE VII: ARGUING FOR AN EXPANSIVE INTERPRETATION OF TITLE VII TO PROTECT AGAINST ATTRACTIVENESS DISCRIMINATION

MICHAEL CONKLIN*

“A fair exterior is a silent recommendation”¹

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* Powell Endowed Professor of Business Law, Angelo State University.

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I. INTRODUCTION

Beauty may only be skin deep, but discrimination against the unattractive runs far deeper. Research emphatically demonstrates that attractiveness discrimination affects nearly every aspect of life, including hiring and promotion decisions.² For example, personal injury attorneys utilize economists as expert witnesses for how their clients’ reduced attractiveness will negatively affect their future earnings.³ Attractiveness discrimination is just as prevalent as discrimination based on ethnicity.⁴ Unfortunately, current interpretations of federal antidiscrimination legislation do not offer protections from attractiveness discrimination.⁵ This Article offers a comprehensive framework for providing such protections under an expansive interpretation of Title VII.

The harmful effects of attractiveness discrimination go far beyond missed job opportunities. By perpetuating a culture obsessed with attractiveness, the mental disorders and unhealthy practices that follow are likely

2. See *infra* Part II.

3. DANIEL S. HAMERMESH, BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL 62–63 (2011).

4. See Timur Kuran & Edward McCaffery, *Expanding Discrimination Research: Beyond Ethnicity and to the Web*, 85 SOC. SCI. Q. 713, 727–28 (2004) (describing a study that found research subjects considered appearance discrimination more significant than ethnic discrimination).

5. James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 648 (2010).

perpetuated.⁶ The high costs in both time and money spent focused on appearance are also exacerbated.⁷ Without the ability to protect victims of attractiveness discrimination, hiring and promotion practices that promote a corporate culture of sexual harassment have been upheld.⁸ Because of the intersectional nature of attractiveness discrimination, women and minorities are disproportionately harmed.⁹ Attractiveness discrimination also reduces corporate productivity through a mismatch in the labor market.¹⁰ These harms appear to be accelerating rapidly as Americans place ever more emphasis on appearance.¹¹

Not only are the systemic harms of attractiveness discrimination far more problematic than most realize, but the alleged difficulties in implementing protections against the practice are grossly exaggerated and, when properly understood, often support such protections. Furthermore, many of these objections function to perpetuate dangerous views that inflict additional harm on victims of attractiveness discrimination.

An expansive interpretation of Title VII is the ideal method for providing attractiveness discrimination protections. This is because attractiveness discrimination is intrinsically linked to racial and gender discrimination, and race and gender are explicitly protected classes under Title VII. This method is also consistent with the clear trajectory of Title VII protections, which have steadily expanded over time. The Supreme Court decision in *Bostock v. Clayton County*¹² serves as an excellent example of how the judiciary can extend protections to a previously unprotected group by linking the discrimination to a protected class in Title VII. Finally, enacting protections through an expansive interpretation of Title VII provides numerous benefits when compared to the alternatives of federally enacted legislation, state and

6. See generally DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 42 (2010).

7. See Allen Smith, *Ugly Policy Alleged at NBC: Only Beautiful People Need Apply*, SOC'Y FOR HUM. RES. MGMT. (Aug. 8, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nbc-good-looking-apply.aspx>.

8. *Id.*

9. See Ritu Mahajan, *The Naked Truth: Social Media Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 167, 171 (2007); Jada Jones, *The Beauty Standards Placed on Women are Unrealistically Unachievable*, METEAMEDIA (Apr. 9, 2021), <https://meteamedia.org/20179/opinions/the-beauty-standards-placed-on-women-are-unrealistically-unachievable/>.

10. See Smith, *supra* note 7.

11. See William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 157 (2007).

12. See generally *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

local protections, and protections under the Americans with Disabilities Act (“ADA”).

Some critics contend that the issue of attractiveness is too subjective to be protected.¹³ This Article explains why attractiveness is less subjective than many believe. Furthermore, some existing protected classes involve subjective classifications, so subjectivity is not a valid basis for denying protections. Finally, extending protections to attractiveness discrimination would not require judicial determinations regarding levels of attractiveness.

Section II provides a framework for understanding attractiveness discrimination. This includes distinguishing it from appearance discrimination, discussing research that has demonstrated the widespread and severe harm from the practice, illustrating how victims can sometimes receive protection under existing law, and explaining how protections would result in increased labor productivity. Section III provides the framework for obtaining attractiveness discrimination protections through an expansive judicial interpretation of Title VII. Section IV chronicles potential arguments against legal protections for attractiveness discrimination, followed by responses that demonstrate how these arguments—when properly understood—actually strengthen the case in favor of protections.

II. BACKGROUND

A. *Distinguishing Appearance Discrimination from Attractiveness Discrimination*

Various terms are used to describe the act of discriminating against someone based on looks. Examples include “hotness discrimination,”¹⁴ “lookism,”¹⁵ “lookphobia,”¹⁶ “appearance discrimination,”¹⁷ “attractiveness

13. 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, 662 (2008).

14. William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 615 (2011).

15. Desir, *supra* note 5, at 632 (“Lookism is the experience of discrimination or prejudice on the basis of an individual’s appearance . . .”).

16. Frank J. Cavico et al., *Appearance Discrimination in Employment: Legal and Ethical Implications of “Lookism” and “Lookphobia,”* 32 EQUAL., DIVERSITY & INCLUSION: AN INT’L J. 83, 103 (2013).

17. James B. Taylor, *Appearance Discrimination: A Changing Landscape*, HR PROS. MAG. (July 30, 2019), <https://hrprofessionalsmagazine.com/2019/07/30/appearance-discrimination-a-changing-landscape/>.

bias,”¹⁸ and “attractiveness discrimination.”¹⁹ These terms are sometimes ascribed vague, inconsistent, and contradictory definitions.²⁰ For the purposes of this Article, “attractiveness discrimination” is intentionally used. This is to distinguish the topic of this Article from the more general notion of “appearance discrimination.” This Article does not advocate for protections against all issues of appearance. It does not argue in favor of protections for workers who refuse to abide by a dress code or grooming standards, although such requirements can be problematic.²¹ This Article focuses on attractiveness discrimination, which is limited to characteristics such as facial symmetry, height, weight, body proportionality, acne, jawline prominence, baldness, teeth whiteness/alignment, presence of wrinkles, etc. While behavior such as smiling, being assertive, active listening, use of welcoming hand gestures, and confidence could all be described as “attractive” qualities, they are not included in the consideration of attractiveness discrimination.

B. *Attractiveness Studies*

Research into the effects of appearance unequivocally demonstrates how it affects a wide variety of decisions in life.²² For example: teachers discriminate on the basis of attractiveness when grading their students;²³ parents have lower expectations for their less attractive children;²⁴ people who are considered unattractive are both less likely to get married and less likely to marry someone wealthy;²⁵ judges and juries give preferential treatment in both civil and criminal trials to attractive plaintiffs and

18. Tomas Chamorro-Premuzic, *It’s Time to Expose the Attractiveness Bias at Work*, FORBES (July 17, 2019, 4:06 PM), <https://www.forbes.com/sites/tomaspremuzic/2019/07/17/its-time-to-expose-the-attractiveness-bias-at-work/>.

19. Sunyoung Lee et al., *When Beauty Helps and When It Hurts: An Organizational Context Model of Attractiveness Discrimination in Selection Decisions*, 128 ORG. BEHAV. & HUM. DECISION PROCESSES 15, 15 (2015).

20. See, e.g., Cavico, et al., *supra* note 16, at 103.

21. Dress codes and grooming standards are problematic because they impose disproportionate burdens on workers based on their race and/or gender.

22. HAMERMESH, *supra* note 3, at 86 (“Across the entire economy, good-looking workers earn more on average than their otherwise identical but less well-endowed colleagues.”).

23. Jordan Bello, Note, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 496 (2004).

24. Adam Cohen, Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2038–39 (1987).

25. RHODE, *supra* note 6, at 27.

defendants;²⁶ attractive people receive preferential treatment in both obtaining loans and the loan rates that they are offered;²⁷ attractive people report higher levels of happiness and satisfaction;²⁸ and voters are significantly more likely to vote for an attractive politician.²⁹

The pervasiveness of attractiveness discrimination is present in the workplace. Numerous studies demonstrate that attractiveness plays a significant role in numerous employment contexts. In the legal world, attractiveness discrimination means that attractive attorneys consistently earn more than their less attractive colleagues.³⁰ Additionally, attorneys who are litigators are more attractive than attorneys in any other area of practice.³¹ In sports, attractive quarterbacks in the National Football League (“NFL”) are paid more than their less attractive counterparts who have the same skill level.³² And, attractive female tennis players are more likely to have their matches televised than their similarly skilled female contemporaries.³³ Short males are less likely to be hired, are less likely to be promoted, and earn less than their taller male peers.³⁴

C. Proxy Protection

Level of attractiveness is not currently a recognized protected class in any federal antidiscrimination legislation.³⁵ However, even under the current system, a victim of attractiveness discrimination may receive protection if they can somehow link the discrimination to an existing protected class.³⁶

26. Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195, 205, 212 (2021).

27. HAMERMESH, *supra* note 3, at 145.

28. *Id.* at 174.

29. *Id.* at 75–79.

30. Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity and Discrimination: Lawyers’ Looks and Lucre*, 16 J. LAB. ECON. 172, 184–90 (1998).

31. *Id.* (finding that litigators are the most attractive attorneys, followed by “Corporate or Financial Law” practitioners and “Other.” The least-attractive category of attorneys was “Regulation and Administrative” practitioners).

32. David J. Berri et al., *What Does It Mean to Find the Face of the Franchise? Physical Attractiveness and the Evaluation of Athletic Performance*, 111 ECON. LETTERS 200, 200–02 (2011).

33. *Wimbledon Puts Tennis Babes Front and ‘Centre’*, FOX NEWS (Jan. 8, 2015), <https://www.foxnews.com/world/wimbledon-puts-tennis-babes-front-and-centre>.

34. RHODE, *supra* note 6, at 93.

35. DESIR, *supra* note 5, at 634.

36. *See* Corbett, *supra* note 11, at 158 (This practice is somehow referred to as

Various legal theories have been used to seek redress against attractiveness discrimination using an existing employment discrimination classification. However, this method of protection is largely based on coincidental circumstance and leaves many victims completely unprotected.

In 1980, a court struck down the minimum height requirement for a sheriff's department due to the discriminatory effect on Mexican-Americans.³⁷ In contrast, a different court upheld a ban on braided hair despite its cultural significance and popularity to Black people.³⁸ Beyond legal theories based on race and ethnicity, there have also been sex discrimination claims based on attractiveness. A class-action was filed against Abercrombie & Fitch Co., alleging that Abercrombie's preference for "classic" American looks resulted in discrimination against minority applicants.³⁹ The case was settled with Abercrombie agreeing to pay forty million dollars and agreeing to implement numerous diversity requirements.⁴⁰

In another case, a female television news anchor who was reassigned because of her appearance filed a sex discrimination claim.⁴¹ Despite evidence of disparate attractiveness requirements for male and female employees, the Eighth Circuit dismissed the claim.⁴² In an extremely similar case in California, the California Supreme Court ruled that firing a female employee for "not being hot enough" to sell perfume was in fact unlawful sex discrimination, as a similar standard was not applied to males.⁴³ The Ninth Circuit provided strong language warning against the conflation of attractiveness discrimination with sex discrimination, stating that to allow such claims would "come perilously close to holding that every appearance requirement that an individual finds personally offensive, or in conflict with

"fitting" whereby an appearance discrimination claim must "fit" within an existing protected class in order to receive protection); *see also* Corbett, *supra* note 14, at 632 (explaining how stories and scholarship on appearance-based discrimination may lead to federal policy).

37. Craig v. Cnty. of Los Angeles, 626 F.2d 659, 667–68 (9th Cir. 1980).

38. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

39. *See Abercrombie & Fitch Employment Discrimination*, NAACP LEGAL DEF. FUND (Mar. 17, 2006), <https://www.naacpldf.org/case-issue/abercrombie-fitch-employment-discrimination/> (stating that the case settled for \$40 million dollars and Abercrombie agreed to implement a consent decree requiring the company to institute a range of policies and programs to promote diversity among its workforce and to prevent discrimination based on race or gender).

40. *Id.*

41. Craft v. Metromedia Inc., 766 F.2d 1205, 1209 (8th Cir. 1985).

42. *Id.* at 1216–17.

43. Yanowitz v. L'Oreal USA Inc., 116 P.3d 1123, 1145 (Cal. 2005).

his or her self-image, can create a triable issue of sex discrimination.”⁴⁴ Other attractiveness discrimination claims have been brought using both the ADA and age discrimination.⁴⁵

These examples illustrate not only the possibility of redress from attractiveness discrimination but the difficulty in obtaining it as well. It is also important to consider the relevance of this distinction, whereby attractiveness discrimination is only protected if it happens to coincide with a protected class. While certainly some cases of attractiveness discrimination will be thus aligned, many will not and the victim’s redress should not be so limited. Is someone who was fired for having unsightly missing front teeth any less harmed than someone fired for not possessing the “classic” American look desired by Abercrombie & Fitch? Why should the latter be protected but not the former?

D. State and Local Protections

A few local jurisdictions, one territory, and one state have enacted attractiveness discrimination protections. Santa Cruz, California, has an ordinance prohibiting discrimination based on “physical characteristics.”⁴⁶ The District of Columbia has a statute that includes “personal appearance” as a protected category.⁴⁷ Michigan prohibits discrimination on the basis of height and weight.⁴⁸ Other jurisdictions with attractiveness discrimination protections are San Francisco, California;⁴⁹ Madison, Wisconsin;⁵⁰ Urbana, Illinois;⁵¹ and Howard County, Maryland.⁵² While opponents of federal attractiveness discrimination protections claim that allowing protections

44. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (a waitress who was fired for refusing to wear makeup as required by company guidelines filed a sex discrimination claim against them, as the style guidelines posed a higher burden for women than men).

45. *See Talanda v. KFC Nat’l Mgmt. Co.*, 140 F.3d 1090, 1096–97 (7th Cir. 1998) (a cashier who was fired for missing front teeth did not qualify for protection under the ADA because her condition did not qualify as a disability); *Emlen v. Caterpillar, Inc.*, No. 09-cv-1059, 2011 WL 902177, at *4 (C.D. Ill. Mar. 15, 2011) (ruling against a plaintiff who brought an age discrimination claim based on comments about his gray hair and age).

46. SANTA CRUZ, CAL., MUN. CODE §§ 9.83.010, .020(12) (2010).

47. D.C. CODE ANN. § 2-1401.11 (2001).

48. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2202 (1976).

49. S.F., CAL., CODE § 12A.1 (2000).

50. MADISON, WIS., CODE § 39.03(8) (2010).

51. URBANA, ILL. CODE OF ORDINANCES ch. 12, art. III, § 12-37 (2010).

52. HOWARD COUNTY, MD., CODE § 12.200 (1992).

would result in a flooding of frivolous lawsuits, the above jurisdictions prove this is not the case.⁵³

While state and local protections demonstrate that the concerns of attractiveness discrimination opponents are unlikely to come to fruition, they also demonstrate the need for a uniform, federal standard. Some have argued that state and local legislation is the preferred method of expanding attractiveness discrimination protections,⁵⁴ but achieving these protections through an expansive interpretation of Title VII provides numerous advantages. A significant advantage is that it avoids the problems of how inconsistent the state and local protections would be. Companies with employees in multiple states would have to stay abreast of not only the various state statutes regarding attractiveness discrimination, but also the various state courts' interpretations of those statutes. Even if two states adopted the same legislative language, the respective courts could interpret the language very differently. This situation would be similar to what was experienced trying to protect workers from sexual orientation protections before a uniform standard was applied in *Bostock*.⁵⁵ The existence of inconsistent standards could result in a degrading of the law's moral authority to protect victims of discrimination. Finally, using state legislation could also result in a "race-to-the-bottom" incentive whereby states compete for businesses based on the fewest protections offered, therefore being perceived as more business friendly.⁵⁶

E. *The Case for Attractiveness Discrimination Protections*

This section documents the great costs that are incurred through attractiveness discrimination and therefore the need for protections.

53. See *Id.* at 16–17; Julie Tappero, *Lookism Discrimination*, W. SOUND WORKFORCE, <https://www.westsoundworkforce.com/lookism-discrimination/> (last visited Mar. 24, 2022); RHODE, *supra* note 6, at 16–17, 126–33 (pointing out that some of these jurisdictions have gone consecutive years without a single complaint). In Michigan, for example, only about one lawsuit per year is averaged, and from 1985–2007 only one such lawsuit resulted in final judgment of discrimination.

54. See Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 219 (2000).

55. Michael Conklin, *Good for Thee, But Not for Me: How Bisexuals Are Overlooked in Title VII Sexual Orientation Arguments*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 33, 43–44 (2020).

56. See, e.g., Mark Thoma, *Is Competition to Attract Businesses Harmful?*, CBS NEWS (Feb. 26, 2015), <https://www.cbsnews.com/news/is-competition-to-attract-businesses-harmful/>.

1. *General Harms of Attractiveness Discrimination*

The conflation of appearance with work-related abilities is harmful to both businesses and workers. An example of how society conflates appearance with unrelated abilities is perhaps best illustrated by the reality television show *Britain's Got Talent*. Before contestant Susan Boyle was given the chance to perform, she was laughed at by the audience and condescendingly dismissed by the judges for her homely appearance.⁵⁷ Immediately upon demonstrating her phenomenal singing ability, judges' and audience members' jaws dropped in surprise, and the backstage hosts posited, "I bet you didn't expect that, did you?"⁵⁸ The near-unanimous belief in the concert hall that an unattractive person would not be able to excel at the completely unrelated task of singing demonstrates the illogical nature of attractiveness discrimination. It also demonstrates the harms of mismatch. While Susan Boyle was allowed to demonstrate her abilities and overcome the biases against her, an applicant in a more traditional setting may never be given the opportunity, thus leading to the underutilization of their abilities.

A lot of the harm from attractiveness discrimination extends beyond the workplace context. By perpetuating society's obsession with looks, numerous negative externalities are incurred.⁵⁹ For example, the demanding current beauty standards reinforce economic inequality. This is because they are so costly and time consuming to pursue that they are significantly more unattainable for lower-income individuals.⁶⁰ Because appearance plays such an important role in education, social networking, job placement, and job promotion, it perpetuates lower-income status.⁶¹ The significance placed on being attractive, and the accusatory claim that the unattractive are responsible for their levels of attractiveness, could result in a mindset that the unattractive are deserving of a second-class status.

The harms incurred from attractiveness discrimination appear to be getting worse. A growing number of people have negative perceptions of their bodies.⁶² This is not surprising given that there is never a finish line that can be crossed on the issue—one never reaches perfection. This is what is

57. Davy Leyland, *Susan Boyle - Britain's Got Talent 2009 Episode 1 - Saturday 11th April*, YOUTUBE (Apr. 11, 2009), <https://www.youtube.com/watch?v=RxPZh4AnWyk>.

58. *Id.*

59. Mahajan, *supra* note 9, at 170.

60. RHODE, *supra* note 6, at 96 (citing MICHAEL SANDEL, *THE CASE AGAINST PERFECTION* (2007)).

61. *Id.*

62. *Id.* at 28.

referred to as the “hedonic treadmill,” which means that an improvement in appearance is not met with satisfaction; rather, it just causes the person to obsess on another area of improvement.⁶³ This likely explains the recent emergence of previously unheard-of surgeries such as “cankle” liposuction,⁶⁴ calf implants,⁶⁵ surgical limb lengthening,⁶⁶ and “thigh lifts.”⁶⁷

The harms of attractiveness discrimination are exacerbated through a cruel, self-perpetuating cycle whereby the discriminatory treatment received by the unattractive results in diminished self-esteem and social skills, which in turn compounds their disadvantages.⁶⁸ A similar cycle occurs when discriminatory treatment experienced by the obese causes stress, which results in overeating, which leads to more weight gain and then more stress.⁶⁹

It may be tempting to argue that not all standards of beauty are harmful. For example, the preference for thinness might promote good health. However, it is unclear if even this isolated example is accurate. A recent study concluded that those with a mildly overweight BMI lived longer than those in the lower BMI categories of “healthy” and “underweight.”⁷⁰ Regardless of whether particular areas of attractiveness are linked to positive health outcomes, America’s obsession with being attractive is likely more harmful than helpful when all of the costs are considered.

2. *Link to Sexual Harassment*

The reality of how beauty standards disproportionately harm women is discussed later.⁷¹ Unfortunately, there is an additional way that women are harmed. The practice of male employers discriminating against female employees likely perpetuates harmful stereotypes as to how one of the

63. *Id.* at 30.

64. *Ankles, Cankles, or Calf Liposuction*, PHX. LIPOSUCTION CTR., <https://www.phoenixliposuction.com/procedures/liposuction/ankles-cankles-or-calf-liposuction/> (last visited Mar. 24, 2022).

65. Kristeen Cherney, *Calf Implants: Everything You Want to Know*, HEALTHLINE (Jan. 29, 2019), <https://www.healthline.com/health/calf-implants>.

66. Tom Brada, *Leg-Lengthening: The People Having Surgery to be a Bit Taller*, BBC NEWS (Dec. 5, 2020), <https://www.bbc.com/news/world-55146906>.

67. Kristeen Cherney, *How to Achieve a Thigh Gap with In-Office Procedures*, HEALTHLINE (Aug. 23, 2021), <https://www.healthline.com/health/cosmetic-surgery/thigh-gap-surgery>.

68. RHODE, *supra* note 6, at 42 (noting that nearly eighty percent of people enrolled in weight loss programs respond to stress by increasing caloric intake).

69. *Why Stress Causes People to Overeat*, HARV. MED. SCH. (Feb. 15, 2021), <https://www.health.harvard.edu/staying-healthy/why-stress-causes-people-to-overeat>.

70. Shoaib Afzal et al., *Change in Body Mass Index Associated with Lowest Mortality in Denmark, 1976-2013*, 315 JAMA 1989, 1991 (2016).

71. *See supra* Section II.C.

functions of a female employee is to be aesthetically pleasing to men. Such a mindset is highly conducive to sexual harassment.⁷² For example, in the case of *Brice v. Resch*,⁷³ a woman's job offer was allegedly rescinded after the CEO saw her "body shape" and determined that he "did not consider her the kind of woman he would be inclined to sexually harass"⁷⁴ The plaintiff lost the case based on the theory of at will employment.⁷⁵ Considerations on the likelihood of future sexual harassment as an aspect of the hiring process creates a corporate culture with highly problematic views on sexual harassment. Furthermore, it is easy to imagine the problematic nature in how an employer may, subconsciously or otherwise, feel entitled to have his favorable treatment in hiring an attractive female reciprocated in some way.

3. *Improved Productivity*

"Genius is of small use to a woman who does not know how to do her hair."⁷⁶ This reductionist quote illustrates the harmful reality around our current acceptance of attractiveness discrimination. Namely, the genius of the person from the quote will be wasted—something that not only harms her but also harms her employer and society at large. At best, such a person's genius will only be suboptimally utilized as she invests valuable time on learning how to execute the latest hairstyles rather than perfecting her craft.

Banning the practice of attractiveness discrimination would likely lead to increased productivity in the workforce—and, therefore, superior goods and services for consumers. This is because attractiveness discrimination results in inefficiencies in the hiring and promotion processes. Although some hiring managers view attractiveness as an indicator of work ethic, intelligence, or other positive attributes, it is not.⁷⁷ Likewise, obesity may be viewed as an indication of laziness or a lack of willpower, which is also false.⁷⁸ Therefore, making hiring decisions based on these stereotypes decreases the likelihood that the best candidate will be hired. The resulting mismatch would lead to market inefficiencies in which available labor is not

72. Smith, *supra* note 7.

73. *Brice v. Resch*, No. 10-C-711, 2011 WL 284182 at *1 (E.D. Wis. Jan. 24, 2011).

74. *Id.*

75. *Id.* at *4.

76. EDITH WHARTON, *THE REEF* 8 (1912).

77. Smith, *supra* note 7.

78. Sirena Bergman, *Society Insists that Laziness Makes us Fat - Now Science Proves this is Baseless Bigotry*, *THE INDEPENDENT* (Jan. 25, 2019, 2:31 PM), <https://www.independent.co.uk/voices/fat-overweight-dna-study-thin-people-women-tess-holliday-donald-trump-a8746166.html>.

efficiently utilized.

The negative effects on efficiency from attractiveness discrimination go beyond just hiring and promotion decisions. By placing such importance on attractiveness, employers are sending a message to employees about the significance of attractiveness. Workers seeking career advancement are likely to internalize this lesson and attempt to compete for jobs by focusing in part on their attractiveness.⁷⁹ Similarly, unattractive people who understandably view the system as rigged against them may choose to not attend college, not apply for promotions, or not enter the workforce at all.⁸⁰ Therefore, if attractiveness discrimination was barred, employees would likely focus more on work-related factors to receive employment and promotions, thus improving the overall productivity of the workforce.

Additionally, reduced focus on attractiveness would likely lead to net benefits for people's personal finances and time management. In 2018, Americans spent \$16.5 billion on cosmetic surgery.⁸¹ The average American woman will spend nearly \$226,000 on beauty products throughout her lifetime.⁸² Most women spend nearly an hour a day on their appearance.⁸³ While many people enjoy and find personal and creative benefit in aesthetic routines and practices, such as doing beauty treatments and makeup, not everyone does. So long as attractiveness discrimination continues to be prevalent in the workforce, people will feel forced to spend time and money on their appearance, whereas they may have preferred to spend those resources elsewhere. Reducing attractiveness discrimination increases productivity by allowing these people to freely spend their time and resources on other pursuits they value more greatly.

F. Potential Protection Through the ADA

This Article argues for providing attractiveness discrimination protections

79. Smith, *supra* note 7.

80. HAMERMESH, *supra* note 3, at 57 (referencing studies that demonstrate how “[b]eing [unattractive] causes women to do house work, because the gains to working for pay are less than they are for better-looking women”).

81. *Americans Spent More than \$16.5 Billion on Cosmetic Plastic Surgery in 2018*, AM. SOC’Y OF PLASTIC SURGEONS (Apr. 10, 2019), <https://www.plasticsurgery.org/news/press-releases/americans-spent-more-than-16-billion-on-cosmetic-plastic-surgery-in-2018>.

82. SWNS, *Vanity Costs American Women Nearly a Quarter of a Million Dollars*, N.Y. POST (July 6, 2017, 12:57 PM), <https://nypost.com/2017/07/06/vanity-costs-american-women-nearly-a-quarter-of-a-million-dollars/>.

83. Chanel Parks, *78 Percent of Women Spend an Hour a Day on Their Appearance, Study Says*, HUFFINGTON POST (Feb. 24, 2014), https://www.huffpost.com/entry/women-daily-appearance-study_n_4847848.

through an expansive interpretation of Title VII. Some scholars have advocated for attempting to reach a similar result through the Americans with Disabilities Act (“ADA”). This section explains how protection through the ADA could be accomplished and argues that obtaining protection through Title VII is the preferable course of action.

Those who advocate for attractiveness discrimination protections through a reinterpretation of the ADA generally do so by pointing out that the ADA protections are not limited to people with “a physical or mental impairment that substantially limits one or more major life activities.”⁸⁴ The ADA goes on to include people “regarded as having such an impairment,” defined as existing, “if the individual establishes that he or she has been subjected to an action prohibited . . . whether or not the impairment limits or is perceived to limit a major life activity.”⁸⁵ Therefore, it could be argued that this extension of the definition of a disability could be interpreted to include the unattractive.⁸⁶

A statement from the Equal Employment Opportunity Commission (“EEOC”) regarding an employee with a port wine stain on her face due to Sturge-Weber Syndrome indicates that the ADA could be used for grounding attractiveness discrimination protections.⁸⁷ The EEOC released a press release on the matter stating:

One of the worst types of discrimination occurs when an individual with a cosmetic disfigurement is denied a job because of the unjustified belief that customers will be offended simply by seeing that person. The opportunity to make a living in the workplace is not restricted to models and movie stars but is the promise held out to every person with talent, skills and ambition.⁸⁸

While the victims of attractiveness discrimination generally do not possess a “disfigurement” due to a medically diagnosed syndrome, the mentality embodied in the EEOC’s statement could still be applied. People should not be denied their livelihoods due to an employer’s belief that customers may disapprove of their appearance. And it would likely make little difference to the victim of discrimination if such discrimination was the result of a medical

84. HAMERMESH, *supra* note 3, at 150.

85. 42 U.S.C. § 12102(3).

86. HAMERMESH, *supra* note 3, at 151.

87. *EEOC Sues McDonald’s Restaurant for Disability Bias Against Employee with Facial Disfigurement*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 7, 2003), <https://www.eeoc.gov/newsroom/eeoc-sues-mcdonalds-restaurant-disability-bias-against-employee-facial-disfigurement> [hereinafter “EEOC Press Release”].

88. James J. McDonald, Jr., *Civil Rights for the Aesthetically-Challenged*, 29 EMPLOYEE RELS. L.J. 118, 121—22 (2003).

condition that left a visible disfigurement or just being born with features not associated with being attractive. It is odd to offer stringent protections to the former and none to the latter.

However, this method for obtaining federal attractiveness discrimination protections has significant downsides. It would not offer any protections to people who were discriminated against for being too attractive. As previously discussed, this would be a problem for women.⁸⁹ Additional categories of attractiveness discrimination would also not be covered if the ADA were expanded to include people who were discriminated against not because they were unattractive but because someone else even more attractive received preferential treatment. For example, hiring a man who is 6'4" over a more qualified man who is 5'11" would not be covered since, even under an expansive interpretation of the ADA, a 5'11" man is not "regarded as having an impairment."

Another downside to pursuing attractiveness discrimination protections through the ADA is that, while the severity of harm from attractiveness discrimination may be indistinguishable from that experienced by a disabled person, labeling the unattractive as disabled may ultimately do more harm than good. It could function to expand the perceived importance of being attractive and therefore increase negative externalities related to the obsession with appearance, such as eating disorders, depression, inefficient use of time and money spent on improving appearance, etc. Additionally, it could function as a powerful deterrent to those who have a legitimate case for attractiveness discrimination who may be hesitant to plead that their appearance constitutes a disability.

III. INTERPRETING TITLE VII TO INCLUDE ATTRACTIVENESS DISCRIMINATION PROTECTIONS

A. Introduction

This section provides numerous arguments on why Title VII should be interpreted by courts to include attractiveness discrimination protections. As this section illustrates, doing so would be consistent with the clear trajectory of Title VII protections, which have steadily expanded over time. Attractiveness discrimination is intrinsically linked to racial and gender discrimination. Because these classes are explicitly protected under Title VII, attractiveness discrimination is de facto covered under Title VII. This is the same rationale from *Bostock* that allowed for the interpretation of Title

89. Stefanie K. Johnson et al., *Physical Attractiveness Biases in Ratings of Employment Suitability: Tracking Down the "Beauty Is Beastly" Effect*, 150 J. Soc. PSYCH. 301, 314–15 (2010).

VII to include sexual orientation discrimination even though it is not explicitly listed as an enumerated protected class.⁹⁰ Doing so is also consistent with the legislative purpose of Title VII. Finally, protecting victims of attractiveness discrimination through an expansive interpretation of Title VII offers numerous benefits when compared to the alternatives of federally enacted legislation, state and local protections, and protections through the ADA.

B. The Ever-Expansive Nature of Title VII

Even before Title VII was enacted into law, the breadth of its future coverage was expanding. The language of Title VII originally only included protections for discrimination on the basis of race, color, religion, and national origin.⁹¹ The addition of “sex” as a protected class was included on the final day of debate in the House.⁹²

The history of Title VII adjudications demonstrates a clear trajectory of liberality in enforcement. Title VII originally did not apply to associational race discrimination claims until the 1980s,⁹³ nor in associational gender discrimination claims until 2018.⁹⁴ The causation requirement has been relaxed and lessened.⁹⁵ Title VII has been extended to include prohibitions on workplace sexual harassment,⁹⁶ and then to workplace racial and national

90. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753–54 (2020).

91. See, e.g., Ronald Turner, *Title VII and the Unenvisioned Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L.J. 227, 230 (2020).

92. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–16 (1985).

93. Andrew W. Powell, *Is There a Future for Sex-Based Associational Discrimination Claims Under Title VII?*, 66 LAB. L.J. 164, 165–66 (2015).

94. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 125 (2d Cir. 2018) (“We now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”).

95. Turner, *supra* note 92, at 236 (“Beginning in 1991, Title VII plaintiffs alleging status-based (race, color, religion, sex, or national origin) discrimination can satisfy a relaxed and lessened causation standard by ‘show[ing] that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives which were causative in the employer’s decision.’” (quoting Univ. of Tex. Sw. Med. Ctr. V. Nassar, 570 U.S. 338, 343 (2013))).

96. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 346 (1990) (“In all likelihood, the members of Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term ‘sexual harassment’ did not come into currency until the late 1970s.”).

origin harassment.⁹⁷ It originally did not apply to state and local governments and educational institutions.⁹⁸ At present, Title VII treats pregnancy discrimination as a form of protected sex discrimination but was not originally interpreted to do so.⁹⁹

The Supreme Court extended Title VII sex-based discrimination protections to same-sex harassment in 1998.¹⁰⁰ In *Price Waterhouse v. Hopkins*, the Supreme Court extended Title VII because of sex protections to the victims of gender stereotyping.¹⁰¹ The Equal Employment Opportunity Commission (“EEOC”) previously held that Title VII did not provide protections against sexual orientation discrimination¹⁰² but then maintained that it did.¹⁰³ In 2015 the EEOC stated that it “interpreted and enforced Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.”¹⁰⁴

The issue of sexual orientation discrimination protections under Title VII

97. Turner, *supra* note 92, at 239.

98. Carol Nackenoff, *The Supreme Court Hears Arguments on the Meaning of “Sex Discrimination,”* GENDER POL’Y REP. (Oct. 8, 2019), <https://genderpolicyreport.umn.edu/meaning-of-sex-discrimination/>.

99. *Id.*

100. *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

101. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989).

102. Katherine Carter, *Questioning the Definition of “Sex” in Title VII: Bostock v. Clayton County*, GA, 15 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 59, 72 (2020).

103. *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Mar. 15, 2020) (“Discrimination against an individual because of . . . sexual orientation is discrimination because of sex in violation of Title VII.”). Although, note that Attorney General Jeff Sessions responded to this by claiming that “the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade.” See Nackenoff, *supra* note 99. Also note that the EEOC supported this position before the outcome of the Supreme Court case on the matter in *Bostock*.

104. *What You Should Know: The EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 4, 2015), <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-enforcement-protections-lgbt-workers>. However, relevant to the theme of this Article, the explanations provided by the EEOC as to how “sexual orientation” is protected under Title VII seem to focus on lesbian, gay, and transgender individuals while omitting protections for bisexual individuals. In the section “Examples of LGBT-Related Sex Discrimination Claims,” multiple examples are provided for transgender discrimination. Also, “Denying an employee a promotion because he is gay or straight” is also provided, but no explicit example of how Title VII protections apply to bisexual individuals is provided.

provides an excellent illustration for how attractiveness discrimination protections should be protected under Title VII. The text of Title VII does not include any reference to sexual orientation or gender identity.¹⁰⁵ Furthermore, it is highly unlikely that the 1964 legislature intended for Title VII to offer protections for these two classifications.¹⁰⁶ For the majority of the history of Title VII, there was little support for such a reinterpretation.

Much like the course of action this Article advocates for with attractiveness discrimination protections, Title VII sexual orientation protections were not accomplished by rewriting Title VII to explicitly include “sexual orientation” as an enumerated protected class.¹⁰⁷ Instead, sexual orientation was protected by linking to the existing “sex” protected class.¹⁰⁸

Interpreting Title VII in an increasingly expansive manner is consistent with the legislative purpose of Title VII, which was to ensure equal opportunity in the workplace for all in “a nation dedicated to the proposition that all men are created equal.”¹⁰⁹ Title VII seeks to accomplish this through promoting employment decisions based solely on qualifications.¹¹⁰ The immense harm incurred by workers who are denied promotions and employment due to attractiveness discrimination is clearly inconsistent with this legislative purpose.

C. Gender

Much like sexual orientation, attractiveness discrimination is also inherently linked to existing protected classes. Women, a protected class

105. *Id.* (“Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases . . .”).

106. *See* Conklin, *supra*, note 55, at 42 (explaining how gay and lesbian people were considered “presumptive felons” and “literally, considered psychopaths, criminals, and enemies of the people” at the time).

107. *See, e.g.,* *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 343 (7th Cir. 2017) (explaining that “[o]bviously that lies beyond our power.”). Note that this is consistent with the EEOC’s position that that it is not “recogniz[ing] any new protected characteristics under Title VII. Rather [the EEOC] has applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals;” *What You Should Know*, *supra* note 105.

108. As the petitioner’s attorney in *Bostock* explained at oral argument, “[w]hen an employer fires a male employee for dating men but does not fire a female employee who dates men, he violates Title VII.” Oral Argument at 0:15, *Bostock*, No. 17-13801, <https://www.oyez.org/cases/2019/17-1618>.

109. S. REP. NO. 872, 88th Cong., 2d Sess. 8 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2362 (quoting “Building a Better America,” Republican Platform 1960).

110. 1110 CONG. REC. 7188, 7247 (1964).

under Title VII, face disproportionate beauty expectations when compared to men.¹¹¹ Perhaps this is because men are often the ones in positions of power who set the standards,¹¹² and men are more likely than women to judge candidates by their appearances.¹¹³ Regardless of the explanation, it is clear that women are more likely to face unfair treatment based on their attractiveness. Obesity decreases the odds of marriage twice as much for women as for men.¹¹⁴ The status of a man is generally enhanced if he is with an attractive woman, but a woman with an attractive man receives no such status boost.¹¹⁵ Nearly ninety percent of cosmetic surgery patients are female.¹¹⁶ The obesity penalty in earnings is more pronounced for women than men.¹¹⁷ The perception of a woman's attractiveness decreases with age at a more rapid rate than it does for men.¹¹⁸ Women experience significantly more stringent and difficult-to-obtain beauty standards than men.¹¹⁹ And attractive women experience a "beauty is beastly" obstacle when pursuing a traditionally masculine career, while there is no corresponding obstacle for unattractive women in these careers or for men pursuing a traditionally feminine career.¹²⁰ Even if men and women were victimized by attractiveness discrimination at the same rates, gender discrimination would still be present because women incur a much greater cost in obtaining an acceptable standard of attractiveness than men do.¹²¹

Under existing case law, disparate appearance standards, which impose a greater burden on women, have been upheld. In *Jespersion v. Harrah's Operating Co.*, the court upheld style guidelines that clearly imposed more

111. See Mahajan, *supra* note 9, at 167, 171; Jones, *supra* note 9.

112. *Why Are There More Male Entrepreneurs Than Female Ones?*, WHARTON U. PA. (Dec. 14, 2015), <https://knowledge.wharton.upenn.edu/article/why-are-there-more-male-entrepreneurs-than-female-ones/>.

113. Roy Maurer, *Survey: Male Recruiters More Likely to Judge Candidates on Appearance*, SHRM (Nov. 14, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/survey-male-recruiters-more-likely-to-judge-candidates-on-appearance.aspx>.

114. RHODE, *supra* note 6, at 30.

115. *Id.*

116. *Id.* at 97.

117. HAMERMESH, *supra* note 3, at 53.

118. *Id.* at 30 (measuring perceived attractiveness in people aged 18–29 compared to 50–64 and finding that men only decreased from thirty-six percent to twenty-one percent, while women decreased from forty-five percent to eighteen percent).

119. Jones, *supra* note 9.

120. Johnson et al., *supra* note 90, at 313–14.

121. Jones, *supra* note 9.

of a burden on female employees.¹²² Male guidelines prohibited long hair, makeup, and nail polish, while requiring trimmed nails and solid black shoes.¹²³ Female guidelines stipulated that “hair must be teased, curled, or styled” and “worn down” and required stockings, nail polish, makeup, and heels.¹²⁴

Women not only face attractiveness discrimination for not being attractive enough but also for being too attractive. While there appears to be no downside for an attractive male in the workplace, the same is not true for women. This is sometimes referred to as the “blopsy effect”¹²⁵ or less generously as the “bimbo effect.”¹²⁶ Here, a woman’s attractiveness may be interpreted as an indication of incompetence and diminished intellectual ability.¹²⁷ Similarly, women with large breasts are perceived as less intelligent.¹²⁸ Opinions on attractiveness discrimination are consistent with the understanding that women are disproportionately harmed by the practice. While forty-six percent of men believe that employers should have the right to discriminate based on looks, only thirty-two percent of women do.¹²⁹

D. Race and Ethnicity

People of color are also disproportionately victimized by attractiveness discrimination. This is primarily due to how standards of beauty are shaped by the general cultural consensus of the majority.¹³⁰ Since white people are the dominant group in the United States, it is their values of appearance, aesthetics, and grooming that are imposed on the rest of society.¹³¹ A 1996 study conducted in the United States illustrated this reality by surveying Caucasian, Black, Asian, Hispanic, and Native Americans and asking them, after excluding their race, which race is the most attractive.¹³² The most

122. Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261, 265 n.24 (2006).

123. *Id.*

124. *Id.*

125. RHODE, *supra* note 6, at 31.

126. Adriana Barton, *Unemployed? You Might be Too Pretty*, GLOBE & MAIL (Apr. 10, 2012), <https://www.theglobeandmail.com/life/the-hot-button/unemployed-you-might-be-too-pretty/article4099428/>.

127. RHODE, *supra* note 6, at 31.

128. *Id.*

129. *Id.* at 103.

130. Mahajan, *supra* note 9, at 167.

131. *Id.* at 171.

132. Jie Zhang, *Patterns of Physical Preference Among Races: A Preliminary Study with College Students*, 83 PERCEPTUAL & MOTOR SKILLS, 901, 901 (1996).

attractive race was determined to be Caucasian.¹³³ Not surprisingly, some of these Caucasian-based beauty standards are highly incompatible with non-white races. For example, Eurocentric preferences for smaller noses and long, straight hair are problematic for Black women.¹³⁴

The intersectionality of attractiveness discrimination functions to magnify other forms of discrimination, such as that experienced by racial minorities. For example, socioeconomic status is magnified in attractiveness discrimination because of the cost associated with the pursuit of beauty standards.¹³⁵ Because racial minorities are disproportionately likely to be of low socioeconomic status, they are less likely to be able to invest the money in their appearance and are therefore more likely to be a victim of attractiveness discrimination. Opinions on attractiveness discrimination are consistent with the understanding that racial minorities are disproportionately harmed by the practice. While forty-one percent of whites believe that employers should have the right to discriminate based on looks, only twenty-four percent of non-whites do.¹³⁶

E. Conclusion

As this section illustrates, the notion of an employer discriminating on the basis of attractiveness with such precision that the protected categories of gender, race, and ethnicity are in no way implicated is a fiction. Even if this fictional employer existed, such a practice would still have a discriminatory effect on these protected classes because the costs of adhering to attractiveness standards falls disproportionately on women and minorities. For these reasons, interpreting Title VII to include attractiveness discrimination protections is remarkably parallel to how Title VII was interpreted to include protections against sexual orientation discrimination

133. *Id.*

134. See Tamara Gilkes Borr, “I Spent Thousands on Chemical Straightening”: The Price of Having Black Hair in a White World, *THE ECONOMIST* (May 27, 2021), <https://www.economist.com/1843/2021/05/27/i-spent-thousands-on-chemical-straightening-the-price-of-having-black-hair-in-a-white-world>; Jack Guy, *Black Women with Natural Hairstyles Are Less Likely to Get Job Interviews*, CNN BUS. (Aug. 12, 2020, 12:26 PM), <https://www.cnn.com/2020/08/12/business/black-women-hairstyles-interview-scli-intl-scn/index.html>; Kimberly Bertrand, *25-Year-Long Study of Black Women Links Frequent Use of Lye-Based Hair Relaxers to a Higher Risk of Breast Cancer*, PBS NEWSHOUR (July 14, 2021, 2:32 PM), <https://www.pbs.org/newshour/health/25-year-long-study-of-black-women-links-frequent-use-of-lye-based-hair-relaxers-to-a-higher-risk-of-breast-cancer>.

135. RHODE, *supra* note 6, at 96.

136. *Id.* at 103.

in *Bostock*.¹³⁷ In both instances, the language and original intent of Title VII do not offer protection, Title VII was interpreted for a long time to not include such protections, and the protections in question are intrinsically linked to enumerated classifications.

Likewise, the pragmatism with how sexual orientation protections were connected to Title VII would also apply to attractiveness discrimination protections. This method does not rely on elected politicians who may be easily swayed by alarmist claims as to the effects of protecting victims of attractiveness discrimination.¹³⁸ Achieving protections through an interpretation of Title VII results in a universally applied standard that avoids the many problems of relying on various state and local protections.¹³⁹ This method does not rely on the mere coincidence of attractiveness discrimination being overtly linked to a protected class to offer protections to victims, therefore providing consistency and predictability for both workers and employers. Finally, attaining attractiveness discrimination protections through the current language of Title VII means that existing, well-developed case law would be applied. Issues such as the burden of proof, burden shifting, disparate impact, damages, customer preference, and bona fide occupational qualification have already been established and are well defined. The existence of this developed framework provides additional consistency and predictability that might not be present with alternative options.

IV. OBJECTIONS TO ATTRACTIVENESS DISCRIMINATION PROTECTIONS WITH RESPONSES

Nearly sixty years after the passage of Title VII of the Civil Rights Act, there remains no federal protection for attractiveness discrimination. Therefore, it comes as no surprise that there are numerous objections to such protections. This section will present these objections followed by a response that will explain how, when properly understood, these objections are more accurately understood as evidence in favor of the protection, not against it. Furthermore, many of these same objections could have been made with equal force to argue against the implementation of existing

137. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

138. *See, e.g.*, Cavico et al., *supra* note 16, at 103 (“[I]t appears unlikely that the national legislature has the fortitude to even attempt to vest appearance as a protected class.”); Hannah Alsgaard, Book Note, 27 *BERKELEY J. GENDER, L. & JUST.* 142, 148 (2012) (reviewing DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010)) (“[T]here seems to be no substantial evidence that the passage of these laws is possible.”).

139. *See* Section I.D., *supra*.

discrimination protections.

A. Subjective Nature of Attractiveness

OBJECTION: Level of attractiveness is a highly subjective determination. As the adage goes, “beauty is in the eye of the beholder.” It is ill-advised to offer protections for such an amorphous and subjective topic.¹⁴⁰ Widespread disagreement on who is unattractive enough to receive protection would render the pursuit futile.¹⁴¹ Furthermore, as James J. McDonald, Jr., illustrates:

Will the prima facie case require proof of a certain level of unattractiveness? Will there be a national standard of attractiveness established by [Equal Employment Opportunity Commission (“EEOC”)] rulemaking? Or will it be left to judges and juries to decide on a case-by-case basis? Will beauty contest judges go on to find lucrative careers as expert witnesses in these cases?¹⁴²

RESPONSE: Level of attractiveness is certainly more subjective than a person’s age. There does exist a general consensus as to what traits are attractive. Some existing protected classes likewise involve subjective determinations. Finally, the notion that judges and juries would somehow be tasked with making determinations regarding threshold levels of attractiveness and who is and is not attractive is unfounded.

Evidence for the existence of commonly accepted principles of attractiveness are abundant. For example, the existence of competitions like beauty pageants and *People* magazine’s Sexiest Man Alive Award point to a general consensus on the matter. This is because in the absence of such a general consensus, these contests would be reduced to mere lotteries, with everyone having an equally random chance of winning. The fact that Channing Tatum, David Beckham, and Michael B. Jordan have won *People*’s Sexiest Man Alive award¹⁴³ and not Steve Buscemi, Willem Dafoe, and Paul Giamatti, demonstrates that attractiveness is at least somewhat agreed upon. Furthermore, if there were no common standards of attractiveness, then it would have no economic value, as it could be neither

140. James, *supra* note 13.

141. HAMERMESH, *supra* note 3, at 156 (“Could we even agree on which people are sufficiently bad-looking as to merit protection under some policy designed to aid this particular group?”).

142. McDonald, *supra* note 89, at 118.

143. Callie Ahlgrim, *All 33 Guys Who Have Been Named People Magazine’s Sexiest Man Alive*, BUS. INSIDER (Nov. 10, 2021), <https://www.insider.com/who-has-been-sexiest-man-alive-people-2018-11>.

identified nor scarce.¹⁴⁴ Because research into the subject emphatically shows that attractiveness bestows numerous advantages to those who possess it, this demonstrates that there is a common standard of attractiveness.

Research into the subject also finds that, while not perfectly uniform, there is widespread agreement as to who is attractive.¹⁴⁵ These consistently reliable results of attractiveness perceptions come from a “truth in consensus” method whereby study participants rank pictures of people and the averages of these rankings are compared.¹⁴⁶ This method yields high levels of agreement regarding level of attractiveness even across different races, ages, socioeconomic statuses, and genders.¹⁴⁷ Some features have even consistently been perceived as attractive throughout history.¹⁴⁸ These include facial and body symmetry, clear skin, youth in females, and height in males.¹⁴⁹

There are also objective measures that have a high correlative value to perceived attractiveness. Body mass index (“BMI”) is an objective number produced by comparing a person’s weight with his or her height.¹⁵⁰ A person’s BMI may correlate to how attractive he or she is perceived¹⁵¹ even though there are exceptions, such as men whose high muscle mass produces a high BMI despite maintaining a lean look.¹⁵² There are also facial symmetry scores utilizing the Golden Ratio that produce an objective number highly correlative of perceived attractiveness.¹⁵³

Subjectivity is not grounds for denying protection, as demonstrated by how some existing protected classes are subjective as well. For example, the

144. HAMERMESH, *supra* note 3, at 24.

145. *Id.* at 25–27.

146. RHODE, *supra* note 6, at 24.

147. *Id.*

148. *Id.* at 46.

149. *Id.*

150. See *Body Mass Index (BMI) Calculator*, DIABETES CANADA, [https://www.diabetes.ca/managing-my-diabetes/tools---resources/body-mass-index-\(bmi\)-calculator](https://www.diabetes.ca/managing-my-diabetes/tools---resources/body-mass-index-(bmi)-calculator) (last visited Mar. 24, 2022) (illustrating the formula as kg/m²).

151. See Tracy K. Richmond, S. Bryn Austin, Courtney E. Walls & S.V. Subramanian, et al., *The Association of BMI and Externally Perceived Attractiveness Across Race/Ethnicity, Gender, and Time*, 50 J. ADOLESCENT HEALTH 74, 75 (2012).

152. See, e.g., Alice Stone, *Dwayne ‘The Rock’ Johnson Is Technically Obese Because Science is Complicated*, SHOWBIZ CHEATSHEET (Oct. 15, 2019), <https://www.cheatsheet.com/entertainment/dwayne-the-rock-johnson-is-technically-obese-because-science-is-complicated.html/> (explaining that Dwayne Johnson’s BMI is 34, thus categorizing him as “obese” despite being widely recognized as attractive).

153. Emmanuel P. Prokopakis et al., *The Golden Ratio in Facial Symmetry*, 51 RHINOLOGY 18 (2013).

threshold for when an ailment qualifies as a disability is subjective.¹⁵⁴ There is also no universally agreed upon standard for how to determine race/ethnicity. The very notion of different races and ethnicities itself is ultimately just an “arbitrary biological fiction.”¹⁵⁵ Even DNA tests are insufficient to determine race.¹⁵⁶ This reality has led some experts to posit that governmental classifications based on race “should be dismissed out of hand if for no other reason than the government has no scientific or other reasonable basis for determining who qualifies as [what race].”¹⁵⁷

In recent years, even gender has become recognized by many as a subjective, fluid concept.¹⁵⁸ Some religions maintain well-defined tenants of belief but the line as to what exactly constitutes an adherent of one religion or another is often unclear. And the sexual orientation classification is subjective as well, with heterosexuality and homosexuality often being described not as two binary categories, but rather as a broad spectrum.¹⁵⁹ Contrary to objectivity being the standard for protected classes, it is the exception, with age being the sole classification which does not contain any subjectivity.

Despite assertions to the contrary, attractiveness discrimination protections would not require plaintiffs to prove that they are unattractive.¹⁶⁰

154. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 213 (2000) (“[M]uch of the of the larger disagreement over the Americans with Disabilities Act can be characterized as a clash of perspectives about the meaning of disability.”).

155. Ritchie Witzig, *The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct*, 125 ANNALS INTERNAL MED. 675, 675 (1996).

156. This is because “[y]ou cannot rely on DNA evidence alone to decide what is really a socially constructed concept.” Sarah Zhang, *A Man Says His DNA Test Proves He’s Black, and He’s Suing*, THE ATL. (Sept. 19, 2018), <https://www.theatlantic.com/science/archive/2018/09/dna-test-race-lawsuit/570250/>.

157. David E. Bernstein, *Two Decades Ago, the FDA and NIH Mandated the Use of Race to Categorize Subjects and Report Results in Medical and Scientific Research They Oversee. It was a Huge Mistake*, YALE J. ON REG. (July 27, 2020), <https://www.yalejreg.com/nc/two-decades-ago-the-fda-and-nih-mandated-the-use-of-race-to-categorize-subjects-and-report-results-in-medical-and-scientific-research-they-oversee-it-was-a-huge-mistake-by-david-e-bernstein/>.

158. See *US Proposal for Defining Gender Has no Basis in Science*, NATURE (Oct. 30, 2018), <https://www.nature.com/articles/d41586-018-07238-8> (“The research and medical community now sees sex as more complex than male and female”).

159. See Dan Brennan, *What is the Sexuality Spectrum*, WEBMD (June 29, 2021), <https://www.webmd.com/sex/what-is-sexuality-spectrum>.

160. See Tappero, *supra* note 53 (“Who would define the parameters of what is good looking and what is unattractive?”); James, *supra* note 13, at 662 (“Enforcing an

A plaintiff would only need to prove that they were discriminated against because of a perception of attractiveness. Even someone who was discriminated against for being considered too attractive would be protected. This framework is similar to existing anti-discrimination legislation. For example, discriminating against someone for erroneously believing they are a particular national origin is still actionable discrimination.¹⁶¹ Likewise, discriminating against someone based on the mistaken belief that the person possesses a disability is also actionable.¹⁶²

In conclusion, attractiveness is less subjective than this objection asserts. More importantly, attractiveness discrimination protections would not require judicial determinations as to who qualifies as unattractive. Therefore, even if attractiveness were entirely subjective, these protections would not be hindered because they are based on an employer's perceived attractiveness determinations, not the existence of an objective standard. The same person could receive protections if the evidence showed that she was fired at one job for being perceived as unattractive and at another job for being perceived as too attractive.

B. Likelihood of Inconsistent Results

OBJECTION: Beauty is not only subjective, but it is also multi-faceted. While other discrimination protections only encompass one attribute (age, race, sex, etc.), attractiveness discrimination would encompass numerous attributes. Examples include facial symmetry, acne, baldness, height, weight, body proportions, eye color, jawline prominence, teeth color/alignment, etc. Even more problematic is the great variance within these attributes. An employer might generally believe that baldness is an undesirable attribute while concurrently maintaining that Bruce Willis,

appearance discrimination law is wholly impracticable because if beauty truly 'is in the eye of the beholder,' it will be too difficult for courts to determine when employers have such a discriminatory motive."); McDonald, *supra* note 89, at 127 ("Will there be a national standard of attractiveness established by EEOC rulemaking?"); Cavico et al., *supra* note 16, at 103 ("[This] would logically necessitate a 'sliding scale of ugliness,' consequently placing judges in an unenviable position to apply such a standard on a case-by-case basis to determine if a plaintiff employee or job applicant falls within this newly defined, yet descriptively abstract, new type of protected class."); HAMERMESH, *supra* note 3, at 156 ("Could we even agree on which people are sufficiently bad-looking as to merit protection under some policy designed to aid this particular group?").

161. See, e.g., Equal Emp. Opportunity Comm'n v. WC&M Enters., 469 F.3d 393, 397 (5th Cir. 2007) (noting that co-workers harassed plaintiff by making statements that he was Arabic and a part of the Taliban, despite the fact that he was Indian).

162. See 42 U.S.C. §§ 12102(1)(C), 12102(3) (requiring that the plaintiff need only show that he or she was "regarded as" disabled by the employer under the ADA).

Dwayne “The Rock” Johnson, and Jason Statham—all bald—are nevertheless attractive.

These issues will inevitably lead to inconsistent results in the enforcement of attractiveness discrimination protections. For example, the District of Columbia’s ordinance protecting those discriminated against for their appearances has been alleged to produce inconsistent results because “one employer may discriminate against a bald applicant because he perceives baldness as unattractive, when another employer may discriminate against an applicant with dark eyes for the same reason.”¹⁶³

RESPONSE: This objection is fatally flawed. Pointing out that attractiveness discrimination protections could result in protections for multiple traits, such as baldness, eye color, and facial symmetry, does not demonstrate inconsistency. If these three people were all discriminated against, then they all deserve protections. What is inconsistent, is the current system, which in effect protects some from attractiveness discrimination and not others. For example, someone who is not hired because the employer perceives him or her as unattractive due to wrinkly skin may be protected—because this would be covered age discrimination. But someone who was not hired because the employer perceived his or her crooked teeth as unattractive would not be protected. Here, the true inconsistency is shown: two people being fired for being unattractive and one of them is protected, while the other one is not.

C. Detrimental Effects of Adding More Protected Classes

OBJECTION: As a Wisconsin court explained in describing its decision to uphold a CEO’s ability to not hire an applicant he viewed as unattractive, “[t]o hold otherwise would open a Pandora’s box and create a protected class out of millions of at-will employees who could allege they were fired or passed over because they had gained a few pounds over the holidays or developed a pimple.”¹⁶⁴ Not only would adding attractiveness as a protected class significantly increase the number of characteristics that qualify for

163. James, *supra* note 13, at 660–61. Notably, the examples in this hypothetical are already potentially covered under existing federal discrimination protections. Discriminating against bald applicants could potentially be covered as gender discrimination since men are more likely to be bald than women. Similarly, discriminating against people with dark eyes could potentially be covered under race discrimination protections since Black and Hispanic people are more likely to have dark eyes than white people.

164. *Brice v. Resch*, No. 10-C-711, 2011 WL 284182, at *4 (E.D. Wis. Jan. 24, 2011).

protection;¹⁶⁵ it would also correspond with a drastic increase in the likelihood of litigation costs, potential liability, and human resource compliance costs for purely benign hiring decisions that may be perceived as discriminatory simply by random chance. This is due to the unique nature of employment discrimination claims, in which a case can be made, and the burden of proof shifted to the employer, by a mere showing that the employer's policy or practice causes statistical imbalances with respect to the plaintiff's protected class.¹⁶⁶ These imbalances become increasingly probable—through random chance and not intentional discrimination—the more characteristics there are to measure. For example, if there were only one protected class, there would be only a five percent probability that a given place of employment would fall outside a ninety-five percent normal distribution, absent intentional discrimination. But with ten protected classes, the probability that a place of employment falls outside a ninety-five percent normal distribution on at least one of the protected classes rises to forty percent, absent intentional discrimination. Therefore, adding a protected class and increasing the number of characteristics within the new protected class unjustifiably places too much risk on employers.¹⁶⁷

RESPONSE: With each additional protected class, the marginal costs and benefits must be considered. Yes, one of the costs is the litigation expenses that may be incurred by businesses that were not engaged in a discriminatory practice. But this is the case for every protected classification, not just attractiveness. There is even reason to believe that false accusations of attractiveness discrimination would be less frequent than those present in other classifications. This is because workers are likely to be less willing to allege they were discriminated against for being unattractive than for their race or gender.¹⁶⁸

165. As previously mentioned, this would include characteristics such as height; weight; lack of acne; facial symmetry; hair color, volume, and style; teeth whiteness and alignment; skin color; lack of wrinkles; muscle mass in men; and body proportionality in women.

166. See Kevin Tobia, *Disparate Statistics*, 126 YALE L. J. 2382, 2389 (2017).

167. See, e.g., Corbett, *supra* note 11, at 173 (“The less cohesive and identifiable (and the more amorphous) a group characteristic is, the more it arguably intrudes on the freedom of employers to make decisions without fear of liability for violating an employment discrimination law. Consider an employer contemplating firing an employee. The employer may want to know whether it is likely to be sued and incur substantial cost in defending an employment discrimination lawsuit. For race, color, sex, and to some extent national origin, the employer can observe or discern the potential plaintiff's characteristics.”).

168. See Chuck Campbell, *Most Americans Think They're More Attractive Than Most*

It is also true that existing protections against age, race, and sex discrimination only protect a singular trait.¹⁶⁹ But the fact that attractiveness discrimination protections would encompass numerous traits is of limited value in arguing against its implementation. Existing disability protections are likewise multifaceted, covering conditions such as an amputated limb, blindness, deafness, carpal tunnel syndrome, paralysis, etc. It does not logically follow that because one type of protection is based on a singular trait and another is based on numerous traits, the former should be enacted and not the latter.

With each protected class—both currently existing and potentially considered—one must weigh the benefits of implementation with the costs. Such deliberation would include the costs to businesses of litigating frivolous claims and increased human resources compliance costs. And with every classification, if the benefits outweigh the costs, then that classification should receive protection.¹⁷⁰ Such consideration ends at this point. There is no special exception for why a classification should not be protected based on an accumulation of protected classes objection.

D. Adverse Selection

OBJECTION: A significant problem exists with proving attractiveness discrimination in court. There would be a naturally occurring incentive for people to not pursue an attractiveness discrimination cause of action, because doing so would require them to acknowledge in public documents that they are unattractive.¹⁷¹ A comical depiction of this problem was illustrated in a recent law journal Article:

“Judge: You say your employer discriminated against you because of your appearance. What do you mean?

Plaintiff: I mean because I am ugly, Your Honor.

Other Americans, Survey Says, KNOX NEWS (Aug. 27, 2018), <https://www.knoxnews.com/story/entertainment/2018/08/27/hot-americans-sexy-rate-themselves-better-bed-than-average-scale-1-10-self-image-confidence/1115745002/> (finding that, while people are aware of their race and gender, the majority of Americans believe they are more attractive than the average person).

169. Although, it could be argued that gender discrimination protections are multifaceted in that they protect pregnancy, which is no longer viewed as inseparable from gender.

170. To clarify, it is the legislature who should make this determination, not the judiciary. The judiciary must apply discrimination legislation such as Title VII as written, regardless of judges’ personal calculus regarding the costs and benefits of doing so.

171. RHODE, *supra* note 6, at 111–12.

Judge: Well, you are not the most attractive person I have ever seen, but I have seen worse. Take my clerk, for example. I doubt your employer discriminated against you because you are ugly, because you are not all that ugly.

Plaintiff's Counsel: With all due respect, Your Honor, my client is hideous. To wit, *res ipsa loquitur*."¹⁷²

RESPONSE: This objection is misguided because the number of complaints filed is not an accurate measure of success. A better measure would be the reduction in attractiveness discrimination from the fear of litigation. From this more accurate viewpoint, the objection largely falls apart. This is because businesses would not know in advance which employees would be willing to file suit and would therefore minimize their liability by viewing every employee as a potential litigant, thus reducing the practice of attractiveness discrimination.

While some potential plaintiffs might be dissuaded from pursuing recourse because they do not want their names even associated with an attractiveness discrimination claim, they would not have to admit to being unattractive. They would only need to show that they were discriminated against because of someone else's perception of their attractiveness. This would include being discriminated against for being too attractive. It would also include an employer discriminating against someone for possessing an attribute that the employer found unattractive but that is widely viewed in society as attractive.¹⁷³ This is consistent with current antidiscrimination legislation—for example, discriminating against someone based on the mistaken belief that the person possesses a disability is actionable,¹⁷⁴ and discriminating against someone for erroneously believing the person is of a particular national origin is actionable.¹⁷⁵ Finally, this objection that plaintiffs would have to confess to being objectively unattractive in court, and therefore would be highly dissuaded from pursuing such protections, is somewhat inconsistent with the other objections made in this section regarding how attractiveness discrimination protections would result in a

172. This satirical hypothetical of a plaintiff claiming *res ipsa loquitur* ("the thing speaks for itself") is taken from Corbett, *supra* note 14, at 627–29.

173. For example, an employer who refused to hire someone because he viewed the applicant's straight teeth as unattractive.

174. See 42 U.S.C. §§ 12102(1)(C), 12102(3) (requiring that the plaintiff need only show that he or she was "regarded as" disabled by the employer under the ADA).

175. See, e.g., *Equal Emp. Opportunity Comm'n v. WC&M Enters.*, 469 F.3d 393, 397 (5th Cir. 2007) (noting that co-workers harassed plaintiff by making statements that he was Arab and a part of the Taliban, despite the fact that he was Indian).

drastic increase in frivolous lawsuits.

E. Attractive Employees are Good for Business

OBJECTION: Hiring attractive people can be beneficial to a business's profitability.¹⁷⁶ Attractive people "evoke sympathy, admiration, forgiveness, or other milk of human kindness in situations in which unattractive people do not."¹⁷⁷ Customers are more likely to purchase products and services from attractive salespeople.¹⁷⁸ Furthermore, market analysts note how "employees' outward appearances reflect on the product and the brand image."¹⁷⁹ For these reasons, some economists posit that appearance should always be a factor just like other characteristics that affect profitability, like work ethic, experience, and education.¹⁸⁰ One economist explained:

I believe the only meaningful measure of productivity is the amount a worker adds to customer satisfaction and to the happiness of co-workers. A worker's physical appearance, to the extent that it is valued by customers and co-workers, is as legitimate a job qualification as intelligence, dexterity, job experience, and personality.¹⁸¹

Additionally, allowing the market for labor to account for attractiveness results in a more ideal distribution of labor. By allowing businesses to give preference to attractive applicants in positions that interact with customers—as opposed to positions where they will not—customers benefit by being in contact with more attractive people. Even workers benefit by being placed in positions where their attributes are most efficiently utilized. For example, an attractive person would probably find working with customers to be a more pleasurable experience than an unattractive person would, because their attractiveness would likely result in more amiable interactions with customers.

Because attractiveness plays such an important role in the profitability of businesses, it is unfair and counterproductive to deprive them of recognizing and capitalizing on this reality. Furthermore, the net effect of reduced profitability could be a harmful reduction in U.S. gross domestic product. And finally, this reality means that even if attractiveness discrimination

176. See, e.g., Robert J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, BUS. WK., Mar. 16, 1998, at 18.

177. Corbett, *supra* note 14, at 632–33.

178. See Eliot Burdett, *Do Looks and Appearances Matter in Sales?*, PEAKSALES RECRUITING (Oct. 9, 2013), <https://www.peaksalesrecruiting.com/blog/how-important-are-looks-for-sales-professionals/>.

179. James, *supra* note 13, at 638.

180. See Barro, *supra* note 176, at 18.

181. *Id.*

protections were passed, they would constantly be challenged under the bona fide occupational qualification (“BFOQ”) exception.

RESPONSE: While it is true that an individual business could potentially increase its profitability by hiring a more attractive workforce, this is a zero-sum game. It does not follow that if this were a widespread practice, it would result in a net increase in the profitability of U.S. businesses.¹⁸² Pointing out that currently permissible attractiveness discriminatory practices may help the profitability of those who are willing to engage in the practice—properly understood—is a strong argument in favor of legal protections, not against them. This is because it illuminates how the current system rewards discriminatory practices while punishing those who refuse to discriminate. This happens through aggregate effects on the labor market. If some businesses pay a premium for attractive employees, this effectively prices attractive people out of the market for jobs that choose not to pay the same premium.¹⁸³

The objection is based on the assumption that discriminating on the basis of attractiveness increases profitability. This may not be the case. Under the existing system, an employer would likely have to pay a premium for attractive people.¹⁸⁴ Therefore, referring to studies that show attractive employees enhance brand image and sales is just one side of the equation. One would also have to weigh the extra cost involved, which could result in no gain in profitability or even a decrease in profitability.

The claim that attractiveness discrimination helps more efficiently distribute labor to ideal positions is highly suspect because it does not account for skillsets other than attractiveness. Banning such discrimination would potentially increase profitability by minimizing mismatch. This is because employment and promotion decisions based on merit and not attractiveness would more efficiently distribute labor to maximize the net utility for society. Hiring people for given positions based on their abilities and not their level of perceived attractiveness would likely lead to net

182. See, e.g., HAMERMESH, *supra* note 3, at 108 (distinguishing the issue of benefit to an individual company and any potential benefit to society at large by clarifying the benefits of attractive employees are “productivity in a narrow, private sense . . . say[ing] nothing about whether society is better off”).

183. See, e.g., *id.* at 92–93 (“As long as some companies implicitly account for how beauty affects costs and revenue, they will make extra profits. Employers in their industry who fail to make the correct decisions about the effects of beauty on their sales and costs will make less profit.”).

184. See Mila Gumin, Note, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1773–74 (2012).

increases in efficiency, reduced employee turnover, and increased worker satisfaction.¹⁸⁵ This problem of mismatch also applies regardless of whether people are even in the labor market. Studies show that under the current system, unattractive women are more likely to stay at home and not enter the labor market.¹⁸⁶

The claim that attractiveness discrimination leads to increased profitability is based on a customer preference theory. This theory has been explicitly rejected when proffered as an excuse for race and gender discrimination.¹⁸⁷ Employers substituting underqualified workers for qualified workers would likely see reduced efficiency regardless of whether the decision was made based on race, gender, or perceived attractiveness.¹⁸⁸ The analogy to race is further illustrative when one considers a similar practice to what this objection advocates for. For example, imagine an employer forcing Black workers to work in the back while white workers worked up front in the belief that such a practice would increase profitability.

At best, one could argue that not allowing U.S. businesses to discriminate on the basis of attractiveness would put them at a disadvantage at the international level, as U.S. companies are competing against foreign companies who do not have the burden of such limits. But in this context, with disparate beauty standards in different countries, any benefit would likely be trivial. Any slight loss in profitability from not being able to hire based on attractiveness would potentially be made up for with increases in productivity from hiring practices that focus more on job-related abilities.¹⁸⁹ Finally, while attractiveness discrimination protections would apply to most employees, businesses would still be allowed to discriminate based on attractiveness for certain jobs, such as models for advertisements.

In conclusion, regardless of whether attractiveness discrimination increases the profitability of the businesses who engage in the practice, it is nevertheless beneficial for society to ban the practice. Overall U.S. productivity would likely benefit from such protections due to the minimizing effect it would have on mismatch. This is only based on an assessment of effects on profitability. The case for protections becomes even stronger when other societal costs are considered, such as the costs incurred

185. *See id.* at 1774.

186. *See* HAMERMESH, *supra* note 3, at 57.

187. *See* Corbett, *supra* note 14, at 647.

188. *See, e.g.,* Gumin, *supra* note 184, at 1793 (“Appearance discrimination is equally as . . . inefficient as discrimination against any of the currently protected classes”).

189. *Id.* at 1774.

with greater obsession over appearance.¹⁹⁰

F. Attractiveness as a Bona Fide Occupational Qualification (“BFOQ”)

OBJECTION: Because employee attractiveness corresponds to profitability,¹⁹¹ it is therefore a BFOQ, and as such, any protections against it would be largely ineffective. Attractiveness would only not be a BFOQ, and therefore subject to protections, for positions in which attractiveness is irrelevant such as working from home. But because employers do not benefit from attractive people in these positions, they are less likely to engage in attractiveness discrimination when fulfilling these roles. Therefore, attractiveness discrimination protections are unlikely to accomplish its goal.

RESPONSE: This objection is predicated on a misunderstanding of BFOQ defenses. The increases in profitability described in this objection derive from customers preferring to interact with attractive employees. But customer preference is rarely a valid BFOQ in existing discrimination protections.¹⁹² BFOQ exceptions under Title VII are only allowed when the discrimination is “reasonably necessary to the normal operation of that particular business or enterprise.”¹⁹³ Because this Article advocates for protections through Title VII, these same limits on the BFOQ exception would apply. The state and local jurisdictions that currently offer attractiveness discrimination protections demonstrate how this would likely not be an issue.¹⁹⁴

Just as with other forms of discrimination protections, the BFOQ exception would apply to a very limited category of discrimination. For example, clothing brands would likely be permitted to refuse to hire people they perceive as unattractive as runway models. A restaurant like Hooters may even be allowed to discriminate in favor of attractive women for its waitresses.¹⁹⁵ But for most businesses, such as a coffee shop, airline company, retail clothing store, hotel, or law firm, the BFOQ exception would

190. See Mahajan, *supra* note 9, at 170 (discussing the consequences of increased obsession over attractiveness).

191. See Barro, *supra* note 176, at 18.

192. James, *supra* note 13, at 642.

193. 42 U.S.C. § 2000e-2(e)(1) (2000) (note that the BFOQ exception is not applicable in any form to race discrimination).

194. RHODE, *supra* note 6, at 16.

195. An argument could be made that the essential task of a Hooter’s waitress is to serve as a waitress, in which case, their appearance would not be a BFOQ. However, it could also be argued that Hooters provides a unique experience predicated upon the attractiveness of its waitresses. The name “Hooters,” the focus on attractive and scantily clad waitresses in its advertisements, and the public’s widely held perception of the brand all support the notion that the essence of the business is more than just selling food.

not allow for attractiveness discrimination, just as it currently would not allow for gender discrimination, regardless of customer preference.

This narrow application of the BFOQ exception is consistent with modern case law. A business is allowed to discriminate against a female applicant for a janitorial position cleaning a male locker room.¹⁹⁶ A hospital choosing not to hire a male gynecologist is allowed.¹⁹⁷ But a court rejected Southwest's claim that being a woman was a BFOQ for flight attendant positions, despite Southwest's mostly male customers preferring female flight attendants.¹⁹⁸ Despite Southwest focusing advertising efforts on sex appeal, the court found that the essential function of a flight attendant is to ensure passenger safety and not to sexually titillate male customers.¹⁹⁹

G. Subconscious Nature of Attractiveness Discrimination

OBJECTION: Attractiveness discrimination is often so deeply engrained that it is largely subconscious.²⁰⁰ It is ethically dubious to attempt to hold people liable for their involuntary actions. Furthermore, the subconscious nature of attractiveness discrimination means that attempts to regulate it will be largely ineffective, as people cannot stop what they are unaware they are doing. Relatedly, the preference for attractiveness in others is largely human nature.²⁰¹ This contributes to the lack of moral conviction for attractiveness discrimination regulation,²⁰² which, in turn, will cause difficulties in enforcement. Put simply, you cannot legislate morality.

RESPONSE: Pointing out the partially subconscious nature of attractiveness discrimination is a peculiar objection because race²⁰³ and gender²⁰⁴ discrimination can also be subconscious. *Plessy v. Ferguson* was based in part on the belief that the desire for "separate but equal" policies were natural.²⁰⁵ The damage caused by discrimination—to the victim, the

196. *Norwood v. Dale Maint. Sys.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984).

197. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1198 (E.D. Ark. 1981).

198. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981).

199. *Id.* at 304.

200. RHODE, *supra* note 6, at 45–46.

201. Corbett, *supra* note 14, at 629.

202. *Id.*

203. Laura Hensley & Jasmine Pazzano, *It's Possible to be Racist Without Realizing it. Here's How to Catch Your Own Bias*, GLOBAL NEWS (June 25, 2020, 9:57 AM), <https://globalnews.ca/news/7101551/implicit-racial-bias-test/>.

204. Tiwonge Chipeta, *How Unconscious Gender Bias Affects All Women Across the Workplace*, EW GROUP, <https://thegroup.com/blog/unconscious-gender-bias/> (last visited Mar. 24, 2022).

205. RHODE, *supra* note 6, at 112.

business, and society at large—is present regardless of whether the discrimination was conscious or subconscious in nature. Even subconscious behavior can be altered through legal protections.²⁰⁶

The first step to solving a bias is to acknowledge it,²⁰⁷ and extending attractiveness discrimination protections under Title VII would help acknowledge the problem. For example, a business may not even be aware that their hiring managers are engaging in attractiveness discrimination. An EEOC complaint could help a business adopt more effective hiring practices that result in increased profitability. Furthermore, such an EEOC complaint could also shed light on potential sexual harassment issues.

The objection that one cannot legislate morality is ineffective as an argument against attractiveness discrimination protections. First, nearly all legislation has some moral component.²⁰⁸ Second, attractiveness discrimination protections do not criminalize the mental state of thinking lesser of unattractive people; rather, they criminalize the practice of victimizing people based on such beliefs. Such protections often lead to positive mental changes nevertheless.²⁰⁹ This is no different than other forms of discrimination protections. For example, gender and racial protections do not legislate morality in the sense of criminalizing immorally racist and sexist thoughts. They only criminalize the behavior of victimizing people based on such thoughts. The objection that one should not attempt to legislate morality is not only inconsistent with the purpose of most legislation, but it also has a dubious history. For example, civil rights opponents in the 1960s offered the same objection.²¹⁰

H. Immutability Issue

OBJECTION: Unlike other protected classifications such as age and race, attractiveness is largely not immutable. A septuagenarian who is discriminated against for being too old or a Black person who is discriminated against because of his race cannot simply change to avoid further discrimination. Conversely, an individual who is discriminated against for being unattractive has a variety of avenues to alter his or her

206. *Id.* at 111–12.

207. See Jessica Miller-Merrell, *Should Ugly be a Protected Class*, WORKOLOGY (Mar. 13, 2019), <https://workology.com/ep-173-should-ugly-be-a-protected-class/>.

208. See Micah Watson, *Why We Can't Help but Legislate Morality*, PUB. DISCOURSE (Nov. 4, 2010), <https://www.thepublicdiscourse.com/2010/11/1792/> (“All legislation is moral.”).

209. RHODE, *supra* note 6, at 112–13 (providing the examples of evolving changes regarding the civil rights movement of the 1960s, the ADA, and same-sex marriage).

210. *Id.* at 112.

appearance and avoid such discrimination. The person can lose weight through diet and exercise, wear makeup, get orthodontics, dye their hair, wear contacts, treat their acne, correct their posture, wear Spanx®, etc. There are even long-running television shows that focus solely on the ability to dramatically transform people perceived as unattractive into an attractive person.²¹¹

The notion of immutability affecting legal protections is deeply entrenched in modern jurisprudence.²¹² The less immutable the characteristic, the less unfair the discrimination is perceived.²¹³ This view is consistent with the social sciences that maintain that discrimination against someone for attributes beyond their control is more harmful and more deserving of legal protections.²¹⁴

RESPONSE: Mutability is a peculiar standard on which to base discrimination protections. The distinction between what is mutable and immutable changes with scientific advancements²¹⁵ and evolving social norms. For example, gender was once considered immutable and is now considered mutable.²¹⁶ Some have even argued that race should be considered mutable.²¹⁷ Furthermore, mutability is a term that encompasses such a wide range of attributes that it is largely meaningless in this context. For example, the decision to wear a necklace and the decision to undergo gender reassignment surgery both technically demonstrate the mutability of those attributes. But to treat them as comparable in an effort to argue against discrimination protections is highly suspect. When properly understood, mutability is more of a wide spectrum rather than a binary classification. With attractiveness discrimination, some attributes are highly mutable, some much less so, and some are immutable—for example, bushy eyebrows, breast size, and height, respectively.

211. *Extreme Makeover* and *The Swan* are examples of such television shows.

212. See, e.g., Corbett, *supra* note 11, at 175 (“[T]he concept of immutability is deeply entrenched in the law, and the more immutable a characteristic, the more unfair and immoral the discrimination is likely to be considered and the more urgent the need for law to address the unfairness and immorality.”).

213. *Id.*

214. RHODE, *supra* note 6, at 25–26.

215. Corbett, *supra* note 11, at 157–58 (with scientific advances in plastic surgery, “what was once thought to be immutable has now become mutable.”).

216. Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html>.

217. See e.g. Deepa Das Acevedo, *(Im)Mutable Race?*, 116 NW. U. L. REV. 88, 113 (2021).

The topic of mutability becomes even more amorphous—and therefore an even less sound basis for denying discrimination protections—when one considers that a given attribute may fall in very different places on the spectrum when experienced by different people. Due to genetics, mental health, social support networks, and access to personal trainers and nutritionists, one person may find it relatively easy to lose weight and alter the mutable trait of being overweight. Conversely, another person without those advantages who lives in a food desert may find losing weight nearly impossible.²¹⁸

This objection implies that existing case law only allows immutable characteristics to receive protections. This is false, as there are numerous mutable characteristics that currently receive protection.²¹⁹ Adherents to a given religion are protected from discrimination regardless of how they are free to abandon such belief at any time—something that could be accomplished in a fraction of the time it would take to lose weight, treat acne, or undergo plastic surgery. Disabilities, some of which are mutable, are given protection.

Arguing about mutability is not only unhelpful in strengthening the case for denying attractiveness discrimination protections; it is also unhelpful for the mental health of those deemed unattractive. It is highly reductionist to claim that a trait such as obesity is simply an issue of willpower. Weight is the product of numerous physiological, psychological, socioeconomic, and cultural factors.²²⁰ Claiming that people choose to be obese is paramount to victim blaming. Furthermore, even if blaming people for being perceived as unattractive did result in more people making improvements through sheer willpower, it would nevertheless still be a harmful notion to promote. This is because as more and more people successfully implement changes to alter their appearances for the better, people who are unable to do so will become increasingly faulted for being unattractive.²²¹

It is sadly ironic that this practice of accusing people of choosing to be obese likely makes weight loss even more difficult. This is because

218. Robyn Correll, *Food Deserts*, VERYWELL HEALTH (Nov. 28, 2019), <https://www.verywellhealth.com/what-are-food-deserts-4165971> (“[F]ood deserts are generally considered to be places where residents don’t have access to affordable nutritious foods like fruits, vegetables, and whole grains.”).

219. RHODE, *supra* note 6, at 25 (“Social science research on appearance generally does not distinguish among these forms of bias; what makes a given individual attractive may reflect both innate and voluntary characteristics.”).

220. *Id.* at 42.

221. Corbett, *supra* note 11, at 175.

overeating is closely associated with stress,²²² something that would be exacerbated—not alleviated—by being discriminated against for being perceived as unattractive. This likely helps explain why only three percent of dieters successfully keep the weight off long-term, despite the significant benefits of doing so.²²³ This unfounded accusation tragically places those who are being discriminated against again as victims, as now they are effectively being accused of being responsible for the discrimination they received. Consequently, this would likely result in emboldening those who engage in attractiveness discrimination.

Some of the behaviors necessary to mute unattractive characteristics can impose a great physical, mental, and financial toll, and even lead to death. Crash dieting has long-term health consequences,²²⁴ long-term wearing of high heels contributes to back and foot problems,²²⁵ diet pills such as Fen-Phen contribute to heart valve defects,²²⁶ up to forty percent of silicone breast augmentation surgeries result in complications,²²⁷ the use of steroids to increase muscle mass is accompanied by numerous health risks,²²⁸ and gastric bypass surgery has nearly a two percent fatality rate.²²⁹

Simple behaviors, such as dressing better, have been shown to increase perceived attractiveness, but there are limits.²³⁰ Studies show that money

222. *Why Stress Causes People to Overeat*, *supra* note 69.

223. Harriet Brown, *The Weight of the Evidence*, SLATE (Mar. 24, 2015, 3:00 AM), <https://slate.com/technology/2015/03/diets-do-not-work-the-thin-evidence-that-losing-weight-makes-you-healthier.html>.

224. Bryan Miller, *How Crash Diets Harm Your Health*, CNN (Apr. 20, 2010, 8:22 AM), <http://www.cnn.com/2010/HEALTH/04/20/crash.diets.harm.health/index.html>.

225. *A Dance Medicine Doctor Tackles High Heel Harm*, AM. OSTEOPATHIC ASS'N, <https://osteopathic.org/what-is-osteopathic-medicine/the-real-harm-in-high-heels/> (last visited Mar. 23, 2022).

226. Gina Kolata, *How Fen-Phen, A Diet 'Miracle,' Rose and Fell*, N.Y. TIMES (Sept. 23, 1997), <https://www.nytimes.com/1997/09/23/science/how-fen-phen-a-diet-miracle-rose-and-fell.html>.

227. INFORMATION FOR WOMEN ABOUT THE SAFETY OF SILICONE BREAST IMPLANTS 11 (Martha Grigg, Stuart Bondurant, Virginia L. Ernster & Roger Herdman, eds., 2000), https://www.ncbi.nlm.nih.gov/books/NBK44776/pdf/Bookshelf_NBK44776.pdf.

228. Daniel J. DeNoon, *Why Steroids Are Bad for You*, WEBMD (Mar. 16, 2005), <https://www.webmd.com/fitness-exercise/news/20050316/why-steroids-are-bad-for-you#1>.

229. *Studies Weigh Risks of Gastric Bypass Surgery*, WEBMD (Oct. 7, 2004), <https://www.webmd.com/diet/news/20041007/studies-weigh-risks-of-gastric-bypass-surgery#1> (“1.9% of gastric bypass surgery patients died within 30 days of the procedure.”).

230. HAMERMESH, *supra* note 3, at 54.

spent on increasing one's attractiveness is an inefficient way to counteract the effects of attractiveness discrimination, returning only four cents per dollar spent.²³¹ Therefore, even setting aside the psychological issues, telling people to try harder is a woefully inadequate solution to attractiveness discrimination.

I. Lesser Discrimination

OBJECTION: To put attractiveness discrimination in the same category as race and gender discrimination is to ignore U.S. history. Black people were enslaved, barred from voting, lynched, and still face the repercussions of this today.²³² Women were not allowed to vote for the majority of U.S. history,²³³ were banned from the practice of law,²³⁴ and were forcibly sterilized.²³⁵ To claim that unattractive people belong in this same category is to disparage the suffering of those persecuted for their race and gender.²³⁶ Furthermore, the trivial nature of attractiveness discrimination—and the associated tolerance of the practice in society—means that it would be impossible to eradicate.²³⁷ The simple truth is that the federal government has limited resources. Money spent rooting out, adjudicating, and punishing attractiveness discrimination is money that could have been spent on other more worthy pursuits.

RESPONSE: It is true that the unattractive have not been subject to the same extent of historical discrimination as women and racial minorities.²³⁸ However, there are isolated examples of legislation enacted to discriminate against the unattractive.²³⁹ Regardless, using this historical fact to argue

231. *Id.* at 33–34.

232. Sean Collins, *The Systemic Racism Black Americans Face, Explained in 9 Charts*, VOX (June 17, 2020, 12:00 PM), <https://www.vox.com/2020/6/17/21284527/systemic-racism-black-americans-9-charts-explained>.

233. U.S. CONST. amend. XIX.

234. *Bradwell v. Illinois*, 83 U.S. 130, 130 (1869) (unanimously upholding the Illinois ban on admitting females to the state bar).

235. *Buck v. Bell*, 274 U.S. 200, 208 (1925).

236. *See, e.g.*, Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1060 (2009).

237. *Id.* at 1067.

238. James, *supra* note 13, at 658.

239. Nina Renata Aron, *In the 1800s, There Were Literally Laws Against Being Ugly (and No Surprise Who Suffered Most)*, TIMELINE (July 13, 2017), <https://timeline.com/in-the-1800s-there-were-literally-laws-against-being-ugly-and-no-surprise-who-suffered-most-c0b7a26ba8c9> (discussing Chicago's 1881 ordinance that criminalized any person

against attractiveness discrimination protections is not only logically unsound, but it likely harms all discriminated groups. The case for protecting people from discrimination is not a winner-take-all contest in which only the most oppressed group is deemed deserving of protection. This mindset is not only harmful to the group that is perceived to experience “lesser” discrimination—here, the unattractive—but also harmful to the “greater” group—here, racial minorities and women. This is because this mindset pits advocates against themselves, which results in not only the practice of trying to bolster their oppression status but also trying to diminish the oppression status of others.²⁴⁰ Such a competitive, hierarchical mindset leads to division among victimized groups rather than support and encouragement.²⁴¹

This line of reasoning would perhaps be relevant if there were no employment discrimination protections in existence and the issue being discussed was which classification to protect first. There, it might make sense to rank the relative harms from each type of discrimination in order to protect the most vulnerable first. But this is not the case when discussing the current state of discrimination protections and whether attractiveness discrimination protections should be implemented.

While the historical disparities of oppression are undeniable, it is unclear that in the present, attractiveness discrimination is a significantly “lesser” discrimination than racial or gender discrimination. Someone who was fired, not hired, or not promoted would likely find little solace in learning that this was the result of how unattractive they were perceived and not because of his or her race or gender.

The EEOC apparently disagrees with the claim that attractiveness discrimination is a lesser form of discrimination than race and gender discrimination, as illustrated in the following statement:

One of the worst types of discrimination occurs when an individual with a cosmetic disfigurement is denied a job because of the unjustified belief that customers will be offended simply by seeing that person. The opportunity to make a living in the workplace is not restricted to models and movie stars but is the promise held out to every person with talent, skills and ambition.²⁴²

who was “diseased, maimed, mutilated, or in any way deformed, so as to be unsightly or disgusting object” from being in public view).

240. Michael Conklin, *Unnecessary, Counterproductive, and Unjust: The Case Against Hate Crime Legislation*, GEO. MASON L. REV. F. (forthcoming 2022) (currently available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3826673).

241. Beverly A. McPhail, *Hating Hate: Policy Implications of Hate Crime Legislation*, 74 SOC. SERV. REV. 635, 646–47 (2000).

242. McDonald, *supra* note 89, at 121–22 (citing EEOC Press Release, *supra* note 88).

Even if one accepts for argument's sake that attractiveness discrimination is generally perceived as significantly less harmful than race and gender discrimination, it could be an argument in favor of attractiveness discrimination protections, and not against them. The strong stigma attached to race and gender discrimination—not present in attractiveness discrimination—could be the result of consistent legal protections against the former and not the latter.²⁴³ This objection is successful at illustrating how effective legal protections are at changing public opinion, and therefore how effective they would be at not only reducing attractiveness discrimination in the workplace, but also in mitigating harmful prejudices against the unattractive.

Pointing to the pervasiveness of attractiveness discrimination as an argument against protection is highly peculiar.²⁴⁴ It is because the practice is so ingrained in our society that it should be protected. Surveys demonstrate appearance discrimination is as prevalent as or even more prevalent than other forms of discrimination that are protected.²⁴⁵ People in the United States believe that discrimination based on looks is more common than discrimination based on ethnicity or national background.²⁴⁶ In the United States, slightly more people report themselves as having been discriminated against for their appearance than for their ethnicity.²⁴⁷ This statistic is even more illuminating when one considers that racial discrimination would likely be more salient than attractiveness discrimination.²⁴⁸ While everyone is aware of their racial classifications, few

243. RHODE, *supra* note 6, at 112–13.

244. *See, e.g.,* Corbett, *supra* note 14, at 616 (“[A]pppearance-based discrimination, although it is a common occurrence, will never be covered by federal employment-discrimination law or by many state or local employment discrimination laws.”).

245. RHODE, *supra* note 6, at 102–03 (“In national surveys, between 12 and 16 percent of workers report that they have been subject to appearance-related discrimination. That percentage is comparable to, or greater than those reporting other forms of discrimination, such as that based on sex (12-19 percent), race (12 percent), age 9-14 percent), or religious or ethnic bias (3 percent).”).

246. Timur Kuran & Edward McCaffery, *Expanding Discrimination Research: Beyond Ethnicity and to the Web*, 85 SOC. SCI. Q. 713, 713 (2004).

247. Ashley Mears, Book Review, 41 CONTEMP. SOCIO. 814, 814 (2012) (reviewing DANIEL S. HAMERMESH, *BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL* (2011)).

248. *See* RHODE, *supra* note 6, at 112 (for example, if a Black person were singled out from a group of nine white people, a casual observer could quickly see the racial implications. Conversely, if the least-attractive person in a group were singled out, this would be less obvious).

people are likely to believe they are unattractive.²⁴⁹

The objection regarding the limited resources available in enforcing discrimination protections is also largely baseless. Governmental agencies, such as the EEOC, are not required to dedicate equal resources to every claim of discrimination.²⁵⁰ They can choose to allocate their resources strategically based on their expertise regarding likelihood of success, egregiousness of behavior, severity and pervasiveness of harm incurred by victims, and potential deterrent effects.

J. Trivializing Effect on Discrimination Claims

OBJECTION: Attempts to put attractiveness discrimination on par with racial and gender discrimination will trivialize the overall act of discrimination and therefore reduce the effectiveness of existing legislation. Enacting attractiveness discrimination protections would also result in an overall diminution of the law's moral authority, as demonstrated by the failed experiment of alcohol prohibition in the 1920s.²⁵¹ Richard Ford explains this unintended consequence of attractiveness discrimination protections as follows:

[T]here are practical limits of human attention and sympathy. The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments And a business community united in frustration at a bloated civil rights regime could become a powerful political force for reform or even repeal The growing number of social groups making claims to civil rights protection threatens the political and practical viability of civil rights for those who need them most.²⁵²

RESPONSE: Just because the prohibition of alcohol was a failed experiment

249. See, e.g., Chuck Campbell, *Most Americans Think They're More Attractive than Most Other Americans, Survey Says*, KNOX NEWS (Aug. 27, 2018), <https://www.knoxnews.com/story/entertainment/2018/08/27/hot-americans-sexy-rate-themselves-better-bed-than-average-scale-1-10-self-image-confidence/1115745002/> (“Most Americans think they’re better looking . . . than most other Americans, according to a new survey. That’s mathematically impossible, of course, but it says something about our self-confidence.”).

250. See, e.g., Corbett, *supra* note 11, at 168–69 (ranking existing federal employment discrimination laws from strongest regulation to weakest as follows: (1) race (and color), (2) sex, (3) age, (4) religion, and (5) disability).

251. Annika Neklason, *Prohibition Was a Failed Experiment in Moral Governance*, THE ATL. (Jan. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/prohibition-was-failed-experiment-moral-governance/604972/>.

252. RICHARD FORD, THE RACE CARD 176 (2008).

that resulted in a diminution in the law's moral authority does not mean that every law is. It is suspicious to use alcohol prohibition as an analogy when it occurred over 100 years ago and is not comparable to attractiveness discrimination protections. It would be far more analogous to compare attractiveness discrimination protections to other discrimination protections, such as race and gender under Title VII, which currently maintain widespread support.²⁵³ The same objections regarding legal fatigue and diminution of the law's moral authority could have been made to argue against Title VII, as many at the time viewed the legislation as unwarranted.²⁵⁴

Not only is the legal fatigue objection inapplicable to attractiveness discrimination protections, but it is suspect in any context. There are nearly 100,000 federal laws and regulatory rules.²⁵⁵ Therefore, any additional laws would increase the total legislative and regulatory burden so insignificantly so as to not be worth noting. The experiences in the one state and few localities that have implemented attractiveness discrimination protections are consistent with this, as there is no reason to believe that such legislation incurred the alleged unintentional consequences.²⁵⁶

K. Ancillary Benefits of Being Attractive

OBJECTION: Including attractiveness as a protected class creates an increased risk of ensnaring non-discriminatory employers in costly litigation. While every additional protected class imposes an increased risk that an employer will be wrongfully accused of an offense, this risk is even greater when attractiveness protections are included. This is because attractiveness carries with it numerous ancillary benefits beyond just preferential treatment in an employment setting.

Parents have higher expectations for their more attractive children, which

253. Sarah Dutton et al., *As Civil Rights Act Turns Fifty, Most Americans Appreciate its Importance*, CBS NEWS (Apr. 9, 2014, 6:30 PM), <https://www.cbsnews.com/news/as-civil-rights-act-turns-50-most-americans-appreciate-its-importance/> (“Eighty-one percent think [Title VII] has been good for the country, while a mere 1 percent thinks it has been bad.”).

254. Andrew Kohut, *From the Archives: Fifty Years Ago: Mixed Views About Civil Rights but Support for Selma Demonstrators*, PEW RESCH. CTR. (Jan. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/01/16/50-years-ago-mixed-views-about-civil-rights-but-support-for-selma-demonstrators/>.

255. Clyde Wayne Crews Jr., *How Many Rules and Regulations do Federal Agencies Issue?*, FORBES (Aug. 15, 2017, 12:48 PM), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/>.

256. RHODE, *supra* note 6, at 113.

likely contributes to their greater success later in life.²⁵⁷ Attractiveness is positively correlated with self-esteem.²⁵⁸ And it is easy to see that the advantageous life experiences of the attractive could lead to greater confidence, valuable business connections, more experience interacting in social settings, and a more positive outlook on life. These characteristics and experiences would naturally culminate in a more desirable candidate for employment and promotion, regardless of appearance. If attractiveness discrimination protections are enacted, employers who understandably give preferential treatment to people with such beneficial characteristics may be unjustifiably punished because those characteristics happen to be disproportionately held by the attractive.

RESPONSE: This is a spurious objection because benefits such as increased confidence and richness of life experience are hard to quantify. Furthermore, the level to which confidence and life experience contribute to a more productive employee are likewise unclear. The nonsensical nature of using such an argument to object to discrimination protections is more evident when an analogy is drawn to another form of discrimination. Imagine the absurdity of someone proposing that racial discrimination protections impose an unjustifiable risk to employers because white people are more likely to have had rich life experiences, leading to beneficial employment traits such as confidence and social skills.

Finally, pointing out the preferential treatment the attractive receive in their non-employment-related lives is evidence in favor of attractiveness discrimination protections, not against it. If the preferential treatment experienced by the attractive over the unattractive is this pervasive in society, then protections are even more necessary. This is because legal protections against discrimination are often an effective catalyst for changing minds in society as to the acceptability of discrimination in non-employment contexts.²⁵⁹

L. The Attractive Earn Their Preferential Treatment

OBJECTION: It takes great effort to maintain an attractive appearance. Many attractive people spend over an hour getting ready to go to work every day.²⁶⁰ Therefore, allowing these people to receive a slight preference in

257. Cohen, *supra* note 24, at 2038–39.

258. HAMERMESH, *supra* note 3, at 51.

259. RHODE, *supra* note 6, at 112.

260. Chanel Parks, *Seventy-Eight Percent of Women Spend an Hour a Day on Their Appearance, Study Says*, HUFFINGTON POST (Feb. 24, 2014), https://www.https://www.huffpost.com/entry/women-daily-appearance-study_n_4847848.

employment is simply rewarding hard work. In this way, attractiveness discrimination is distinguishable from race and gender discrimination, whose benefactors have done nothing to earn preferential treatment.

RESPONSE: This objection does an excellent job at illustrating why attractiveness discrimination should be banned. All of this effort expended by the attractive does not culminate in any improved worker efficiency. It would be far greater for society if such people invested the time and money they currently spend on appearance on something else, such as pursuing marketable skills, spending quality time with their families, focusing on their mental health, etc.²⁶¹ Furthermore, this objection implies that attractiveness is largely a function of effort. As previously discussed, this mindset is not only false, but highly pernicious.²⁶²

M. Difficulties of Implementation

OBJECTION: The difficulties of extending protections based on perceived attractiveness render the notion largely moot.²⁶³ For example, where exactly is the line between attractiveness discrimination (which is to be protected) and appearance discrimination (which is not)? Would a person who refuses to wash dirt and grease off his or her face be covered? What about someone with an offensive tattoo on his or her forehead? Would there be an exception made for models? Clerks at a high-end clothing store? Exotic dancers? Hooters waitresses? On what consistent principle would some of those professions be protected and not others?²⁶⁴ Additional problems would stem from how difficult it is for plaintiffs to prove attractiveness discrimination at trial. Finally, disparate impact claims based on large-scale statistical analyses—which are used effectively to adjudicate race, gender, and age

261. See, e.g., HAMERMESH, *supra* note 3, at 7 (“If beauty affects behavior in labor markets and generates differences in wages and the kinds of jobs that we hold, it may also produce changes in how we choose to use our time outside our jobs. How we spend our time at home is not independent of how we spend our time at work or of the kinds of occupations we choose. If differences in beauty alter outcomes in the workplace, they are likely to alter outcomes at home too.”).

262. See *supra* notes 219–22 and accompanying text.

263. See Corbett, *supra* note 11, at 174 (“Line-drawing in this area seems difficult, at best . . . the difficulty of defining the protected characteristic suggests coverage would produce much litigation in which the principal issue would be whether the plaintiff was covered”).

264. Gumin, *supra* note 184, at 1793 (some advocate that “[c]ourts should not find that a particular appearance is a business necessity unless a person’s appearance makes it impossible to do the work, or . . . impact[] the safety of the individual or others”); see also *id.* at 1791 (it is certainly not “impossible” or unsafe for a traditionally unattractive person to perform the duties of a model or exotic dancer).

discrimination cases—would be nearly impossible given the unquantifiable nature of attractiveness.²⁶⁵

RESPONSE: The majority of this objection can be reduced to line drawing, which is hardly grounds to deny legal protections. Line drawing issues are present in many aspects of the law. Examples include the line between assumption of risk and actionable negligence, battery and aggravated battery, and second-degree murder and third-degree murder. Even in the limited context of employment discrimination, numerous line-drawing issues are involved. What exactly justifies a BFOQ exception, which ailments rise to the level of a disability, where is the line between an employee and an independent contractor, and what exactly rises to the level of preferential treatment? While courts would need to consider exactly where the line is between permissible attractiveness discrimination and impermissible attractiveness discrimination, this is not a fatal flaw in the protections; rather, it is something inherent in all anti-discrimination protections.

The claim that attractiveness discrimination should not be protected because it would be difficult to prove at trial is likewise not persuasive. Attractiveness discrimination claims would likely be proven in similar ways to how other discrimination claims are proven. Internal emails, admissions by current and former employees, and examples of past hiring decisions could all be offered as evidence of discrimination. It is true that the cumulative, statistical evidence that is sometimes present in employment discrimination actions would be less likely in attractiveness discrimination claims than in race, gender, and age discrimination claims. Regardless, it does not logically follow that if attractiveness discrimination is, on average, more difficult to prove than race and gender discrimination that society should therefore turn a blind eye to the practice.

All forms of employment discrimination are inherently difficult to prove given the subjective nature of hiring and promotion decisions involved. For example, an employer who hired a white, male worker over a Black, female worker with similar qualifications could explain that the former was confident, was positive, maintained eye contact, and appeared to be proactive in the interview, while the latter was not. If the jury believes this claim, which may be difficult to disprove, that is likely enough to not be held liable, whether true or not, absent additional evidence by the plaintiff to the contrary. Additionally, all forms of employment discrimination are inherently difficult to prove because it is difficult for victims to be aware that they were victimized. While most harms in the context of civil liability have obvious indications of victimhood—broken bones from an assault, missing

265. See generally Cavico et al., *supra* note 16, at 83.

items from a theft, property damage from negligent driving, etc.—a person who was not hired based on his or her race or gender is unlikely to ever be made aware of this causation.

N. Slippery Slope

OBJECTION: A 2007 law review Article provides a frightening prediction as to the long-term consequences of passing attractiveness discrimination protections.²⁶⁶ It explains how such protections could lead to a slippery slope whereby traits such as low intelligence would also become protected classes.²⁶⁷ After all, intelligence is beneficial to the profitability of a business just as attractiveness is, and customers surely prefer intelligent employees just as they prefer attractive ones. As law professor Michael Selmi warns, “[a]lthough most slippery slopes are not as slippery as they appear, this one actually [is].”²⁶⁸

RESPONSE: The use of a scare tactic demonstrates desperation from those who oppose attractiveness discrimination protections. Such slippery slope arguments are largely inconsequential, as they can be applied to nearly any legal principle and are only limited by the imagination of their creators. It makes just as much sense to claim that not protecting people from attractiveness discrimination will likely lead to not protecting people from racial and gender discrimination. The same slippery slope argument could be made against the latest addition to employment discrimination protections about sexual orientation by claiming that it would somehow lead to undesirable future protections.²⁶⁹

This slippery slope argument is particularly questionable because intelligence is distinguishable from attractiveness in the job-related context. A lack of intelligence diminishes the ability of workers to perform their essential job duties, while a lack of perceived attractiveness does not. Finally, one does not need to hypothesize about the future to see the weakness in this objection; real-world experience demonstrates its unlikely occurrence. The state and localities that have adopted attractiveness discrimination protections have not traveled down any slippery slope toward banning intelligence discrimination.²⁷⁰

266. Corbett, *supra* note 11, at 153, 156.

267. *Id.* at 156.

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

269. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753–54 (2020).

270. *See, e.g., RHODE, supra* note 6, at 127–33 (illustrating that other claims of the dangers of such protections have not come to fruition).

V. CONCLUSION

This Article provides a framework for understanding the persuasiveness of attractiveness discrimination and the severity of its harm. By considering the severity of the practice, how it is intrinsically linked to explicitly protected classes such as gender and race, the clear trajectory of Title VII to offer more protections, the recent successful example of *Bostock*, and the impractical nature of alternatives, a strong case is made in favor of interpreting Title VII to include attractiveness discrimination protections. Additionally, potential objections are considered and found to be largely ineffective when properly understood. These two things combines to make a strong, cumulative case for expanding the interpretation of Title VII to include attractiveness discrimination protections. Including attractiveness discrimination protections will protect victims of discrimination, help increase productivity of the U.S. economy, and likely reduce societal ills, such as eating disorders and depression, that are associated with the currently unhealthy obsession over appearance.

This Article also invites future research by calling attention to the subject of attractiveness discrimination. An open dialogue about competing alternatives for offering protection would be beneficial. This Article advocates for Title VII as the preferred method but also discusses the limitations of using the ADA. Some have even posited that victims of attractiveness discrimination could receive protection under an affirmative action theory.²⁷¹ By discussing alternative solutions, the problem is better understood. Furthermore, while this Article is highly skeptical of the political will to pass such legislation, perhaps more discussions regarding the harms of the practice and the better understanding of the weaknesses behind the objections to offering protections proposed in this Article could increase support for such legislation.

271. See, e.g., HAMERMESH, *supra* note 3, at 152–53. Such an affirmative action solution would be problematic in that it may cause blowback from those who feel victimized by “reverse” attractiveness discrimination. Additionally, this would necessitate some kind of quantification of attractiveness.