The Naked Truth: Appearance Discrimination, Employment, and the Law

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INTRODUCTION

Physical beauty elicits benefits that are more than skin deep. In every aspect of our lives we are reminded that appearance matters. Evidence suggests that society tends to attribute to those who are physically attractive the added qualities of sociability, friendliness, and competence.[1] The appropriate standards for appearance are measured and dictated by societal norms, for which white culture often serves as a reference. Those who do not measure up to society's norms of aesthetics, appearance, and grooming are often perceived as lazy, incompetent, and less productive. Not only do these implicit biases affect social interactions, they also affect one's ability to obtain employment. Employers often use appearance as a signal of an employee's qualifications,[2] and even after hiring decisions are made, employers continue to regulate the appearance of their employees through dressing and grooming policies.

While such appearance-based decisions are pervasive in the employment context, under current law it is not illegal for an employer to consider appearance when making hiring or other employment decisions. Generally, the only way an aggrieved employee can secure her day in court is by tying her appearance-based complaint to a category protected by Title VII, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. However, because of the manner in which courts currently examine such claims, these statutes are unlikely to provide adequate relief for employees who have experienced appearance-based discrimination. The law's failure to address appearance-based discrimination is problematic

† J.D. 2007, University of California, Berkeley School of Law (Boalt Hall); B.A., University of California, Irvine. I would like to thank Rohit Mahajan and Saurabh Bhargava for their insightful comments and suggestions. I would also like to thank Lisa Chin and her entire editing team for all their hard work.

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

2. Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 197 (2000).

because it serves as a proxy for other forms of discrimination that are explicitly prohibited by Title VII and often disadvantages minorities and women who are unable or unwilling to conform to prevailing appearance norms. Through the combination of novel legal remedies that restructure how courts evaluate appearance-based policies in the employment context and prescriptions for broad socio-cultural change, courts can provide adequate relief for employees who have been subjected to appearance-based discrimination and combat the damaging effects of such policies.

The remainder of this comment proceeds as follows: Part I briefly reviews the psychological evidence regarding the pervasive biases associated with beauty and appearance in our society as well as the cultural conceptions of beauty. Part II examines the role that appearance plays in the employment context. Part III discusses why appearance-based decisions in the employment context are problematic. Part IV reviews cases in which courts have assessed dressing and grooming policies and hiring decisions based on appearance, identifies flaws in the courts' legal reasoning as well as the inadequacies of current legal doctrines, and examines the courts' inability to effectively address such policies. Part V assesses proposed alternatives to the current principles governing the resolution of appearance-based claims.

PART I
APPEARANCE MATTERS

Our society is obsessed with appearance. Both men and women, recognizing the value of an attractive appearance, constantly strive to improve their looks. Beyond facial characteristics, society measures appearance on variables such as grooming, dress, and use of cosmetics. Indeed in initial interactions, appearance is often used to judge and compare people. Not only does an individual's appearance tend to overshadow her other characteristics in forming the basis of first impressions, it also influences perceptions of the individual's other attributes.[3]

According to the "beauty is good" stereotype, attractive people are perceived and treated more positively.[4] In the classic study illustrating this heuristic, psychologists Kenneth Dion, Ellen Berscheid, and Elaine Walster asked subjects to match personality traits to pictures of attractive and unattractive people. In a preliminary study, 100 Minnesota undergraduates determined the physical attractiveness of each of the pictures.[5] However, how these students measured attractiveness is unclear. The psychologists found that more socially desirable traits, such as likeability, honesty, and

3. *See* Dion, Berscheid & Walster, *supra* note 1.
4. *See id.*
5. *Id.* at 286 n.4.

competence, were attributed to the attractive individuals, whereas less attractive individuals were deemed lazy and unproductive.[6] This "beauty is good" stereotype has since been replicated in a number of subsequent studies including teacher evaluations of students,[7] simulated jury trials,[8] voter preferences in political candidates,[9] and nursing homes.[10]

While there is some uniformity in perceptions of what constitutes a physically appealing appearance, perceptions of beauty are also shaped by the culture in which we live.[11] The majority, which is often made up of one racial or ethnic group, tends to shape the general cultural consensus of which attributes are considered attractive.[12] For instance, in the United States, the norms of attractiveness have created a culture in which whites are deemed more attractive than members of other racial groups. Indeed, according to a 1996 study testing the perceptions of general attractiveness held by a group of students of differing races, whites were considered the most attractive racial group.[13]

PART II
THE ROLE OF APPEARANCE IN EMPLOYMENT

Hiring Decisions

The attributional biases associated with physical appearance are also pervasive in the employment context. In employment, appearance is part of the employee's non-verbal communication. Assessment of an employee's appearance is tied to her attractiveness, which is usually based simply on the employee's facial features. In addition to facial characteristics, empirical research addressing the role of appearance in employment has also focused on grooming, jewelry, hairstyles, glasses, and clothing.

In employment, a psychological phenomenon, known as the "halo/horns effect," encompasses the "beauty is good" stereotype. The "halo effect" operates when an employee is rated positively on one factor

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6. *Id.* at 288-89.

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

8. *See* Cookie Stephan & Judy Corder Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOL. 149 (1977).

9. *See* Michael G. Efran & E.W.J. Patterson, *Voters Vote Beautiful: The Effect of Physical Appearance on a National Election*, 6 CAN. J. BEHAV. SCI. 352 (1974).

10. Sidney Katz, *The Importance of Being Beautiful*, *in* DOWN TO EARTH SOCIOLOGY 307, 313 (James M. Henslin ed., 1997).

11. Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 498 (2004).

12. *See id.* (discussing John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH J. RACE & L. 283, 289-91 (1997)).

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

that in turn influences her ratings on all other factors.[14] The "horn effect" functions similarly but works against the employee. Thus, an employee's appearance may influence the employer's overall perception of the employee, serving as a measure of an employee's abilities and qualifications.

In fact, empirical evidence suggests that in the context of employment decision-making, the more attractive a person, the more likely she is to be hired and the more highly she will be paid.[15] For example, in a study on the influence of physical attractiveness, dress, and job type, researchers found that style of dress had a consistent influence on interviewers' perceptions of employability.[16] A subsequent study established that appropriate dress had greater impact on judges' evaluations of potential for hire than physical attractiveness.[17] Moreover, psychology professor Thomas Cash discovered that raters favored women groomed according to a managerial style; this includes shorter, simpler hairstyles, hair away from the face, moderate cosmetics, tailored blouses and jackets, and simple gold jewelry.[18] Men and women wearing glasses are seen as "relatively intelligent, hardworking, and successful, but not active, outgoing, attractive, popular, and athletic."[19] In a study focusing on cosmetics use, researchers discovered that cosmetics use "positively correlated with perceived attractiveness, femininity, and sexiness."[20] Specifically, makeup strengthened sex role stereotypes associated with traditionally feminine jobs, such as secretaries and teachers, but had no effect on traditionally non-feminine jobs, such as accountants and doctors.[21]

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14. Katz, *supra* note 10, at 308.

15. Lucy M. Watkins & Lucy Johnston, *Screening Job Applicants: The Impact of Physical Attractiveness and Application Quality*, 8 INT'L J. SELECTION & ASSESSMENT 76 (2000). Additionally, attractive people obtain higher wages. According to a study in the United States and Canada using two broad-based household labor market surveys with interviewers measuring each respondent's physical appearance in order to examine the effects of personal appearance on an individual's earnings, all else being equal, physically attractive men and women earned more money than their less attractive counterparts. Specifically, less-than-average attractiveness resulted in a 7-9% wage loss for workers in the lowest 9% of attractiveness, while above average attractiveness resulted in a 5% wage gain for workers in the top 33% of attractiveness. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174 (1994).

16. Kim K.P. Johnson & Mary E. Roach-Higgins, *The Influence of Physical Attractiveness and Dress on Campus Recruiters' Impressions of Female Job Applicants*, 16 HOME ECON. RES. J. 87 (1987).

17. Ronald E. Riggio & Barbara Throckmorton, *The Relative Effects of Verbal and Nonverbal Behavior, Appearance, and Social Skills on Evaluations Made in Hiring Interviews*, 18 J. APPLIED SOC. PSYCHOL. 331, 346 (1988).

18. Thomas F. Cash, *The Impact of Grooming Style on the Evaluation of Women in Management*, *in* THE PSYCHOLOGY OF FASHION 343 (M. Solomon ed., 1985).

19. Mary B. Harris, Richard J. Harris & Stephen Bochner, *Fat, Four-Eyed, and Female: Stereotypes of Obesity, Glasses and Gender*, 12 J. APPLIED SOC. PSYCHOL. 503, 511 (1982).

20. Cathryn L. Cox & William H. Glick, *Resume Evaluations and Cosmetics Use: When More Is Not Better*, 14 SEX ROLES 51 (1986).

21. *Id.* at 56.

From an economic standpoint, employers have incentives to hire based on physical appearance. Just as appearance affects an employer's judgment about the qualifications of a particular employee, so does it affect a customer's perception of the company and its products or services.[22] Thus, many employers use appearance-based hiring as a marketing technique.[23]

Dressing and Grooming Policies

While appearance is relevant to initial hiring decisions, it also plays a role in the workplace. In order to appeal to customers, enforce social norms, and ensure that employees conform to the culture of the organization, employers often regulate employee appearance through dressing and grooming policies.[24] By instituting these policies and appearance guidelines, employers guarantee minimum standards that enable them to capitalize on the effects of appearance-related biases.

Beyond catering to consumer preferences and ensuring conformity within the workplace, employers utilize dressing and grooming policies to build on commonly learned associations. The color, style, and material of a certain dress can elicit associations that assist a business in aligning itself with certain values.[25] For example, some suggest that dark colors, like those worn by police officers, express authority, whereas the color white, often worn by hospital employees, conveys purity and cleanliness.[26] Uniform dress standards may also indicate that a business values consistency and homogeneity over individual expression.[27]

Of course, dressing and grooming policies can serve important business-related concerns. Employers frequently use these policies to ensure safety, maintain the public image of the business, boost employee morale, and increase productivity. Additionally, such policies are often imposed to make employees more aware of their roles and reduce differences within the organization.[28]

PART III
PROBLEMS ASSOCIATED WITH POLICIES REGULATING APPEARANCE

While employers are motivated to regulate employee appearance for both social and economic reasons, appearance-based decisions in the

22. Bello, *supra* note 11, at 496-97.

23. *Id.* at 483.

24. *See* Stacey S. Baron, Note, *(Un)lawfully Beautiful: The Legal (De)construction of Female Beauty*, 46 B.C. L. REV. 359, 365, 373 (2005).

25. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2553 (1994).

26. *Id.*

27. *Id.* at 2554.

28. *Id.* at 2554-55.

employment context are problematic on several levels. Appearance regulations are troubling because they facilitate the judging of employees based on qualities unrelated to job performance. Beyond their irrelevance to job performance, appearance regulations reflect certain prejudices, and adversely affect the individuals against whom they are enforced.[29]

Irrelevant to Job Performance

Employment decisions influenced by appearance are problematic when they involve assessments of characteristics that are unrelated to the actual job at issue.[30] While appearance is not relevant to an employee's ability to perform most jobs, under current law, employers are free to use such criteria when making hiring decisions.[31] Such policies are "arbitrary, irrational, and unfair,"[32] as they harm society by affirming certain appearance-related stereotypes and biases. Furthermore, appearance-based hiring decisions and grooming policies suggest that appearance is more important than other more relevant factors, such as "academic, career, or personal accomplishments," and also perpetuate society's obsession with looks.[33]

Express Certain Assumptions and Prejudices

In her article *Work Culture and Discrimination,* Tristin Green, Associate Professor of Law at Seton Hall University, identifies work culture as a source of discrimination and suggests that many of the problems associated with appearance-based policies stem from cultural and structural dimensions of the workplace.[34] While work cultures delineate appropriate standards of appearance and behavior, these standards tend to reflect the dominant group's (i.e., male, white, heterosexual) ideals of appearance and aesthetics.[35]

The tendency for appearance policies to cater to dominant group norms must be examined in light of the nature of work culture. Work culture is essentially a product of social interaction, which is influenced by a number of cognitive and motivational biases as well as larger organizational context.[36] Furthermore, work culture is affected by the

29. Karl E. Klare, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1396 (1992).

30. Karen Zakrzewski, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB & EMP. L. 431, 434 (2005).

31. Adamitis, *supra* note 2, at 212.

32. *Id.*

33. Zakrzewski, *supra* note 30, at 434.

34. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 646 (2005).

35. Klare, *supra* note 29, at 1431.

36. Green, *supra* note 34, at 646-47.

likelihood that individuals favor those with whom they share similarities and will enforce group boundaries in order to maintain status and power.[37] Green claims:

> The predisposition to categorize and stereotype along racial and gender lines, the need to feel good about oneself and the use of group membership to serve that need, and the asymmetry of in-group favoritism and out-group bias depending on one's position of power and individual desire for social dominance all suggest that work cultures are likely to develop and persist along racial and gender lines.[38]

In line with Green's argument, one would expect white males, the group most likely to be in charge of making decisions regarding appearance standards, to create a work culture that disadvantages women and people of color.[39] Nor would it be surprising that employer appearance standards generally devalue racial, cultural, and religious diversity, often requiring conformity to white, heterosexual notions of beauty and appearance.[40]

Racial Assumptions

In the article, *Deconstructing the Ideology of White Aesthetics*, John Kang, Ph.D. pre-candidate in Political Science at the University of Michigan, argues that as the dominant group in the United States, whites determine what is beautiful and force their values of appearance, aesthetics, and grooming on the rest of society.[41] He defines the "ideology of White aesthetics," as "the belief that the physical racial features of White Americans are seen as objectively appealing and universally true whereas the physical racial features of people of color are seen as subjective and deviant."[42] Racial features include those through which people dress or express themselves, as well as physical characteristics such as hairstyle, skin color, nose size, and eye shape.[43] While whites, whose aesthetic values are seen as objective and universal, can exercise preferences in deciding how to look or express themselves, non-whites must conform to white standards or suffer the consequences.[44] Kang argues, "[I]f a certain value is objective and true, a person cannot, idiomatically speaking, 'prefer' to choose this value. Rather, the person merely deviates from it or adheres to it."[45] Thus, non-whites are faced with the decision either to conform to or

37. *Id.* at 647-48.
38. *Id.* at 647.
39. *Id.* at 648.
40. Klare, *supra* note 29, at 1398.
41. John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 283 (1997).
42. *Id.* at 286.
43. *Id.* at 315, 321, 333.
44. *See id.* at 311.
45. *Id.* at 311-12.

reject white aesthetic values.[46]

The fact that appearance and grooming regulations are often based on white norms is further complicated by what Barbara Flagg, Assistant Professor at Washington University, refers to as the "transparency phenomenon."[47] Flagg defines this as the "tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[48] As a result, whites frequently view the norms adopted by the dominant culture as race-neutral and fail to acknowledge how these norms could in fact be specific to one race.[49] Application of the transparency phenomenon to employer dressing and grooming policies illustrates that even "neutral" policies may be based on race-specific norms of white beauty.[50] Thus, individuals who do not fit the white, Anglo-Saxon, protestant model of success in the employment context are likely to "elicit a negative response to some degree, regardless of whether that response is conscious or subconscious."[51]

The unconscious biases that stem from the transparency phenomenon have real consequences for minorities. Appearance regulations based on white norms communicate that minorities and their appearance choices do not belong in the workplace.[52]

Gender Assumptions

In addition to relying on racial assumptions, appearance regulations are also based on gender assumptions. Appearance regulations mold gender consciousness by suggesting that proper men and women should dress and behave in particular ways.[53] Dressing and grooming policies act on assumptions that reinforce existing gender expectations. For example, dressing and grooming policies are particularly problematic for women, as they often reflect patriarchal views about the appropriate role and behavior of women.[54] Appearance choices and dress code enforcement are complicit in creating gender differences, renegotiating identities, and reinforcing men's domination of women.[55] Appearance regulations maintain the sexual subordination of women by taking advantage of and repressing expressions

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46. *Id.* at 312.

47. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

48. *Id.*

49. *See id.* at 1012-13.

50. Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 131 (2001).

51. Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan. 15, 2006, at 632 (quoting JOHN T. MOLLOY, NEW DRESS FOR SUCCESS (1988)).

52. Turner, *supra* note 50, at 131.

53. Klare, *supra* note 29, at 1432.

54. *Id.* at 1397.

55. *Id.*

of female sexuality; these regulations also punish deviance from male expectations regarding appropriate female behavior.[56] Through such regulations, employers capitalize on women's sexuality in order to attract customers on the one hand, and restrict female dress choices on the other.[57] Appearance-based decisions in the employment context tend to "generat[e] and reinforc[e] beliefs that help sustain a social order founded on the domination of woman in general and of specific groups of women, such as lesbians, African American women, and others, in particular."[58] Judgments about appearance reflect which members of society are valued and entitled to control, and this in turn determines social and economic opportunities and outcomes.

Furthermore, attractiveness requirements, which some employer appearance policies encompass, disproportionately burden women, as society's expectations and standards of appearance tend to fall more heavily on women than men.[59] Such requirements reinforce stereotypes about the images of femininity and beliefs about female behavior and worth,[60] driving many women to spend endless time and energy to measure up to the ideal form of female beauty.[61] The resulting obsession with beauty maintains women's secondary status in society by increasing their vulnerability to forms of male exploitation and dangers associated with the beauty industry.[62]

Adverse Impact on Employees

Individuals express their identities through social practices, including the choices they make about dress and appearance.[63] Dress and appearance choices communicate certain ideas, values, or beliefs held by an individual and create meaning.[64] Thus, restrictions on forms of dress and appearance in the workplace can adversely affect employees by prohibiting forms of individual expression and can elicit feelings of hurt, anger, and shame among employees when their appearance choices are rejected.[65]

Appearance policies are especially harmful when they are enforced against minorities and women. Grooming and dressing policies that are based on white male norms undermine the value of minorities and women and their appearance choices.[66] Furthermore, appearance practices and

56. *Id.* at 1398.
57. *Id.* at 1433.
58. *Id.* at 1397.
59. *Id.* at 1421.
60. *Id.* at 1425.
61. *See* Baron, *supra* note 24, 363-64.
62. *Id.* at 380.
63. Klare, *supra* note 29, at 1409.
64. *Id.* at 1409-10.
65. *Id.* at 1400.
66. Turner, *supra* note 50, at 131.

expectations preserve the existing social, political, and economic domination of subordinated groups.[67] The irony of appearance regulations, however, is that they give employers unjustifiable amounts of coercive power, while creating the illusion that employees have a choice in the matter.[68]

Appearance policies based on white norms often cause minorities to internalize these norms and reject those aspects of their identities that do not conform.[69] Minorities seeking greater social legitimacy attempt to comply with prevailing norms by hiding, masking, or covering traits that do not conform to white norms and distinguish them from the dominant group.[70] For example, in an attempt to cover traits, minorities are often careful to present themselves in an "appropriate" manner, speak without a detectable accent, and use products to attain a look more consistent with white norms.[71] This process can lead to self-loathing.[72]

Dressing and grooming policies profoundly impact those who do not conform to traditional gender norms. Such policies tend to normalize gender, to dictate social expectations about social roles, and to penalize those who refuse to conform.[73] Attractiveness requirements in particular have destructive consequences for women's economic and social well-being, as well as their self-esteem.[74] Pressure to meet standards for attractiveness pushes women to excessive dieting, eating disorders, and plastic surgery.[75] Furthermore, women's dress and appearance policies tend to objectify women and are based on presumptions of their inferiority and incompetence.[76]

In his article *The Pressure to Cover*, Kenji Yoshino, Associate Professor at Yale Law School, suggests that the quest for conformity leads non-whites and females to downplay their identities in order to blend into the mainstream.[77] He defines "covering" as the act of minimizing obtrusive qualities so people focus on an individual's other characteristics.[78] While exclusions based on race, gender, religion, and sexual orientation are now uncommon, he argues that a subtler form of discrimination has emerged that does not target entire groups, but rather "aims at a subset of the group that refuses to cover, that is, assimilate to dominant norms."[79] Although

67. Klare, *supra* note 29, at 1411.
68. *Id.* at 1432.
69. Turner, *supra* note 50, at 139.
70. *Id.* at 140-41.
71. *Id.* at 140.
72. *Id.*
73. Klare, *supra* note 29, at 1432.
74. *Id.* at 1421.
75. Adamitis, *supra* note 2, at 215.
76. Bartlett, *supra* note 25, at 2547.
77. Yoshino, *supra* note 51, at 32.
78. *Id.*
79. *Id.* at 33.

racism is now rejected and looked down upon, society still responds negatively to cultural traits associated with certain races.[80]

Tristin Green also notes that work cultures that develop along racial and gender lines cause outsiders to overcome a presumption against fitting in.[81] Green explains, "Women and people of color in these workplaces must signal, by conforming to work culture, that they are the exception rather than the rule."[82] Green argues that while victims of discriminatory work cultures suffer both social and economic harms, even those who ultimately succeed at fitting in are harmed.[83] Discriminatory work cultures force non-whites and women to perform extra identity work and reshape their identities in order to fit in.[84]

Functions and Consequences of Appearance Regulations

Homogeneity

In the article *Law and Economics of Critical Race Theory*, Devon Carbado, Professor of Law and Director of the Critical Race Studies Concentration at the University of California, Los Angeles, and Mitu Gulati, Professor of Law at Georgetown University, draw on behavioral management literature to illustrate that employers have incentives to promote homogeneity in the workplace.[85] Homogeneity is needed to achieve trust, fairness, and loyalty among employees, and this in turn decreases transaction costs associated with employee supervision.[86] Evidence suggests that trust, fairness, and loyalty among employees results in a more productive, cooperative, and open workforce.[87]

While employers have incentives to create a homogeneous workplace, evidence shows a direct correlation between employers' pursuit of homogeneity in the workplace and racial discrimination.[88] This occurs because "homogeneity norms, by their very nature, reflect a commitment to sameness . . . and a rejection of difference."[89] Since whites are insiders, and non-whites are outsiders in most professional settings, the relationship between discrimination and homogeneity is clear.[90] While one might argue that current law, which prohibits covert racial discrimination in hiring and

80. *Id.* at 36.
81. Green, *supra* note 34, at 648.
82. *Id.*
83. *Id.* at 628.
84. *Id.*
85. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1788-89 (2003).
86. *Id.* at 1789.
87. *Id.*
88. *Id.* at 1790.
89. *Id.*
90. *Id.*

promotion, prevents employers from pursuing homogeneity in the workplace, neither anti-discrimination law nor other efforts to increase diversity effectively hinder employers attempting to attain homogeneity in the workplace.[91] Carbado and Gulati suggest that employers prefer to hire non-whites whose racial identities are not prominent and who do not fit stereotypes associated with their racial group to non-whites whose racial identities are more evident.[92] In other words, employers look for non-whites who dress and act in ways that negate stereotypes about their racial groups.[93]

Conformity

Appearance regulations also help employers facilitate conformity to work culture, which is becoming an increasingly important determinant of job success.[94] In order to ensure a strong work culture which increases organizational performance and motivates employees, employers reward conformity and make efforts to find employees who are likely to fit in.[95] Tristin Green argues that while encouraging employees to commit to common work norms is not discrimination, the social interactions which comprise work cultures are likely tainted with the discriminatory biases resulting from work cultures formed along racial or gender lines.[96] Conformity is an element of every culture, but demands to conform to a work culture defined along racial or gender lines pose particular problems for women and people of color.[97]

PART IV
FAILINGS IN THE ADJUDICATION OF APPEARANCE

The manner in which courts currently examine dressing and grooming policies and appearance-based hiring decisions perpetuates many of the racial and gender biases associated with appearance while leaving little protection for individuals harmed by such arbitrary policies. Title VII of the Civil Rights Act of 1964[98] prohibits employment discrimination based on race, color, religion, sex, or national origin, and is the vehicle through which plaintiffs typically challenge employer appearance policies. However a review of cases involving Title VII challenges to appearance policies reveals that courts are influenced by an assimilation bias, and thus require minorities and women to minimize differences and conform to

91. *Id.* at 1791.
92. *Id.* at 1792.
93. *See id.*
94. *See* Green, *supra* note 34, at 634.
95. *Id.* at 638.
96. *Id.* at 643.
97. *Id.* at 644.
98. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

cultural norms.[99] As a result of assimilation bias, courts often minimize the harm associated with appearance policies that affect mutable characteristics, accord less weight to employee interests by trivializing their appearance choices as merely matters of personal preference that are easily changed, and fail to recognize how appearance choices can be tied to one's racial, gender, and/or religious identity.[100] Acting under the presumptions that employer regulations promote efficiency and that policies based on community norms are not discriminatory, courts give substantial deference to employers' managerial interests and prioritize workplace efficiency over diversity and personal autonomy.[101]

Employer appearance policies can also be challenged under the Age Discrimination in Employment Act ("ADEA"),[102] which prohibits age discrimination in employment, and Title I of the Americans with Disabilities Act ("ADA"),[103] which guarantees equal opportunity in employment for individuals with disabilities. However, it can be difficult to contest appearance policies under these laws because neither was intended to address appearance discrimination. Under these two statutes, the only way to successfully challenge an appearance policy is by demonstrating that the policy actually functions to discriminate based on age or disability.

Inadequacies of Current Forms of Title VII Liability

The Civil Rights Act of 1964, a historic piece of legislation, banned discrimination in public facilities, government, and employment. Title VII was intended to ensure equal employment opportunity, specifically prohibiting discrimination based on race, religion, color, national origin, or sex in the employment context. Since Congress also intended to provide employers with a certain level of discretion, Title VII does not prohibit all forms of discrimination.[104] For instance, an appearance policy is not illegal under Title VII unless the policy implicates one of the protected categories mentioned above. Even if an appearance policy implicates one of Title VII's protected categories, the framework of Title VII's two main theories of liability, disparate treatment and disparate impact, makes it difficult for employees who challenge discriminatory appearance policies to obtain relief.[105]

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99. Carbado & Gulati, *supra* note 85, at 1822-23.

100. Klare, *supra* note 29, at 1401-02, 1411.

101. *Id.* at 1405; Bartlett, *supra* note 24, at 2541.

102. 29 U.S.C. § 621 (2006).

103. 42 U.S.C. § 12101 (2006).

104. Ken N. Davison, Note, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 164 (2005).

105. Green, *supra* note 34, at 655.

Disparate Treatment

Courts use the disparate treatment theory to assess a plaintiff's claim that an employer intentionally discriminated against her because of membership in a protected class. In order to satisfy her burden of proof under the disparate treatment theory, a plaintiff must prove that a decision-maker intended to discriminate and subjected her to a materially adverse employment action because of her race, color, religion, sex, or national origin.[106] However, because appearance policies are often based on unconscious biases, a plaintiff will be unlikely to satisfy her burden of proof since intent to discriminate under this theory usually requires a showing of conscious bias or purposeful discrimination.[107] Even if a plaintiff succeeds in carrying her burden of proof, courts are likely to regard an employer's explanation that the plaintiff failed to conform to the work culture as a legitimate reason for the adverse employment action.[108]

Disparate Impact

Disparate impact theory, which courts use to examine employment practices that are not motivated by discriminatory intent but still have an adverse impact on members of a protected group, is also an inadequate avenue of relief for adversely affected employees. Under the disparate impact theory, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact" on members of a protected group.[109] However, it is difficult for a plaintiff to prove that a specific practice has a disparate impact on members of a protected group if there are not many other employees that are members of the group in question, if other employees who are members of the group choose to abide by the employer's appearance policy,[110] or if the plaintiff can comply with the employer's requirement.[111] In light of Carbado and Gulati's argument that employers pursuing homogeneity in the workplace have particular incentives to hire racially palatable employees, a plaintiff may have difficulty identifying other employees who are group members and who are unable or unwilling to comply with predominantly white workplace norms, including appearance standards.[112] The fact that plaintiffs have difficulty pointing out other similarly situated group members reveals the courts' failure to utilize antidiscrimination law to address employment discrimination based on intra-racial distinctions, "distinctions employers

106. *Id.* at 656.
107. *Id.* at 656-57.
108. *Id.*
109. 42 U.S.C. § 2000e-2 (k)(1)(A)(i).
110. Green, *supra* note 34, at 657.
111. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2027 (1995).
112. Carbado & Gulati, *supra* note 85, at 1824.

make among people within a particular racial group."[113]

Furthermore, assuming a plaintiff is able to establish a disproportionate effect on a specific group, proving causation often poses problems because of the subjective nature of the decision at issue.[114] A plaintiff will usually have difficulty identifying the specific employment practice that caused the disparate effect.[115] Thus, due to what Green argues is a failure of courts to view work culture as a source of discrimination, and the "doctrinal barriers" posed by the disparate treatment and disparate impact theories, women and people of color are often blamed for their inability to conform to the demands of work culture.[116]

Employer Defenses

Even if a plaintiff succeeds in carrying her burden of proof under the disparate treatment or disparate impact theory, courts have consistently upheld appearance regulations that impact race, sex, or religion by accepting employer assertions that such regulations are necessitated by business concerns.[117] For example, under the disparate treatment and disparate impact theories, an employer can assert either that the appearance policy constitutes a bona fide occupational qualification reasonably necessary to the normal operation of the job, or that it is job related and consistent with a business necessity.[118]

Under a disparate treatment claim, if the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to present a legitimate non-discriminatory justification for the employment action.[119] If the employer is able to carry this burden, "the burden shifts back to the plaintiff to prove that the legitimate justification proffered by the employer is only a pretext for an underlying discriminatory motive."[120] Furthermore, in disparate treatment cases, employers can use the "bona fide occupation qualification" defense to justify discrimination against employees or applicants on the basis of sex, religion, or national origin.[121] In order to establish such a defense, the employer must show that the plaintiff's sex, religion, or national origin would substantially interfere with the performance of a specific job, that the employee must have a protected characteristic in order to perform the job properly, and that employing an individual who does not have that characteristic would transform the nature

113. *Id.* 1792.
114. Flagg, *supra* note 111, at 2027.
115. *Id.* at 2027-28.
116. Green, *supra* note 34, at 664.
117. *Id.* at 658.
118. Adamitis, *supra* note 2, at 204.
119. Bello, *supra* note 11, at 487.
120. *Id.*
121. *Id.* at 493-94.

of the business.[122]

In contrast, under a disparate impact claim, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to demonstrate that the employment practice satisfies a legitimate "business necessity," meaning that it relates to job performance or bears some manifest relationship to the employment in question.[123] If the defendant establishes a business necessity, the burden is placed on the plaintiff to offer evidence that the defendant can implement other available employment practices that would be comparably effective for its business, but would have less discriminatory effects.[124]

The disparate impact theory may not be an adequate paradigm for appearance-based claims because the discrimination usually does not stem from an employer's use of certain subjective requirements, which may actually be job related and justified by business necessity. Instead, the discrimination occurs as a result of "the application of that criterion by members of the white majority according to dominant definitions of the term."[125] Courts have a great deal of discretion in deciding whether a proffered business concern is sufficient enough to outweigh the adverse effects of a discriminatory appearance policy and tend to use this discretion in the employer's favor.[126]

Assimilation Bias

In addition to the doctrinal inadequacies of Title VII's two main theories of liability, the manner in which courts interpret Title VII when evaluating challenges to appearance policies is also problematic. Based on court decisions regarding employer dressing and grooming policies, it is evident that judges are influenced by an assimilation bias when interpreting claims brought under Title VII. According to the assimilationist perspective, plaintiffs challenging appearance policies do not have a cognizable claim if they have an opportunity to conform to prevailing norms.[127] Courts often refuse to protect plaintiffs from demands to cover and assimilate to dominant norms if such demands involve mutable characteristics over which plaintiffs have some control.[128] In essence, courts treat being a member of a protected group differently from behavior associated with that group and are less likely to protect individuals from discrimination based on mutable appearance choices because individuals

122. *Id.*

123. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

124. Bello, *supra* note 11, at 492.

125. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 142 (2003).

126. Flagg, *supra* note 111, at 2021-22.

127. *Id.* at 2033.

128. Yoshino, *supra* note 51.

are capable of avoiding discrimination by changing those traits.[129] Such an interpretation fails to recognize the link between covering demands that implicate race, gender, and individual choice.[130] Appearance choices are inextricably tied to racial, gender, and religious identity. Consequently when an employee is subjected to a dressing and grooming policy, she is faced with the choice of either preserving her racial and/or gender identity or rejecting it.[131]

However, the immutability distinction is under-inclusive since it does not provide relief for various forms of impermissible discrimination.[132] The immutability requirement is also problematic as a means of determining whether an employer has discriminated against an individual on the basis of one of Title VII's protected categories because it disregards the plain language and legislative history of the Act, which indicates that "Congress chose those [protected] categories because they reflect unacceptable employment standards, not because they were immutable."[133]

Beyond the basic appeal of the assimilation idea, Kenji Yoshino suggests that judges have institutional reasons for promoting assimilation.[134] Fearing the number of suits that would be filed if recovery for all cases in which individuals were asked to cover were allowed, courts have decided to protect immutable traits.[135] However, the flaw in the courts' analyses of these cases is their view of assimilation as a means through which individuals can avoid discrimination.[136] Courts fail to recognize that "sometimes assimilation is not an escape from discrimination, but precisely its effect."[137] Furthermore, courts often do not force employers to justify why they are requiring employees to cover.[138] Appearance regulations and employer demands to assimilate present a dilemma for courts: on the one hand, courts are hesitant to intervene as they do not want to favor some groups over others, but on the other hand, courts overlook the fact that these sorts of policies reinforce stereotypes and allow inequality to thrive.[139]

Community Standard Doctrine

One explanation for the gaps between what is unacceptable under Title VII and what scholars and advocates contend should be unacceptable

129. *Id.*
130. *Id.*
131. *Id.*
132. Davison, *supra* note 104, at 186.
133. *Id.* at 170.
134. Yoshino, *supra* note 51.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

is an excessive judicial reliance on community norms in determining what Title VII requires.[140] In particular, courts tend to rationalize dress and appearance requirements by referring to community standards. Professor Katharine Bartlett argues that courts are inclined to trivialize the effect of dress and grooming policies on employees by relying on culture-bound judgments that reinforce existing prejudices and stereotypes.[141] Such judgments have less to do with the importance of dress and appearance to individuals or employers and more to do with society's dress and appearance expectations.[142] Thus, according to Bartlett, the manner in which courts analyze dress and grooming policies is troublesome because judges make assumptions regarding what should be considered significant when analyzing these policies without examining the culture in which these requirements function.[143]

The community standard doctrine is also a potential source of discrimination against bisexuals, lesbians, and gays as members of such groups are believed to prefer gender-neutral appearance and dressing styles that undermine traditional expectations about gender and sexuality.[144] For example, *Smith v. Liberty Mutual* reveals the courts' failure to provide protection to individuals who do not conform to established standards of appearance.[145]

In *Smith*, the court rejected a Title VII discrimination claim based on effeminacy—the plaintiff's failure to conform to gender norms.[146] The plaintiff's job application was rejected because the interviewer considered the plaintiff effeminate.[147] However, since the plaintiff was not discriminated against simply because of his sex, but rather because he possessed qualities generally characteristic of the opposite sex, the court held such conduct did not violate Title VII.[148] By allowing employers to discriminate against job candidates who appear effeminate, courts give their approval to patriarchal and heterosexual notions of gender construction through appropriate appearance.[149]

Dress and Grooming Policies Impacting Race and Religion

The following cases reflect the manner in which courts assess dressing and grooming policies that implicate race and religion. In particular, these cases illustrate the doctrinal limitations of Title VII, the influence of an

140. Bartlett, *supra* note 25, at 2543.
141. *Id.* at 2558.
142. *Id.*
143. *Id.* at 2559.
144. Klare, *supra* note 29, at 1420-21.
145. Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978).
146. *Id.* at 326.
147. *Id.*
148. *Id.* at 327.
149. Klare, *supra* note 29, at 1420-21.

assimilation bias on courts' interpretation of Title VII, and the courts' tendency to defer to employer business interests.

Rogers v. American Airlines (S.D.N.Y 1981)

Rogers, an African American female, brought an unlawful discrimination action under Title VII based on American Airlines' grooming policy.[150] Alleging that the policy aided the Airlines in displaying a conservative and business-like image, employees in certain sectors were prohibited from wearing their hair in an all-braided style.[151] Although the plaintiff claimed that the policy discriminated against her on the basis of both her race and gender, the court held that her complaint failed to state a claim for discrimination under both accounts.[152]

The decision was influenced by the fact that the defendant's grooming policy applied to both men and women as well as employees of all races.[153] Because some men have longer hair than women, the court argued that the policy had a practical effect on men and women alike.[154] Even if the policy did impose different standards on men and women, it would not violate Title VII because a regulation of this sort only minimally affects job opportunities.[155] Furthermore, because the policy did not regulate immutable characteristics, it did not impinge on fundamental rights.[156]

As to her race discrimination claim, Rogers alleged that the cornrow-braided hairstyle was tied to the culture and history of black women and held important significance for them.[157] Similar to its analysis of the sex discrimination claim, the court stated that the policy was evenhandedly applied to members of all races and that the plaintiff failed to claim that the all-braided hairstyle was worn only or primarily by blacks.[158] Even if an all-braided hairstyle tends to be associated with a specific race or nationality, it is a permissible basis for distinctions in the application of employment practices, as it is a mutable characteristic.[159]

Citing a case recently upheld by the Fifth Circuit where an employer's grooming policy was found lawful, the court noted that the allegedly discriminatory employment practices seemed to have more to do with running a business than equality of employment opportunity.[160] The court also implied that American Airlines's need to reflect a conservative and

150. Rogers v. Am. Airlines, Inc. 527 F. Supp 229 (S.D.N.Y. 1981).
151. *Id.* at 231.
152. *Id.*
153. *Id.* at 232.
154. *Id.* at 231.
155. *Id.*
156. *Id.*
157. *Id.* at 231-32.
158. *Id.* at 232.
159. *Id.*
160. *Id.* (citing Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980)).

business-like image would qualify as a bona fide business purpose for the grooming policy.[161]

Rogers illustrates the court's inability to handle intersectional claims involving racial and sexual discrimination and its failure to recognize the cultural significance of cornrows for African American women.[162] The court held that the policy was not discriminatory, as it applied to both genders and all racial groups, and it did not regulate immutable characteristics.[163] However, the court's analysis is unsatisfactory because neutral policies can still discriminate. While the policy was applied evenhandedly, it particularly disadvantaged black women by taking away their ability to wear a hairstyle that displays their cultural identity.[164] Cornrows are historically and culturally tied to African American women and policies regulating such hairstyles do not have the same impact on white women as they do on black women.[165] However, the court failed to see how the employer's policy functioned in a discriminatory manner and gave more importance to American Airline's business interests than the adverse effects of the policy on African American women.[166]

The court's reasoning in this case reflects an assimilation bias that fails to recognize culturally biased grooming codes as problematic. The assimilation framework leads courts to take the position that differences should be minimized and employees facing grooming policies they disagree with should comply to the extent possible.[167] Focusing on the ease of compliance with the employer's policy, the court failed to acknowledge the impact and message that compliance sends to affected employees.[168] Through this decision, the court accords legitimacy and importance to certain appearances and racial groups over others.[169]

Hollins v. Atlantic Co. (6th Cir. 1999)

Similarly, in *Hollins*, an African American female brought an action under Title VII, alleging unlawful disparate treatment on the basis of race in the application of Atlantic's appearance and grooming standards to Hollins' hairstyle preferences.[170] Hollins was reprimanded for wearing her hair in "finger waves," allegedly in violation of Atlantic's grooming policy, which was purportedly implemented for safety reasons.[171] On another

161. *Id.* at 233.
162. Klare, *supra* note 29, at 1413.
163. *Rogers*, 527 F. Supp. at 232.
164. Turner, *supra* note 50, at 132.
165. *Id.* at 133.
166. Klare, *supra* note 29, at 1414.
167. Turner, *supra* note 50, at 137.
168. *Id.*
169. *Id.* at 139.
170. Hollins v. Atlantic Co., 188 F.3d 652, 655 (6th Cir. 1999) (en banc).
171. *Id.*

occasion, five white women wore their hair in the same "ponytail" hairstyle as Hollins, but only Hollins was reprimanded for her behavior and asked to seek pre-approval of hairstyles she planned to wear to work.[172] Concluding that similarly situated employees were treated differently, the court found that Hollins had raised an issue of fact as to whether Atlantic's grooming policy was a pretext for its treatment of Hollins and had also established a prima facie case of disparate treatment.[173]

This case indicates that courts are willing to find unlawful discrimination based on employer grooming policies when such policies are applied inconsistently or when adverse action is taken against employees for behavior not proscribed by the policy. In this case, the discriminatory application of the grooming policy was quite evident. Hollins, unlike other individuals who wore similar hairstyles, was the only employee repeatedly reprimanded for her behavior.[174] Furthermore, Atlantic admitted that Hollins hairstyle technically fell within the parameters of the policy, as it was neat, well groomed, and safe, and that the only reason it was unacceptable was because it was eye-catching and too different.[175] Even though dressing and grooming policies that are equally applied can adversely impact members of some groups more than others, it is not likely that the court in *Hollins* would have reached the same conclusion had the employer applied the policy equally.

McManus v. MCI Communs. Corp. (D.C. Cir. 2000)

Wandra McManus, an African American woman, brought a claim for discrimination based on race and personal appearance in violation of the District of Columbia Human Rights Act ("DCHRA")[176] against her former employer after she was replaced by an individual who she claims "more typically reflects corporate America."[177] The DCHRA, which prohibits "discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business," is often construed by looking to cases interpreting Title VII.[178] McManus, who dressed in African-styled clothing at work and wore her hair in dreadlocks, braids and cornrows, argued that "because of her choice of clothing and hairstyle, she represents a subset of African Americans whose claim of discrimination based on race, coupled with personal appearance, cannot be defeated by

172. *Id.*
173. *Id.* at 660.
174. *Id.* at 660.
175. *Id.* at 655.
176. McManus v. MCI Commc'ns Corp., 748 A.2d 949, 951 (D.C. 2000).
177. *Id.* at 957.
178. D.C. CODE §2-1401.01 (2001).

replacing her with an African American whose dress more typically reflects corporate America."[179] The court held that McManus did not make out a prima facie case of racial or personal appearance discrimination because she failed to show that MCI replaced her with someone outside her protected class.[180] As to her personal appearance claim, which was based on comments made by her supervisors regarding her appearance, the court found that the comments made to McManus were not discriminatory, but rather complimentary.[181] They included statements such as "That is a pretty outfit," "Your earrings are interesting," "I like the way you wear your hair up, because it makes your facial features look better," and "Oh, what kind of hair style is this, how did they do this?"[182] Therefore, the court held that McManus did not offer facts sufficient to support such a claim.[183]

The case raises important issues about intra-racial distinctions, specifically differences between African Americans who use clothing and hairstyle to express their heritage and African Americans who dress in a fashion more typical of corporate America. The court suggests that there may be instances in which a discrimination claim based on intra-racial distinctions would be recognized by the law.[184] Had there been a stronger connection between the comments made about McManus' appearance and her termination, perhaps the court would have recognized McManus' claim that she had been replaced by an African American whose dress was more typical of corporate America.[185]

EEOC v. Sambo (N.D. Ga. 1981)

The Equal Employment Opportunity Commission brought a Title VII action on behalf of Mohan Singh Tucker, alleging that the defendant, Sambo's Restaurant, rejected his application for a restaurant managerial position on the basis of his religion.[186] Tucker, who was forbidden by his religion to shave his facial hair, could not comply with Sambo's grooming and appearance standards, which banned managerial personnel from having facial hair.[187] After informing the company's recruiter that he would not comply with the grooming standards, Tucker's application was rejected.[188]

In analyzing the religious discrimination claim, the court noted that if Sambo were to relax its grooming standards, it would negatively affect the

179. *McManus*, 748 A.2d at 956-57.
180. *Id.* at 954.
181. *Id.* at 952-54.
182. *Id.* at 952.
183. *Id.* at 957.
184. *Id.*
185. *Id.*
186. EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 88 (N.D. Ga. 1981).
187. *Id.*
188. *Id.* at 88-89.

restaurant's public image and possibly offend customers.[189] The court also noted that it is the norm to be clean-shaven in restaurants like Sambo and such policies are necessary to attract customers.[190] Implementation of the policy reflects the view that consumers have a preference for restaurants where employees are clean-shaven. This preference may be attributed to negative feelings elicited when customers deal with bearded people, a concern about unsanitary conditions, or personal standards of cleanliness and hygiene.[191] The court stated, "customer preference is [not] an insufficient justification as a matter of law."[192] Although the court found that a disparate impact claim did not apply to religious discrimination cases, it stated that even if it were applicable, there was no evidence demonstrating that Sambo's grooming policy had a disparate impact on Sikhs or other religions that forbid the shaving of facial hair.[193] In essence, the court validated customer preference as a justification for the employer's decision to penalize Tucker for his religious beliefs.[194]

The court also noted that allowing exceptions to this policy might make it difficult to enforce grooming standards against other employees and affect employee morale and efficiency.[195] Moreover, relaxing the policy might cause the restaurant to risk noncompliance with sanitation regulations. The court commented that sanitation is a justifiable concern in the food industry and therefore, a grooming policy like Sambo's might be necessary.[196] Therefore, as the grooming policy was tailored to Sambo's business needs, related to job performance, and necessary to the operation of the restaurant, the court concluded that Sambo's approach to compliance with the sanitation unit's guidelines regarding facial hair was reasonable and justified.[197]

Current State of the Law

A review of the cases involving dressing and grooming policies impacting race and religion indicates that courts generally hold that an employer's dressing and grooming policy do not violate Title VII as long they do not regulate an immutable characteristic and are applied equally to all employees. Furthermore, the cases demonstrate that courts not only tend to give employers a considerable amount of discretion in deciding how to run their businesses, but that they also view dressing and grooming policies

189. *Id.* at 90.
190. *Id.*
191. *Id.*
192. *Id.* at 91.
193. *Id.* at 93.
194. Klare, *supra* note 29, at 1413.
195. *Sambo's*, 530 F. Supp. at 90.
196. *Id.* at 89-90.
197. *Id.* at 90.

as having a minimal effect on job opportunities.

Dressing and Grooming Policies Impacting Gender

Instead of providing protection for women and those who do not conform to traditional gender roles, the manner in which courts interpret Title VII to analyze gender related appearance claims arguably perpetuates gender stereotypes and naturalizes socially constructed gender differences.[198] By relying on community norms in ascertaining the requirements of Title VII, courts end up enforcing prevailing prejudices.[199] This is problematic because "[c]ommunity norms are too discriminatory to provide a satisfactory benchmark for workplace equality."[200]

Professor Karl Klare argues that when it comes to gender related appearance policies, courts allow certain forms of gender discrimination under three common rationales: (1) community standard-based dress codes are not that onerous and do not hinder employment opportunities, (2) the courts must defer to employer discretion in order to increase efficiency, and (3) gender-based appearance requirements are not discriminatory, as each sex is held to standards that reflect community expectations.[201] Although these rationales are often assumed as a given, these arguments are unpersuasive because they perpetuate stereotypical notions of gender and appearance.[202]

Lanigan v. Bartlett (W.D. Mo. 1979)

Plaintiff Data La Von Lanigan brought a sex discrimination action under Title VII against defendant Bartlett based on a dress code policy forbidding women from wearing pants in the executive office.[203] At the outset, the court noted, "nothing in Title VII prohibits an employer from making decisions based on factors such as grooming and dress."[204] The court dismissed Lanigan's argument that prohibiting women from wearing pants perpetuates the stereotype that men are more competent than women,[205] placing more emphasis on the fact that wearing a pantsuit was not a fundamental right and that Lanigan was physically able to comply with the employer's policy.[206] While Lanigan argued that the employer failed to offer a valid business justification for its dress policy, the court stated that Bartlett did not have to defend its policy because Lanigan had

198. Klare, *supra* note 29, at 1415.
199. *Id.* at 1418.
200. Bartlett, *supra* note 25, at 2544-45.
201. Klare, *supra* note 29, at 1419.
202. *Id.* at 1419-20.
203. Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1389 (W.D. Mo. 1979).
204. *Id.* at 1390.
205. *Id.* at 1391.
206. *Id.* at 1390-91.

not presented a prima facie case of discrimination.[207] The court firmly stated, "[a]n employer is simply not required to account for personal preferences with respect to dress and grooming standards."[208] The court also noted that the dressing policy at issue, like policies requiring certain hair lengths, has more to do with an employer's choice of how to manage its business rather than equal employment opportunities.[209] As such, employers may rightfully implement policies that project a certain image.

This case illustrates the extent to which courts rely on community norms in ascertaining what Title VII requires. When it comes to employer dressing and appearance requirements, courts are willing to uphold requirements that impose burdens on women that are different from those imposed on men as long as the rules are based on well-settled community norms.[210] Based on such norms, courts ascertain whether dressing and appearance policies have a significant impact on employees, are "neutral" in that they hold both males and females to a standard of what the community expects of each sex, or are integral to the employer's legitimate business goals.[211] However, employer regulations requiring women to wear skirts are not neutral, but are instead based on stereotypes that regard women as sexual objects who are less capable than men and better suited for less assertive positions.[212] Thus, the courts' use of community norms often results in the legitimization of gender stereotypes and many of the biases Title VII was designed to eliminate.

Carroll v. Talman Federal Savings & Loan Association of Chicago (7th Cir. 1979)

Mary Carroll brought a Title VII action on behalf of herself and other similarly situated female employees against defendant Talman Federal Savings and Loan Association for the defendant's allegedly discriminatory dress code policy.[213] The dress code required only female employees to wear uniforms. The court upheld Carroll's claim, and found immaterial the arguments that the uniforms were not unattractive or uncomfortable, that the uniforms did not deter female employees from enjoying their jobs, and that the uniforms were even preferred by some female employees.[214] The majority also pointed out that Carroll had introduced less discriminatory alternatives to Talman's dress codes.[215] Although it is acceptable for

207. *Id.*
208. *Id.* at 1392.
209. *Id.*
210. Bartlett, *supra* note 25, at 2544.
211. *Id.*
212. *Id.*
213. Carroll v. Talman Fed. Sav. & Loan Ass'n., 604 F.2d 1028, 1029 (7th Cir. 1979).
214. *Id.* at 1037 (Pell, J., dissenting).
215. *Id.* at 1031 (majority opinion).

employers to require uniforms, the dress codes must be applied equally to all similarly situated employees.[216] The majority was hesitant to examine the reasonableness of an employer's appearance policy.[217] Normally appearance standards dictated by employers that differ for men and women do not violate Title VII if they are justified by "commonly accepted social norms and are reasonably related to the employer's business needs."[218] In this case, however, the court found that two sets of employees doing the same work were subjected to different dress policies based on their sex, a practice that was not justified by a business necessity.[219]

Furthermore, the court found that Talman's policy degraded women by implying that women do not have the same professional status as their male counterparts.[220] The court concluded that Talman's justifications for the policy were based on offensive stereotypes about women and their selection of work clothing.[221] Although it was not wrong for the employer to acknowledge different dress norms for men and women, it was wrong for the employer to compel women to wear employer-identified uniforms and assume that women, unlike men, could not be trusted to make good judgments in deciding what to wear to work.[222]

Craft v. Metromedia, Inc. (8th Cir. 1985)

Craft claimed that defendant Metromedia discriminated against her on the basis of her sex, in violation of Title VII, by scrutinizing her appearance and assigning her to a different job because of her looks.[223] Craft's main assertion was that Metromedia's "appearance standards were based on stereotypical characterizations of the sexes and were applied to women more constantly and vigorously than they were applied to men."[224] The court affirmed the district court's finding that the evidence demonstrated only that Metromedia was "concerned with the appearance of all its on-air personnel and that it took measures appropriate to individual situations, characteristics, and shortcomings."[225]

Craft also argued that even if Metromedia applied the appearance standards in an evenhanded manner, the standards were discriminatory in themselves.[226] She claimed that she had to conform to a stereotypical image

216. *Id.*
217. *Id.* at 1032.
218. *Id.*
219. *Id.*
220. *Id.* at 1033.
221. *Id.*
222. *Id.*
223. Craft v. Metromedia, Inc., 766 F.2d 1205, 1207 (8th Cir. 1985).
224. *Id.* at 1210.
225. *Id.* at 1213.
226. *Id.* at 1214.

of how female anchors should look.[227] The district court held that the appearance standards were not discriminatory per se because both men and women were required to maintain a professional, business-like appearance consistent with community standards.[228] Such requirements were critical to Metromedia's economic well-being.[229] Unlike the dress requirements previously found to violate Title VII—which involved demeaning stereotypes about female characteristics and abilities, stereotypical notions of female attractiveness, or female sexuality that is used to attract business—the criteria here did not implicate the primary thrust of Title VII.[230]

The court further noted that grooming policies fall within the domain of an employer's discretion because an employee's appearance can impact a company's image and success.[231] The court acknowledged that it was not the appropriate forum to debate the relationship between newsgathering and dissemination on the one hand, and considerations of appearance and presentation in television journalism, on the other.[232] The court concluded that the district court did not err in deciding that the defendant's appearance standards were based on neutral professional and technical considerations rather than stereotypical notions of female roles and images.[233]

While subjecting women, more than men, to attractiveness requirements may be unlawful, the *Craft* case illustrates that attractiveness requirements have not been eliminated.[234] Employers may freely impose attractiveness requirements on women as long as members of both sexes are supposedly regulated.[235] In the television industry, both men and women are judged based on their appearance, but such standards are likely higher for women.[236] The court in this case allowed Metromedia to evaluate Craft according to viewer surveys that included stereotypical notions of beauty and appropriate behavior for men and women.[237] However, while the court purported to compare the burdens imposed by dress and appearance standards on male and female employees, it relied on viewer surveys as objective evidence to justify Craft's termination.[238]

Klare argues that employer policies requiring attractiveness and a pleasing appearance are incapable of gender neutrality in our society

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 1215.
231. *Id.*
232. *Id.*
233. *Id.* at 1215-16.
234. Klare, *supra* note 29, at 1423.
235. *Id.* at 1424.
236. *Id.*
237. *Id.*
238. Bartlett, *supra* note 25, at 2564.

because such categories are based on stereotypical expectations and judgments about women.[239] The *Craft* case reveals how the law reinforces appropriate standards for women's appearance and how notions of beauty can impact employment opportunities.[240] The court affirmed that Craft's appearance, which was arguably unrelated to the essence of her job, was a valid basis for the adverse employment action taken against her.[241]

Jespersen v. Harrah's Operating Co. (9th Cir. 2006)

Plaintiff Jespersen was terminated from her position as a bartender in Harrah's casino because she refused to comply with Harrah's grooming policy, which required female employees to wear facial makeup.[242] She claimed that Harrah's grooming policy was discriminatory because it subjected women to terms and conditions of employment which men were not similarly subjected to, and further, that it required women to conform to sex-based stereotypes as a term and condition of employment.[243] The district court granted summary judgment to Harrah's, holding that the grooming policy equally burdened male and female bartenders. The district court stated that "while women were required to use makeup and men were forbidden to wear makeup, women were allowed to have long hair and men were required to have their hair cut to a length above the collar."[244] Furthermore, the district court stated that Harrah's grooming policy was not prohibited by Title VII because it did not discriminate based on immutable characteristics.

The Ninth Circuit agreed with the district court that Jespersen failed to present sufficient evidence that Harrah's grooming policy unequally burdened women.[245] However, the Ninth Circuit also concluded that appearance standards might be the subject of a Title VII claim for sex stereotyping.[246] As for the unequal burden claim, Jespersen provided testimony that she felt degraded and demeaned by the makeup policy, but did not establish that complying with Harrah's grooming policy would unequally burden women.[247] As a rule, "grooming standards that appropriately differentiate between the genders are not facially discriminatory."[248] The issue was not whether the policies were different, but whether the policy created an unequal burden for one gender.[249]

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239. Klare, *supra* note 29, at 1425.
240. Baron, *supra* note 24, at 385.
241. *Id.*
242. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1105-06 (9th Cir. 2006).
243. *Id.* at 1108.
244. *Id.* at 1106.
245. *Id.*
246. *Id.*
247. *Id.* at 1108.
248. *Id.* at 1110.
249. *Id.*

With respect to Jespersen's sex stereotyping claim, the court held that Jespersen's personal reaction to the makeup requirement, without more, could not give rise to a claim of sex stereotyping under Title VII.[250] In reaching this conclusion, the court noted that Harrah's policy did not single out Jespersen, was not intended to be sexually provocative, and did not give rise to sexual harassment.[251] Furthermore, there was no evidence suggesting that the policy was implemented to make female bartenders conform to a "commonly-accepted stereotypical image of what women should wear" or that the grooming standards would objectively hinder a woman's ability to perform the job.[252] The court concluded that Jespersen failed to establish a basis for her claim of sex stereotyping, since the evidence was limited to the reaction of one employee and there was no evidence of any stereotyping motives on the part of the employer.[253]

The *Jespersen* case reinforces the long-standing rule that as long as a grooming policy is universally applicable and uniformly applied, courts will generally consider the policy acceptable regardless of its sex differentiated requirements.[254] Despite the outcome of the case, the court ultimately created an opportunity for potential plaintiffs to bring claims of sex stereotyping on the basis of dress or appearance codes. Although Jespersen did not provide sufficient evidence for such a claim, the court indicated that it would have been more inclined to permit the claim if there had been evidence that the employer was motivated by stereotypical images of women in adopting such a policy, if the grooming policy objectively inhibited a woman's ability to do the job, or if the policy subjected women to any form of alleged harassment.[255]

Although the court's holding may potentially provide relief for individuals who are adversely affected by appearance policies, the standard for determining when such a policy constitutes sex stereotyping may be difficult to meet. For example, the court did not consider Jespersen's testimony that Harrah's makeup requirement prohibited her from doing her job because it affected her self-dignity, which may provide an example of "objectively" inhibiting a woman's ability to do the job.[256] Furthermore, it is possible that Harrah's implemented the grooming policy, in part, to make female bartenders conform to a stereotypical notion of how women should dress and groom. As Judge Pregerson's dissent in *Jespersen* points out, the makeup requirement shows that Harrah's regarded "women's faces [as]

250. *Id.* at 1112.
251. *Id.*
252. *Id.*
253. *Id.* at 1113.
254. *Id.* at 1110.
255. *Id.* at 1113.
256. *Id.* at 1112.

incomplete, unattractive, or unprofessional without full makeup."[257]

Current State of the Law

The previous cases demonstrate that courts tend to find dressing and grooming policies impacting gender acceptable if (1) they regulate mutable characteristics, (2) are applied to both sexes, and (3) contain requirements that reflect generally accepted community standards of dress and appearance for each sex. Furthermore, courts generally conclude that such policies have more to do with an employer's choice of how to run the business than with equal employment opportunity. However, if a dressing and grooming policy is only imposed on one sex, courts are likely to find such a policy objectionable. The most problematic feature of the current state of the law with respect to such appearance policies is the courts' blind reliance on commonly accepted social norms that reflect patriarchal and sexist values.

PART V
PROPOSALS FOR REFORM

Recognizing the doctrinal hurdles posed by current legal theories and the courts' problematic resolution of challenges to discriminatory appearance regulations, scholars have proposed a number of reforms to provide relief for adversely affected employees. Such reforms include altering the way courts evaluate community norms, implementing new forms of liability under Title VII, fashioning a private right to appearance autonomy, and reconstructing the labor market. Although the suggested reforms are individually appealing, it is clear that any effective strategy to combat the adverse effects of discriminatory appearance policies will require the collaborative efforts of courts, employers, and society.

Courts

Acknowledging Institutional Constraints on Courts

While it is imperative to change the way courts currently handle appearance discrimination claims, proposed reforms must take into account constraints that courts face when examining employer appearance policies that adversely affect certain groups. In order to address institutional restraints on the courts' power, Kenji Yoshino argues that legal remedies must move away from claims that "demand equality for particular groups toward claims that demand liberty for us all."[258] His argument rests on the prediction that in light of our increasingly diverse society, future courts will

257. *Id.* (Pregerson, J., dissenting).
258. Yoshino, *supra* note 51, at 36.

have institutional limits preventing them from vindicating group-based civil rights.[259] For example, in 2004 when the Supreme Court held that Congress could compel a state to make its courthouses wheelchair-accessible, instead of structuring its analysis in group-based rights, the Court argued that "all people—disabled or otherwise—have a 'right of access to the courts.'"[260]

Although grounding anti-discrimination law in terms of liberty helps address the impact of demands to cover, employers also have liberty interests via the state in running their businesses as they choose and not having the government dictate with whom they can associate.[261] Thus, any advantages of a liberty-based right to be free from discrimination must also be weighed against employers' liberty interests. On the other hand, grounding the right to be free from discrimination in equality, as opposed to liberty, has the strategic advantage of trumping other rights.[262]

Community Norms

Although many scholars who criticize the manner in which courts evaluate employer appearance regulations have proposed either avoiding the use of community norms to rationalize discriminatory appearance codes or eliminating appearance rules entirely to emphasize personal autonomy,[263] Bartlett argues that it is neither possible to assess appearance policies in a vacuum nor wise to abolish dress and appearance codes entirely.[264] She suggests that courts should pay more attention to community norms by recognizing the cultural meanings inspiring such norms and assessing whether they disparately burden certain groups,[265] rather than using them as neutral, external standards that validate most restrictions.[266] Her argument rests on the premise that the law and community norms constantly interact with one another. In light of this dynamic relationship, she recommends incorporating, rather than discarding, community norms in efforts to reform how the law addresses appearance policies.[267]

Furthermore, combating discriminatory dress and grooming codes by prohibiting such policies entirely is not effective. For example, Bartlett argues that eliminating dress codes will not necessarily translate into increased autonomy for employees,[268] as dressing and appearance choices

259. *Id.*
260. *Id.*
261. Linda Hamilton Krieger, Employment Discrimination Lecture at Boalt Hall (Apr. 11, 2006).
262. *Id.*
263. *See generally* Klare, *supra* note 29.
264. Bartlett, *supra* note 25, at 2545.
265. *Id.* at 2569.
266. *Id.* at 2545.
267. *Id.* at 2546.
268. *Id.* at 2549.

are dependent on the culture we live in and employer dress codes are not always formalized. Therefore, eliminating employer dressing and grooming codes will not bring about an increase in employee autonomy as dressing and appearance expectations are pervasive, deeply entrenched, and endure even in the absence of mandatory codes.[269]

Bartlett's suggestion that courts should scrutinize and evaluate community norms, rather than avoid using them entirely is persuasive, as evaluating appearance policies without referring to community norms seems implausible. Furthermore, by focusing on the meanings and assumptions underlying such norms, courts can play an active role in eradicating harmful and discriminatory norms.

Title VII's Anti-Retaliation Provision

Professor Terry Smith suggests that Title VII's anti-retaliation provision can be used to protect minority employees who resist subtle forms of discrimination in the workplace by refusing to conform to discriminatory workplace norms.[270] Section 704, Title VII's anti-retaliation provision, states the following:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.[271]

While this provision protects individuals who oppose lawful employment practices that they believe in good faith are unlawful, the court's analysis of the reasonableness of individual beliefs is based on its evaluation of the underlying § 703 unlawful discrimination claim.[272] An employee who claims she was adversely affected by her employer's application of white norms has a slim chance of winning under § 703. Thus, Professor Barbara Flagg argues that it is imperative to assess reasonableness in a race-conscious manner.[273] A race-conscious analysis will more likely view a minority's decision not to conform to workplace norms as motivated by racial factors than by choice.[274]

Flagg acknowledges that not all claims will receive protection under Title VII's anti-retaliation provision. Generally, opposition behavior must occur in response to some specific employer practice, and the employer has

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269. *Id.* at 2551.

270. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

271. 42 U.S.C. § 2000e-3(a).

272. Barbara J. Flagg, *Subtle Opposition*, 34 COLUM. HUM. RTS. L. REV. 605 (2003).

273. *Id.* at 610.

274. *Id.*

to be aware of the oppositional conduct and take adverse action in response to such conduct.[275] Flagg contends, however, that subtle forms of opposition should be protected under Title VII's anti-retaliation provision because they are consistent with the underlying goals of the provision, insofar as they promote dialog and resolution of discriminatory practices.[276]

While Flagg's proposal is innovative, most plaintiffs who refuse to conform to discriminatory workplace norms will be unable to successfully establish a claim under Title VII's anti-retaliation provision. Among other things, the anti-retaliation provision makes it unlawful for an employer to discriminate against any employee who opposes an unlawful practice. However, courts may not view a dressing and grooming policy based on discriminatory workplace norms as constituting an unlawful practice unless one can establish that the policy implicates one of the categories protected by Title VII. Based on current case law, it would be difficult to make such a showing.

Alternative Theories of Liability Under Title VII

In addition to endorsing Title VII's anti-retaliation provision to combat discriminatory workplace norms, Flagg introduces a doctrinal framework that would address forms of workplace discrimination based on white subjective decision-making under Title VII.[277] She argues that Title VII should be interpreted to encompass claims based on white subjective decision-making, but the disparate impact and disparate treatment forms of liability are not adequate in countering such forms of discrimination.[278] Thus, she proposes two revised models of Title VII liability that would reach white subjective decision-making and achieve the statute's goals more effectively—the foreseeable impact model and the alternatives model.[279]

The foreseeable impact model, which resembles the structure of the current disparate impact analysis, emphasizes foreseeable rather than actual disparate effects.[280] To prove foreseeable disparate effects, for example, the plaintiff might show how the allegedly discriminatory criterion is associated with whites more than other racial groups and that whites view the criterion positively.[281] Flagg suggests that the foreseeable impact approach avoids barriers that plaintiffs face under the current disparate impact theory.[282] For example, the foreseeable impact model does not

275. *Id.* at 612.
276. *Id.*
277. Flagg, *supra* note 111.
278. *Id.* at 2015.
279. *Id.* at 2038.
280. *Id.*
281. *Id.* at 2040.
282. *Id.* at 2038.

require proof of actual disparate effects and, therefore, diminishes the issues of causation and choice while focusing on the uneven distribution of characteristics rather than on the individual.[283] Under the foreseeable impact model, business necessity remains an affirmative defense if assimilation is needed to maintain the "essence" of the business.[284] While the foreseeable impact model is appealing in many respects, its emphasis on alleged differences between whites and other racial groups risks implying minority inferiority.[285]

On the other hand, the alternatives model approach would "capture the structural nature of discrimination" in the workplace more directly than the disparate impact framework.[286] Under this approach, the plaintiff would examine the racial composition of her workplace and attempt to demonstrate that her workplace is predominately white, or that whites fill most of the positions of authority.[287] Such a showing could help reveal that the alleged discriminatory action was based on white decision making.[288] The employer would then have to identify the decision making criteria and the goals they serve.[289] Permissible goals would include financial motives, but exclude customer preferences that impact categories protected under Title VII.[290] The plaintiff would have the ultimate burden of introducing alternative criteria that would achieve the employer's stated goals and the employer would have an opportunity to show that the employee's proposed alternatives would be unreasonable.[291] The alternatives impact approach would allow the plaintiff to introduce evidence from which disparate impact could be inferred[292] and then propose less disadvantageous alternatives that would accomplish the employer's objectives, without addressing business necessity.[293] Possible alternatives include diversity training and changes in decision making authority.[294] While the alternatives model is attractive because it provides a structural solution to a structural problem,[295] the model may intrude on employer autonomy, as its "presumption of race specificity" makes it easier for employers to be found liable for decisions that are in fact race-neutral.[296]

Flagg's proposed models of Title VII liability have their strengths and

283. *Id.* at 2041.
284. *Id.* at 2042.
285. *Id.* at 2043.
286. *Id.* at 2044.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 2046.
291. *Id.* at 2044.
292. *Id.* at 2045.
293. *Id.* at 2044.
294. *Id.* at 2047.
295. *Id.* at 2047-48.
296. *Id.* at 2048.

weaknesses. The foreseeable impact model maintains employer autonomy, but attributes differences to certain racial groups. While the alternatives model provides a direct structural response to a structural problem, it infringes on employer privileges. Even though Flagg's proposals are not a perfect solution to the problem at hand, they are an improvement on the courts' current forms of analysis.

Employers

Labor Market Reconstruction

Klare argues that bargaining within the labor market is preferable to judicial decision-making because it produces more flexible outcomes and involves greater employee participation.[297] Klare introduces the labor market reconstruction theory as a promising approach to tackle discriminatory appearance regulations.[298] He argues that although appealing, the "right" to appearance autonomy, which has been proposed to counter discriminatory appearance policies, is problematic.[299] The right to appearance autonomy is very general and thus, subject to judicial interpretation of its meaning and of the scope of its protections.[300] Judicial interpretation of rights-based challenges to employer appearance policies is also unlikely to be consistent with the views of those who initially proposed the rights approach, as judges may not be sensitive to the adverse impact of dressing and grooming policies on certain racial and gender groups.[301]

Market reconstruction would work in tandem with the rights-based approach, giving employees more control over their appearance choices by increasing their bargaining power over appearance, dress, and grooming policies.[302] This could be accomplished by implementing new employee bargaining policies to "redistribute power in a modest but meaningful way from men to women, from employers to employees, from dominant groups to racial and religious minorities."[303] Democratization of the workplace may also transform the workplace into a forum for reevaluating stereotypes about members of certain racial, gender, and religious groups, thereby creating an atmosphere in which employees can discover more about themselves and their co-workers.[304] Klare also proposes giving employees nonwaivable appearance-related protections as a way to increase employee

297. Klare, *supra* note 29, at 1447.
298. *Id.* at 1446.
299. *Id.* at 1444-45.
300. *Id.* at 1446.
301. *Id.*
302. *Id.* at 1446-47.
303. *Id.* at 1438.
304. *Id.* at 1443.

bargaining power over appearance regulations.[305] For example, employers would be prohibited from using appearance as a basis for discriminating against or firing an employee.[306] However, an employee could waive her right to appearance autonomy in exchange for higher wages,[307] in which case the employer would retain power to set forth the parameters of the appearance policy, enforcement procedures, and penalties for noncompliance with the policy.

The labor market reconstruction theory applies principles of traditional market theory to the employment context and assumes that market forces will produce an efficient outcome. For instance, under the labor market reconstruction theory, an employee has the freedom to choose between receiving a higher wage or appearance autonomy and it is assumed that the market will produce the best result. However, like traditional market theory, the labor market reconstruction theory may rely on faulty assumptions that all participants have rational expectations, that they update their expectations, and that they receive and act on all relevant information as soon as it becomes available. Another problem with the labor market reconstruction theory is that employers may simply avoid bargaining and paying higher wages to those who give up their appearance rights by either hiring employees who are willing to abide by the employer's preferences or by hiring employees who voluntarily waive their appearance autonomy rights without demanding higher wages.

Altering Organizational Structures

As another means to combat appearance-based discrimination in the workplace, Green suggests altering legal discourse to recognize work culture as a potential source of discrimination and to pressure employers into modifying organizational structures that play a role in molding work culture.[308] Discriminatory work culture is influenced by a combination of factors, including cognitive and motivational biases of employees, structural and institutional choices made by the organization, and allocation of power within the organization.[309]

While many scholars have proposed a rights-based approach to counter workplace discrimination and demands to assimilate, Green criticizes the rights-based or identity harms approach for requiring "a legal determination that certain behaviors or traits are central, essential, or integral to a protected individual's identity."[310] She argues, "[p]lacing a legal imprimatur on particular behavior differences in isolation is likely to

305. *Id.* at 1447-48.
306. *Id.* at 1448.
307. *Id.*
308. Green, *supra* note 34, at 625.
309. *Id.* at 648-49.
310. *Id.* at 653.

lead to group-based categorization, entrenched stereotypes, and connotations of inferiority."[311] Furthermore, social relations formed at work are too valuable to be regulated by deferring to judicial interpretation and transforming relational dynamics.[312] Allowing a private right of action would leave courts with the job of identifying legal and illegal conduct on a case-by-case basis and would lead to increased efforts by employers to regulate employee social relations.[313]

Identifying work culture as a source of discrimination, on the other hand, has two advantages. First, it incorporates identity harms as well as other harms without forcing the law to recognize certain traits as central to a particular group's identity.[314] Also, it will help change the way courts currently evaluate discrimination claims, as courts fail to capture the effects of work culture on the personal choices of women and people of color.[315]

In light of the fact that an "employer's organizational choices can both facilitate and constrain the development of discriminatory work cultures,"[316] Green argues that employers should attempt to change how employees interact in the workplace "so that demands to conform to work culture are not demands to conform to a white, male norm."[317] She suggests creating a scheme through which courts would require employer compliance with a legal mandate to eliminate discriminatory work cultures.[318] Regulation on the employer's part would involve "[a]ttention to patterns of bias and relational dynamics, inquiry into organizational influences on intergroup inequities, and context-specific efforts to reshape potentially discriminatory work cultures."[319]

Allowing employers and third parties to reshape potentially discriminatory work cultures may seem risky, but the nature of workplace discrimination requires a complex solution that outsiders would have difficulty developing.[320] Furthermore, such risks can be minimized with appropriate oversight and assessment of employer reforms.[321] On the other hand, this approach, which entails reshaping discriminatory work cultures with the assistance of court supervision, may not be practical because courts tend to have limited resources and are not necessarily the best forum for making such determinations.

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311. *Id.* at 673.
312. *Id.* at 665.
313. *Id.* at 667.
314. *Id.* at 653 (citing Richard Ford, *"Beyond Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM / LEFT CRITIQUE 38, 53 (Wendy Brown & Janet Halley eds., 2002)).
315. *Id.* at 664.
316. *Id.* at 650.
317. *Id.* at 672.
318. *Id.* at 674-75.
319. *Id.* at 674.
320. *Id.* at 675-76.
321. *Id.* at 676.

Society

The law, by itself, represents an incomplete solution to appearance-based assimilation demands because many individuals do not fit within traditionally protected categories of race, gender, and sexual orientation.[322] Given that the law gains meaning within its social context and social actors play an important role in shaping the meaning of the law, Yoshino argues that the solution to coerced assimilation lies in each one of us.[323] As a society we have to look for the reasons why demands to cover are universally made.[324]

Because discrimination is embedded in our culture, any solution to discriminatory appearance policies necessarily entails a transformation of our social and cultural values. Not only does society need to examine stereotypes and attributional biases associated with appearance, but it also needs to recognize and address the subtle forms of discrimination lurking in the modern workplace. Norms that adversely affect racial, gender, sexual orientation, and religious identities in society can also structure workplace culture. As a society, we need to acknowledge that modern forms of discrimination against non-conforming individuals are just as harmful as past forms of discrimination, which resulted in the stigmatization of entire groups, such as racial and religious minorities, women, gays, and the disabled.[325] Society must scrutinize the demands to conform to discriminatory workplace norms and ascertain which grounds, if any, justify such demands.[326] Increasing societal involvement in meaningful reform will have the added benefit of boosting society's stake in the eradication of discriminatory appearance policies. Social movements acknowledging the discriminatory potential of workplace appearance norms may also compel courts to interpret Title VII in a manner that reinforces, rather than undermines, the transformative nature of the act.

Changing social and cultural values and questioning established workplace norms are not easy tasks. However, small steps towards increasing society's role in combating appearance-based discrimination are possible. First and foremost, we must increase awareness of the attributional biases associated with appearance. Perhaps this could be done through education in the classroom setting, particularly at an early age. We must also initiate campaigns, broadcasted through television or other forms of media, to promote diversity and tolerance of different modes of dress and grooming tied to certain racial, religious, and gender groups. Finally, it is important that we congregate in public and political arenas to discuss and

322. Yoshino, *supra* note 51, at 38.
323. *Id.*
324. *Id.*
325. *Id.* at 33.
326. *Id.* at 38.

challenge discriminatory workplace regulations and their damaging effects.

CONCLUSION

The first step toward protecting individuals adversely affected by employer-imposed appearance policies is to recognize the discriminatory potential of those policies, particularly those that serve as proxies for discrimination based on suspect categories such as gender and race. Such recognition will necessarily entail changing the way courts interpret legal doctrine, unraveling societal norms that form the basis of appearance standards, and creating incentives for employers to reshape potentially discriminatory work cultures to make them more inclusive.

By taking the foregoing strides, we as a society can stand behind our commitment to equality. By developing a more comprehensive scheme for eliminating discrimination in the workplace that acknowledges all people's rights irrespective of their race or gender, we can ensure that all identities are valued and recognized. Individuals who have been subjected to appearance-based discrimination deserve protection, as such discrimination is arbitrary, irrational, and has damaging implications. However, in light of reasonable employer interests, not all appearance policies can be per se illegal. Thus, appearance policies that allow employers to implicitly discriminate against employees based on suspect categories such as race, religion, sex, and national origin should be the primary focus of regulation.