

FACIAL DISCRIMINATION: EXTENDING HANDICAP LAW TO EMPLOYMENT DISCRIMINATION ON THE BASIS OF PHYSICAL APPEARANCE

"He had but one eye, and the popular prejudice runs in favour of two."
— Charles Dickens, *Nicholas Nickleby*¹

The most physically unattractive members of our society face severe discrimination. People who are regarded as unattractive are, for example, perhaps the only noncriminal, noncontagious group in America ever to have been barred by law from appearing in public.² The unattractive³ are poorly treated in such diverse contexts as employment decisions, criminal sentencing, and apartment renting. Although appearance discrimination can have a devastating economic, psychological, and social impact on individuals, its victims have not yet found a legal recourse.

This Note will argue that appearance, like race and gender, is almost always an illegitimate employment criterion, and that it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit. It will suggest that existing legislation — in particular, the Rehabilitation Act of 1973,⁴ prohibiting discrimination on the basis of physical handicaps — should be construed to protect people against employment discrimination on the basis of largely immutable aspects of bodily and facial appearance. Thus, mutable aspects of personal grooming such as hair length, cleanliness, or nontraditional dress are outside of the discussion of this Note, whereas shortness, obesity, and unattractive facial characteris-

¹ C. DICKENS, *THE LIFE & ADVENTURES OF NICHOLAS NICKLEBY* 30 (1950).

² Until recently, a number of major American cities had so-called "ugly laws," generally part of their vagrancy laws, which imposed fines on "unsightly" people who were seen in public places. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 863 (1975). For an example of such a statute, see CHICAGO, ILL., MUN. CODE § 36-34 (1966) (repealed 1974) (imposing fines on persons who appear in public who are "diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object"), quoted in Burgdorf & Burgdorf, *supra*, at 863. As recently as 1974, the city of Omaha, Nebraska arrested a man under a similar city ordinance. See *id.* at 864; Fogerty, *'41 Begging Law Punishes Only the Ugly*, Omaha World Herald, Apr. 21, 1974, § B, at 1, col. 1.

³ This Note does not dispute that perceptions of attractiveness are likely to differ among different members of society. It focuses, however, on those individuals who depart so significantly from the most commonly held notions of beauty that they incur employment discrimination. For a discussion of the individuals that this Note proposes to include in the category of the "unattractive," see pp. 2046-48 below.

⁴ Pub. L. 93-112, § 2, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985)). "The Act" will be used in this Note to refer both to the original 1973 Act and its subsequent amendments.

tics are the sort of criteria considered.⁵ Rather than attempting to delineate specific categories of physical appearance to be protected, this Note proposes that administrative agencies and courts accord handicap status to appearance discrimination victims using the same case-by-case analysis of the individual's impairment and employment situation that is generally used in handicap law.

Part I of the Note describes the problem of appearance discrimination in a number of contexts, with particular reference to employment. Part II proposes that the Rehabilitation Act of 1973's prohibition of discrimination against the handicapped should be construed to bar appearance discrimination. This Part also introduces criteria for deciding which individuals should fall within the Act's protection.⁶ Finally, Part III explores how the employment process can be restructured to alleviate appearance discrimination.

I. THE PHENOMENON OF APPEARANCE DISCRIMINATION

To be human is to discriminate. Humans constantly evaluate people, places, and things and choose some over others. The premise of antidiscrimination law is that in some areas, such as employment and housing, certain criteria are not permissible bases of selection. Antidiscrimination law has yet to state a general model of discrimination that describes precisely which criteria are "illegitimate." Despite the difficulty of developing such criteria, some inner and outer bounds are clear. In the domain of employment, for example, members of racial and religious minority groups are legally protected from

⁵ Some argue that appearance is under the control of the individual, and that individuals who do not present a more appealing physical appearance are themselves at fault. This argument is frequently made in the case of the obese. See Cahnman, *The Stigma of Obesity*, 9 SOC. Q. 283, 294 (1968), quoted in R. PAGE, *STIGMA* 6 (1984). In many instances, however, this simply is not true. Recent evidence suggests that many obese people are overweight for biological reasons largely beyond their own control. See Brody, *Research Lifts Blame From Many Obese*, N.Y. Times, Mar. 24, 1987, at C1, col. 3 (stating that "[o]ne by one, obesity experts are concluding that many, if not most, people with serious weight problems can hardly be blamed for their rotund shape"). Furthermore, many other aspects of physical appearance are immutable characteristics that "good grooming" would not affect. See G. PATZER, *THE PHYSICAL ATTRACTIVENESS PHENOMENA* 154 (1985) (listing some immutable aspects of a person's face that have been found to be important components of physical attractiveness); *infra* notes 82-83 and accompanying text.

⁶ In recent years, commentators have suggested that the Act should be interpreted to protect the obese, see Note, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination*, 29 UCLA L. REV. 947 (1982), and dwarfs, see Comment, *Coming Up Short: Employment Discrimination Against Little People*, 22 HARV. C.R.-C.L. L. REV. 231 (1987). This Note goes beyond the existing literature in suggesting that victims of appearance discrimination who do not fall into a clearly defined category such as obesity or dwarfism should also be protected.

discrimination.⁷ Those who score poorly on employment aptitude tests found to bear a legitimate relation to the job generally are not.⁸

One approach to antidiscrimination law would protect any member of a minority group who faces discrimination because of membership in that group. This approach is consistent with Louis Wirth's influential definition of a minority: "a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination."⁹ Physically unattractive people do not fall precisely within Wirth's formulation. First, the physically unattractive do not constitute a cohesive group; a thin person with an unattractive face, for example, may feel little kinship with an obese person. In addition, physical attractiveness is a continuum, and neat determinations of who is "unattractive" are impossible. Nevertheless, the physically unattractive share many of the burdens of Wirth's minority groups. Although our society professes a commitment to judge people by their inner worth,¹⁰ physically unattractive people often face differential and unequal treatment in situations in which their appearance is unrelated to their qualifications or abilities.¹¹ In the employment context, appearance often functions as an illegitimate basis on which to deny people jobs for which they are otherwise qualified.

A. Appearance Discrimination Generally

People in our society often have a visceral dislike for individuals whom they find unattractive. The bias is so strong that it is not deemed inappropriate to express this dislike; the physically unattrac-

⁷ See generally *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

⁸ See, e.g., *Hester v. Southern Ry.*, 497 F.2d 1374, 1381-82 (5th Cir. 1974) (upholding the use of aptitude tests to select employees).

⁹ Wirth, *The Problem of Minority Groups*, in *THE SCIENCE OF MAN IN THE WORLD CRISIS* 347 (R. Linton ed. 1945).

¹⁰ The court in *Donohue v. Shoe Corp.*, 337 F. Supp. 1357 (C.D. Cal 1972), succinctly stated the commitment our society holds to judging individuals by their "intrinsic worth":

In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features. That tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.

Id. at 1359.

¹¹ This sort of unequal treatment based on external appearance has been defended on grounds of efficiency. The argument is that the employer bears no animus against the unattractive but is simply exploiting the economic advantage of having, for example, an attractive waiter or salesperson. For a discussion of this issue, see pp. 2050-51 below.

tive are a frequent subject of derisive humor.¹² People frequently believe, either consciously or unconsciously, that people with unattractive exteriors were either born with equally unattractive interiors¹³ or gradually developed them.¹⁴ By contrast, people tend to think, often with very little basis, that people they find physically attractive are generally worthy and appealing or that, as the title of one study has it, "What Is Beautiful Is Good."¹⁵

Social science studies have shown that people attribute a wide range of positive characteristics to those whom they find physically attractive.¹⁶ These studies also indicate that when less attractive people are compared to more attractive people,¹⁷ the less attractive men and women are accorded worse treatment simply because of their appearance. This less-favored treatment apparently begins as early as the first few months of life.¹⁸ Throughout childhood, unattractive children face parents who have lower expectations for their success than for more attractive children,¹⁹ teachers who have lower expectations for their academic success,²⁰ and contemporaries who prefer more attractive children as friends.²¹ This less generous treatment of

¹² See R. BARKER, M. GONICK & B. WRIGHT, *ADJUSTMENT TO PHYSICAL HANDICAP AND ILLNESS*, 81-82 (1946).

¹³ An illustrative, if extreme, example of such attitudes is the Lombrosian school of criminology, which holds that criminals are marked by certain differentiating, and largely unattractive, physical characteristics. See H. MANNHEIM, *COMPARATIVE CRIMINOLOGY* 215 (1967).

¹⁴ One commentator has argued that people view "stigmatized" people as deficient in respects apart from their stigmatizing characteristic. See E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963) (noting that "[w]e tend to impute a wide range of imperfections on the basis of the original one").

¹⁵ Dion, Berscheid & Walster, *What Is Beautiful Is Good*, 24 J. PERSONALITY & SOC. PSYCHOLOGY 285 (1972).

¹⁶ One study of reactions to patients before and after plastic surgery found that when "before" and "after" photographs were compared, post-surgery patients were judged, compared to their former selves, to be more poised, more interesting, more enthusiastic, friendlier, kinder, and warmer. See Kalick, *Aesthetic Surgery: How It Affects the Way Patients Are Perceived by Others*, 2 ANNALS OF PLASTIC SURGERY 128, 131 (1979).

¹⁷ Despite the well-worn adage that beauty is in the eye of the beholder, studies suggest that within cultures there is substantial agreement about who is attractive and who is not. See *infra* notes 82-83 and accompanying text. Thus, the same people will likely be regarded as unattractive by many potential employers. For a discussion of this issue, see notes 82-84 and accompanying text *infra*.

¹⁸ One study found that relatively unattractive infants as young as three months received less adult attention than cuter babies. See, e.g., Hildebrandt & Fitzgerald, *Adults' Responses to Infants Varying in Perceived Cuteness*, 3 BEHAV. PROC. 159 (1978), cited in G. PATZER, *supra* note 5, at 18.

¹⁹ See Adams & La Voie, *The Effect of Students' Sex, Conduct, and Facial Attractiveness on Teacher Expectancy*, 95 EDUC. 76 (1974).

²⁰ See, e.g., Adams, *Racial Membership and Physical Attractiveness Effects on Preschool Teachers' Expectations*, 8 CHILD STUDY J. 29 (1978).

²¹ See Dion & Berscheid, *Physical Attractiveness and Peer Perception Among Children*, 37 SOCIOMETRY 1 (1974).

unattractive people continues through adulthood. For example, studies of "helping behavior" — the willingness of subjects to do small favors for a stranger — show that such behavior varies directly with the stranger's attractiveness.²² Likewise, simulation studies of court proceedings have found that unattractive people receive higher sentences in criminal cases and lower damage awards in civil lawsuits.²³

Physical appearance can also warp the functioning of ordinarily "objective" evaluations of individuals' work.²⁴ This distortion has been shown in studies in which subjects were asked to evaluate a written essay that was accompanied by a photograph of the purported author. When copies of the same essay were evaluated with a photograph of an attractive or an unattractive person attached, the essays with the more attractive purported author were judged to have better ideas, better style, and more creativity.²⁵ Moreover, studies have shown that in general, attractive people are disproportionately likely to receive credit for good outcomes, whereas the good outcomes of unattractive people are more likely to be attributed to external factors, such as luck.²⁶ Such biases might easily lead an employer to underrate the talents of an unattractive job applicant.

Empirical research on the real-world effects of appearance discrimination supports the results of these simulation exercises. Considerable empirical research has been done in the area of obesity.²⁷ One study showed that obese high school students were significantly less likely

²² One study, testing the willingness of subjects to assist attractive and unattractive strangers, found that "[r]egardless of the task, significantly more help was reported when the stimulus person was of higher physical attractiveness." Wilson, *Helping Behavior and Physical Attractiveness*, 104 J. SOC. PSYCHOLOGY 313 (1978), cited in G. PATZER, *supra* note 5, at 72.

²³ See Gray & Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOLOGICAL REP. 727 (1976) (criminal cases); Stephan & Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decision of Simulated Jurors*, 101 J. SOC. PSYCHOLOGY 149 (1977) (civil cases). In rejecting a challenge that the death penalty is unconstitutional because it is disproportionately used against blacks, the Supreme Court this Term dismissed, in dictum, the similar notion that the death penalty is unconstitutional because it may be used disproportionately against less attractive defendants. See *McCleskey v. Kemp*, 55 U.S.L.W. 4537, 4547 (U.S. Apr. 22, 1987) (No. 84-6811). Nonetheless, it is noteworthy that the Court recognized for the first time the possibility that appearance discrimination may exist. Indeed, here as elsewhere, the first step toward having a right recognized may well be having it considered and rejected.

²⁴ This discounting process is similar to one that has been noted by some concerning the work of women. See, e.g., Taub, *Keeping Women in their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 353 (1980).

²⁵ See, e.g., Landy & Sigall, *Beauty is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness*, 29 J. PERS. & SOC. PSYCHOLOGY. 299 (1974); cf. Clifford & Walster, *The Effect of Physical Attractiveness on Teacher Expectations*, 46 SOC. EDUC., 248 (1973).

²⁶ See Seligman, Paschall & Takat, *Effects of Physical Attractiveness on Attribution of Responsibility*, 6 CAN. J. BEHAV. SCI. 290 (1974), cited in G. PATZER, *supra* note 5, at 104.

²⁷ See generally Note, *supra* note 6.

than non-obese students to be admitted to selective colleges, when academic achievement, motivation, and economic class were held constant;²⁸ another found that obese adults were discriminated against in the renting of apartments.²⁹

Appearance discrimination thus seems to occur in a wide variety of situations. Clearly, the law cannot intervene directly to prevent all such discrimination; no law, for example, can itself make a teacher have more faith in an unattractive child's academic success. The law can, however, address discrimination in discrete areas. One such area is employment selection, in which appearance discrimination is widespread.³⁰

B. Appearance Discrimination in Employee Selection

Physical appearance is a significant factor in employee selection, regardless of the nature of the job or the relevance of appearance to the task at hand. One of the primary methods of assessing applicants for all levels of jobs is the personal interview,³¹ in which the applicant's appearance is a central criterion. One survey found that appearance was the single most important factor in determining candidate acceptability for a wide variety of jobs, regardless of the level of training of the interviewers.³² Another study asked 2804 employment interviewers throughout the United States to give "favorability" scores to a variety of characteristics of applicants for various positions. Interviewers considered as important positive characteristics such factors as "Has a good complexion" and rated as important negative charac-

²⁸ See Canning & Mayer, *Obesity — Its Possible Effect on College Acceptance*, 275 NEW ENG. J. MED. 1172, 1173 (1966) ("Since obese applicants are as . . . qualified for college acceptance as nonobese, a strong possibility arises that a form of unconscious prejudice toward obese adolescents is exercised by high school teachers in writing recommendations or by college interviewers or by both.").

²⁹ See McCormick, *Body Fat: Viewing the Negative Effects*, L.A. Times, June 18, 1981, § V at 20, col. 1.

³⁰ Appearance discrimination should also be addressed in apartment renting, college admissions, and other areas in which unattractive individuals face discrimination. These topics, however, are beyond the scope of this Note.

³¹ See R. GATEWOOD & S. FIELD, HUMAN RESOURCE SELECTION 347 (1987). Indeed, the authors of one employee selection study state that they "know of only one organization that hires a candidate sight unseen." See Arvey & Campion, *The Employment Interview: A Summary and Review of Recent Research*, in PERSPECTIVES ON EMPLOYEE STAFFING AND SELECTION 289 (G. Dreher & P. Sackett eds. 1983) ("Apparently, the Princeton University Philosophy Department hires on the basis of credentials only.").

³² See R. Gatewood, J. Lahiff, R. Deter & F. Hargrove, *Effects of Training on the Selection Interview* 17 (paper presented to the Academy of Management Meeting, San Diego, Cal.) (1985) (on file at the Harvard Law School Library).

teristics factors such as "Is markedly overweight," and, for men, "Physique appears feminine."³³ Interview manuals written for employers make clear the importance of physical appearance in the selection process. One general employment handbook places "Appearance" first on its list of "hire appeal" factors.³⁴

Research in specific areas of physical difference reinforces the claim that appearance discrimination pervades the job market. The National Association to Aid Fat Americans found that fifty-one percent of its members who responded to a survey reported instances of employment discrimination.³⁵ A report of the State of Maryland's Commission on Human Relations concluded that it may well be easier to place a thin black person on a job than a fat white person.³⁶ Extremely short people also experience severe employment discrimination.³⁷

There have as yet been no direct challenges to appearance discrimination, although appearance issues have been raised in other lawsuits.³⁸ Hiring practices based on explicit evaluations of applicants'

³³ M. HAKEL & M. DUNNETTE, CHECKLISTS FOR DESCRIBING JOB APPLICANTS 1-2, 29, 36, 35 (1970).

³⁴ See A. PELL, BE A BETTER EMPLOYMENT INTERVIEWER: A GUIDE FOR THE SCREENING INTERVIEW 15-S (1976); see also R. JENKINS, RACISM AND RECRUITMENT: MANAGERS, ORGANISATIONS AND EQUAL OPPORTUNITY IN THE LABOUR MARKET 52 (1986) (listing "appearance" as the most important selection criterion in a survey of British managers).

Studies involving mock employee selection procedures have confirmed the importance of physical appearance in employer hiring decisions. Studies in which college students and professional personnel officers were asked to evaluate resumes with attached photographs found that attractive applicants were preferred over unattractive ones. See, e.g., Dipboye, Arvey & Terpstra, *Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resume Evaluations*, 62 J. APPLIED PSYCHOLOGY 288, 293 (1977). Another study found that when job-seekers were offered jobs, the attractive applicants were offered salaries ranging from 8% to 20% more than the salaries offered unattractive applicants for the same position. See Waters, *Beauty and Job Application*, FAIRLEIGH DICKENSON U. BULL., Spring 1980, cited in G. PATZER, *supra* note 5, at 109.

³⁵ Cited in STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS, REPORT ON THE STUDY OF WEIGHT AND SIZE DISCRIMINATION 34 (1979) [hereinafter MARYLAND REPORT], cited in Note, *supra* note 6, at 952-53.

³⁶ *Id.* at 41, cited in Note, *supra* note 6, at 953 n.49.

³⁷ See Comment, *supra* note 6, at 235-36. Screening based on appearance is not limited to jobs that have attempted to create an image of glamorous physical appearances. A pending sex discrimination lawsuit has brought to light a dramatic example of appearance discrimination in the form of a "Recruiting and Selection Standards" memorandum used by the Ortho Pharmaceutical Corporation which instructed divisional managers on qualities to look for in female applicants. The document lists "appearance" first, and states that the applicant hired should not be "pretty" or "sexy," nor "look like someone who found new boyfriends in singles bars," but "should have the look of someone who might clean her bathroom on her hands and knees." *Understanding Women*, HARPER'S, Apr. 1987, at 23-24.

³⁸ The much-publicized lawsuit of Christine Craft, the television anchorwoman, alleged that "she was subjected to a rigorous dress code and constant criticism of her appearance while her

physical appearance were challenged in the courts for the first time in the 1960s and early 1970s in lawsuits charging airlines with sex and race discrimination in the hiring of flight attendants. One Equal Employment Opportunity Commission hearing of a race discrimination claim revealed that an interview form contained the written comment that a black applicant had "unattractive, large lips."³⁹ The Commission found that this negative evaluation of a race-related aspect of the applicant's appearance provided reasonable cause to believe that unlawful racial discrimination had taken place.⁴⁰ More recently, a computer programmer successfully sued under New York State law a company that failed to hire her because she was obese.⁴¹ The challenge alleged, however, that obesity was a medical handicap, and did not raise the broader issue of appearance discrimination.

II. HANDICAP DISCRIMINATION LAW

Several possible rubrics could protect victims of appearance discrimination. These victims could plausibly frame a constitutional equal protection clause challenge, although this appears unlikely given current restrictive interpretations of the clause's reach.⁴² Some individual victims of appearance discrimination who are also members of other, protected groups may find protection under race, sex, or age discrimination statutes.⁴³ Nonetheless, the legal rubric most likely to afford general protection for appearance discrimination victims appears to be handicap discrimination law.⁴⁴

male counterparts received no such treatment." *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 876 (W.D. Mo. 1983), *aff'd in part, rev'd in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986). However, Ms. Craft's unsuccessful suit was for sex discrimination under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

³⁹ E.E.O.C. Decision No. 70-90, Case No. 6-2-1079, 1973 E.E.O.C. DECISIONS (CCH) No. 41, ¶ 6065 (Aug. 19, 1969).

⁴⁰ *See id.*

⁴¹ *See State Division of Human Rights v. Xerox*, 65 N.Y.2d 213, 480 N.E.2d 695 (1985).

⁴² The Supreme Court has been reluctant to recognize new suspect classes and thus would likely be unwilling to bring physical disability under the protection of the equal protection clause. *See, e.g., City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3257-58 (1985) (rejecting a path that would lead the Court to accord quasi-suspect classification to "the aging, the disabled, the mentally ill, and the infirm," among others).

⁴³ For example, the flight attendant whose "unattractive, large lips" were noted in an interview sued for race discrimination.

⁴⁴ The handicapped are not protected by title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), and attempts to amend the Civil Rights Act to include them have failed. *See* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 104.20, at 22-3 (1986). Handicap discrimination law has also been suggested by other commentators as a possible protection for obese people and dwarfs. *See* Comment, *supra* note 6; Note, *supra* note 6.

A. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 bars employers who receive federal funds — estimated to be one half of all businesses⁴⁵ — from discriminating on the basis of physical or mental impairment.⁴⁶ Passed by Congress in order to extend “the guarantee of equal opportunity”⁴⁷ to “handicapped individuals,”⁴⁸ the Act states in Section 504: “No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”⁴⁹ The Act’s definition of “handicap” is highly expansive. It defines a “handicapped individual” as: “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.”⁵⁰

Legislative history offers no help in further delineating the parameters of the “handicapped” category.⁵¹ Moreover, in regulations implementing the Act, the Department of Health and Human Services (HHS) has explicitly declined to explain the term “handicapped” beyond these broad statutory strokes.⁵² The regulations make clear that “environmental, cultural, and economic disadvantage are not in themselves [physical and mental handicaps]; nor are prison records, age or homosexuality.”⁵³ Both HHS regulations and courts, however, have

⁴⁵ The Act covers “any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794 (1982). Although the Act applies only to the federal government and recipients of federal funds, it has been estimated that about half of American businesses, employing more than one-third of the workforce, fall under this rubric. See Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS U.L.J. 25, 26 & n.9 (1978).

⁴⁶ See 29 U.S.C. § 794 (1982). Although the statute is not explicit on this point, the Act has generally been construed to cover employment discrimination. See generally Cook & Butler, *Coverage of Employment Discrimination Pursuant to Section 504 of the Rehabilitation Act of 1973*, 19 WAKE FOREST L. REV. 581 (1983).

⁴⁷ 29 U.S.C. § 701 (1982).

⁴⁸ *Id.* § 706(7)(B).

⁴⁹ *Id.* § 794. The Act also contains several other protections. Section 501 requires federal agencies to prepare affirmative action plans for hiring, placement and promotion of disabled employees. See *id.* § 791(h). Section 502 addresses difficulties with “architectural, transportation, [and] attitudinal barriers.” *Id.* § 792. Section 503 requires affirmative action by private employers who receive federal contracts or subcontracts in excess of \$2500. See *id.* § 793.

⁵⁰ *Id.* § 706(7)(B).

⁵¹ See R. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 53 (1984). (“The legislative history of the Rehabilitation Act contains only passing references to Section 504, stating simply that the section prohibits discrimination, without providing any rationale or predicting any impact.”).

⁵² See 45 C.F.R. pt. 84, app. A, at 310 (noting that “the Department does not believe that a definition of [‘handicapped’] is possible at this time”).

⁵³ *Id.*

consistently interpreted the Act to extend beyond such "traditional" handicaps as blindness or confinement to a wheelchair. Courts have applied the Act to such impairments as tuberculosis,⁵⁴ epilepsy,⁵⁵ and back conditions,⁵⁶ among others.⁵⁷ Such liberal interpretations leave room for bringing the physically unattractive under the protection of the Act.

In addition to the federal Act, forty-four states, the District of Columbia, and New York City prohibit some forms of employment discrimination against the handicapped.⁵⁸ In many cases, state and local court interpretations of state human rights laws are more expansive than federal court interpretations of the Act. For example, state courts have held that state handicap acts cover the obese⁵⁹ and people with asthma and migraine headaches.⁶⁰ It is quite possible that appearance discrimination victims will first achieve handicapped status under such a state law interpretation. Nonetheless, the federal Act potentially applies to the greatest number of employees, and it is thus the focus of this Note.

B. The Handicap Of Physical Appearance

To qualify as handicapped under the federal Act, a person must make a two-pronged showing. He or she must show, first, that he or she has a "physical or mental impairment . . . or is regarded as having such an impairment," and, second, that the impairment "substantially limits one or more major life activities."⁶¹ If a court were to find that a person with an unattractive or disfavored physical appearance met the first prong, the Act would not extend much further than the current wording of HHS regulations, which state: "Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . [including] skin"⁶² Elsewhere, the regulations include persons with "disfiguring scars" within the handicapped category.⁶³ Because the whole notion of disfigurement is one of marred appearance, the law already regards some people as handicapped by virtue of their physical appearance. It thus seems an

⁵⁴ See *School Board v. Arline*, 107 S. Ct. 1123 (1987).

⁵⁵ See *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

⁵⁶ See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

⁵⁷ See generally 3 A. LARSON & L. LARSON, *supra* note 44, § 105.12, at 22-6 to 22-10.

⁵⁸ See *id.*, § 108.10, at 22-78.

⁵⁹ See *State Div. of Human Rights v. Xerox*, 480 N.E. 2d 695, 65 N.Y. 2d 213 (1985).

⁶⁰ See *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 392, 215 N.W. 2d 443 (1974).

⁶¹ 29 U.S.C. § 706(7)(B) (1982).

⁶² 45 C.F.R. § 84.3(j)(2)(i) (1985).

⁶³ *Id.* pt. 84, app. A, at 311.

arbitrary distinction to say that an employer cannot refuse to hire a person who has a disfiguring scar on his chin, for example, but can refuse to hire someone whose chin is jutting or unusually shaped. Moreover, the Act makes clear that a person may be protected by the Act even if he or she is not impaired so long as he or she is "regarded as having such an impairment."⁶⁴ Congress added the "is regarded as having" language in 1974 in order to protect people who are denied employment due to employer misperceptions about the disability of an applicant.⁶⁵ Thus, the Act is particularly applicable to appearance discrimination, which is often based on prejudiced attitudes about people's abilities.

The second prong of the Act's test requires that the impairment substantially limit, either directly or as a result of the attitudes of others toward it, one or more major life activities. HHS regulations interpret this requirement to include people who have "a physical or mental impairment that substantially limits major life activities *only as a result of the attitudes of others toward such impairment*."⁶⁶ The regulations specifically include "difficulty in securing, retaining or advancing in employment" as one such limitation.⁶⁷ These regulations make clear that it is no answer to a discrimination charge that an appearance discrimination victim may be able to find *some* form of work. As one court stated in holding that a man with a back condition was handicapped under the Act, if an individual is unable to find work in his "chosen field" due to his impairment, he is substantially limited in a major life activity.⁶⁸

C. Deciding Which Jobs Are Covered

Even if physical unattractiveness can at times be a handicap, difficult questions emerge concerning which jobs should be covered under the Act. In many cases, employers will likely argue that an attractive appearance is "necessary" for a job. Courts will have to decide when, if ever, an employer should be permitted to reject an applicant on the basis of appearance.

Under the Act, the question would be phrased in terms of when an applicant is "otherwise qualified" for the job at issue. Courts have been unclear in their interpretations of this concept. It may be argued that certain jobs — for example, modeling and acting — require people who look a certain way. Nevertheless, courts have defined job "requirements" narrowly. "The test," said the Fifth Circuit in *Prewett*

⁶⁴ 29 U.S.C. § 706(7)(B) (1982).

⁶⁵ See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Hawaii 1980).

⁶⁶ 45 C.F.R. § 84.3(j)(2)(iv)(B) (1985) (emphasis added).

⁶⁷ 41 C.F.R. § 60-741.2.

⁶⁸ See *E.E. Black*, 497 F. Supp. at 1099.

v. United States Postal Service,⁶⁹ "is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion 'can perform the essential functions of the position in question without endangering the health and safety of the individuals or others.'" ⁷⁰

No doubt employers would urge exceptions to appearance discrimination rules not only for persons, such as models and actors, who perform clearly appearance-related work, but also for receptionists, flight attendants, salespeople, and many other jobs in which physical attractiveness might be an important asset. Courts should grant such exceptions sparingly. If they follow the lead of *Prewett*, they will take a narrow view of the "essence" of a job and will in most cases decide that appearance is not relevant. The flight attendant litigation under title VII of the Civil Rights Act of 1964⁷¹ provides a good model for courts in defining jobs narrowly. Those cases held that appearance was not part of the essence of the job of flight attendant. As the Fifth Circuit stated in holding that men were just as capable as women of being flight attendants, "[w]hile a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide . . . [may] be important, [it is] tangential to the essence of the business involved."⁷² By similar logic, it should be determined that physical attractiveness is not essential to most jobs.

D. Proving Appearance Discrimination

Courts will also have to determine which individuals should be able to claim the Act's protection from appearance discrimination. Proving discrimination is difficult in all employment discrimination litigation. When a female or minority group member is rejected from a job, it is frequently difficult to determine to what extent the decision was based on the applicant's membership in the protected group. Appearance discrimination suits would be more difficult still because a race or gender discrimination suit can begin with the assumption that a plaintiff is a member of a particular race or gender, whereas an appearance discrimination suit cannot start with the same certainty that an individual's appearance is a handicap.

Such difficult determinations are a staple of handicap discrimination law. "Handicapped" is not an absolute term but rather a label imposed by society,⁷³ and much of handicap law consists of deciding

⁶⁹ 662 F.2d 292 (5th Cir. 1981). The case considered the handicapped status of a federal employee with limited arm and shoulder mobility due to a war injury.

⁷⁰ *Id.* at 307 (quoting 28 C.F.R. §§ 1613.702(f)–703).

⁷¹ 29 U.S.C. § 2000e (1982).

⁷² *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

⁷³ See Burgdorf & Burgdorf, *supra* note 2, at 858 ("the fine line between 'handicapped' and 'normal' has been arbitrarily drawn by the 'normal' majority.").

who qualifies for that protected category.⁷⁴ This is a problem that occurs in many instances of disability discrimination. For example, although back injuries have been held to be covered by the Act,⁷⁵ it would be difficult to state in general terms what *sorts* of back injuries render a person handicapped under the Act. A general description is particularly difficult in the case of appearance discrimination.

In some cases, a "smoking gun" will exist. An employer may have used applicant rating sheets or hiring manuals that make explicit reference to the physical appearance of applicants. Or an employer may have commented verbally to an applicant or others that appearance was a factor in hiring. In the absence of such clear-cut evidence, the issue of whether an employer has rejected an applicant on the basis of appearance would be a question for the trier of fact at the administrative hearing, analogous to the question now posed in other handicap discrimination cases.⁷⁶ In either case, the applicant plaintiff would carry an initial burden of demonstrating handicapped status.⁷⁷

The test under the Act, as with other handicaps, would be whether the person's appearance constituted "a physical or mental impairment that substantially limits major life activities" or leads him or her to be treated as if this were so.⁷⁸ To fall under the protection of the Act, the person would have to show that, like the person with the disfiguring scar contemplated by the HHS Regulations, he has a physical appearance that constitutes an impairment that substantially limits his ability to find employment.⁷⁹ Such a determination is best suited to case-by-case determination.⁸⁰

This individualized inquiry can take one of two forms. In some cases, an applicant will be able to point to some "objective" aspect of his appearance — such as obesity, shortness, an unusual-looking nose, or protruding ears. These characteristics would most closely resemble the sort of medically verifiable conditions on which the Act now focuses. Allowing protection for such "objectively" unattractive people would cover many instances of appearance discrimination, but is not by itself sufficient to protect all victims of appearance discrimination.

⁷⁴ See Wolff, *supra* note 45, at 28-33.

⁷⁵ See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1102 (D. Hawaii, 1980).

⁷⁶ For a description of administrative enforcement proceedings under the Act, see 29 C.F.R. §§ 32.6(a), 32.44-46 (1981).

⁷⁷ According to the reasoning of the *Black* court, evidence that one has been discriminatorily rejected by one employer may be enough to make this showing. See *E.E. Black*, 497 F. Supp. at 1100.

⁷⁸ 45 C.F.R. § 84.3(j)(2)(iv); see *supra* pp. 2044-45.

⁷⁹ See 3 A. LARSON & L. LARSON, *supra* note 44, at 22-16 (stating that a person denied employment because he was considered "too ugly" would likely fall under the Act's protection).

⁸⁰ See, e.g., *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *E.E. Black*, 497 F. Supp. at 1099 (finding that "[t]he definitions contained in the Act are personal and must be evaluated by looking at the particular individual").

No approach to preventing appearance discrimination will be complete if it does not protect people whose obstacle to being hired is simply a face that is deemed unattractive by employers.⁸¹

In this second, less "objective," category of impairment, an applicant may nevertheless be able to demonstrate that in some general way, given the totality of his appearance, he is considered unattractive. Despite the conventional wisdom that "beauty is in the eye of the beholder," studies have found a high degree of agreement among people in their ratings of other people's physical attractiveness.⁸² These studies suggest that a finding of fact could indeed be made that an individual's appearance constitutes a handicap in the employment context. Moreover, such determinations can be grounded in "objective" physical features. Studies have found that human attractiveness often correlates closely with the size and placement of facial features, which can be measured precisely.⁸³ Thus, much as other suits under the Act may rely on expert testimony about handicapped conditions,⁸⁴ expert witnesses or surveys of lay judges may be called upon to make an initial determination about whether a person's appearance constitutes an "impairment." A finding that the applicant is handicapped under the Act could then be combined with an analysis of the employer's entire hiring process, including a comparison of the abilities and appearance of applicants who were hired with those of the plaintiff, to determine whether discrimination had occurred.

III. REFORMING EMPLOYMENT SELECTION TO PREVENT APPEARANCE DISCRIMINATION

In addition to the deterrent effect of individual complaints, restructuring the employment selection process can also prevent appearance

⁸¹ As one social scientist states, "although definition remains elusive, physical attractiveness is dependent on a global evaluation based on a person's face." G. PATZER, *supra* note 5, at 2-3.

⁸² See G. PATZER, *supra* note 5, at 17. For examples of such studies, see Kaats & Davis, *The Dynamics of Sexual Behavior of College Students*, 32 J. MARRIAGE & FAM. 390, 392-93 (1970) (finding an interrater reliability coefficient of .79 for two researchers rating college students); Udry, *Structural Correlates of Feminine Beauty Preferences in Britain and the United States: A Comparison*, 49 SOCIOLOGY & SOCIAL RESEARCH 330 (1965) (showing relative uniformity of beauty preferences among Americans). These studies involve ratings of a general cross-section of people. It seems likely that even greater agreement among raters would be found at the extremes of the attractiveness spectrum — in particular, with respect to judgments about who is extremely unattractive.

⁸³ See, e.g., Cunningham, *Measuring the Physical in Physical Attractiveness: Quasi-Experiments on the Sociobiology of Female Facial Beauty*, 50 J. PERSONALITY & SOC. PSYCHOLOGY 925, 931 (finding in study of adult male evaluations of adult females that "eye height and width, cheekbone width, and smile width were positively correlated with attractiveness ratings, whereas nose area and chin length were negatively correlated").

⁸⁴ See *E.E. Black*, 497 F. Supp. at 1104 (indicating that it might be necessary for the court to appoint an expert to study the "handicapping" nature of back ailments).

discrimination. Employers may be reluctant at first to embark on new approaches to selecting employees. But the Rehabilitation Act and its accompanying regulations are written in aspirational terms. The regulations state that "[t]he Federal Government shall become a model employer of handicapped individuals."⁸⁵ This Part will suggest several ways to restructure the system to make the federal government and its contractors such a model. In addition, it will discuss some of the tensions and broader issues raised by efforts to minimize appearance discrimination.

A. Restructuring Employment Selection To Reduce Appearance Discrimination

Even if employers agreed in principle that considerations of physical appearance should ideally be eliminated from the hiring process, this ideal would be difficult to achieve in practice. As long as hiring is based on face-to-face interviews, physical appearance will inevitably have an impact on impressions. This problem can be avoided, however, by restructuring the hiring process to eliminate or reduce information about applicants' appearance when applicants are evaluated and hiring decisions are made.

The regulations promulgated by the HHS bar "preemployment inquiries"⁸⁶ concerning a job applicant's handicapped status, unless the inquiries specifically concern the applicant's ability to do the job.⁸⁷ To meet this requirement, employers could publicly announce a policy of not soliciting information about an applicant's appearance, other than grooming and neatness, and of not considering appearance as a factor in employee selection. The standard face-to-face interview, in which the applicant's appearance is highly salient, in many ways resembles just such a statutorily forbidden preemployment inquiry into appearance handicaps.⁸⁸ To conform with the ban on preemployment inquiries, employers should reevaluate their commitment to the standard employment interview.

To be sure, interviews undoubtedly have some informational value beyond permitting illegitimate appearance evaluations. An employer may justifiably be concerned, for example, with an applicant's interpersonal skills. But this information can be obtained in ways that avoid the prejudicial process of face-to-face interviews. One possible method is the expanded use of telephone interviews. Another possi-

⁸⁵ 29 C.F.R. § 1613.703 (1982).

⁸⁶ 45 C.F.R. § 84.14(a) (1985).

⁸⁷ See *id.*; *id.* § 84.14(b)(c).

⁸⁸ See Cann, Siegfried & Pearce, *Forced Attention to Specific Applicant Qualification: Impact of Physical Attractiveness and Sex of Applicant Biases*, 34 PERSONNEL PSYCHOLOGY 65 (1981) (finding appearance bias even when interviewers delayed their decision until after rating a series of qualifications unrelated to appearance).

bility, which could work well for many kinds of jobs, is the adoption of the practice used by virtually every American symphony orchestra to avoid discrimination and favoritism in hiring: auditions conducted behind screens.⁸⁹ Such an interview process would provide employers with useful information about an applicant, revealing factors such as a "pleasant personality," without prejudicing the selection process by injecting appearance into the calculus.⁹⁰

Employers could also reduce or eliminate appearance discrimination through less dramatic modifications in the selection process. They could, for example, set a rigid dividing line between the person who meets and interviews job applicants and the person who makes the decision about whom to hire. The interviewer could pass along a form to the decisionmaker that includes only job-related information and impressions. Although the applicant's appearance might still influence the interviewer's perceptions of other subjective qualities,⁹¹ it would nevertheless be a considerable reform.

Objections that employment decisions will be difficult or "random" under such a new regime are misplaced. Workable selection procedures and criteria can be maintained without permitting appearance discrimination. Employers could continue to use the battery of legitimate, work-related criteria: they could ask about education, prior work experience, and success in school and at previous jobs. And they could administer bona fide, work-related, nondiscriminatory tests. Indeed, to the extent that these reforms eliminate irrelevant criteria, they should lead to a greater weighting of job-relevant criteria and hence a fairer overall process.

B. Moving From "Efficiency" to Equality

Efforts to eliminate appearance discrimination would significantly restructure employment practices. Inevitably, such proposed reforms raise questions about the sort of criteria on which our society should permit employment decisions to be based. One objection to eliminating physical appearance as a criterion for hiring is an argument about

⁸⁹ Virtually every major American symphony orchestra conducts auditions blindly. At the New York Philharmonic, for example, hundreds of applicants are winnowed out through blind auditions, either by use of a screen between the prospective employee and the selection panel or by evaluating tape-recorded performances. Applicants are observed in person only in the final round, after the field has been narrowed to a few musicians, so that the evaluators can see directly how the applicant holds and uses the instrument. See Telephone interview with Carl Schiebler, Personnel Manager, New York Philharmonic Orchestra (Mar. 31, 1987).

⁹⁰ Of course, such interviews would prevent employers from considering such grooming aspects as cleanliness, see *supra* text accompanying note 5, as well as eye-contact and sincerity of expression. The proposal to reduce the use of face-to-face interviews is premised on the likelihood that the probity of such information is often outweighed by the prejudice of physical appearance information that is inevitably gleaned at the same time.

⁹¹ See *supra* notes 24-25 and accompanying text.

economic efficiency. If an employer can show that an applicant's appearance makes him or her more profitable, why should this not be a valid criterion for employment? The response to this objection is that "efficiency" is not always an acceptable basis on which to make distinctions in the employment process.

In fact, many sorts of discrimination may be "economically efficient." For example, a restaurant owner in a racist neighborhood might enlarge his or her clientele — and thus increase profits — by refusing to hire black waiters and waitresses. Yet in all forms of antidiscrimination law we proclaim that our society has some principles of equality that it holds more dear than efficiency.⁹²

IV. CONCLUSION

The implications of appearance discrimination go beyond the sizeable number of people who experience its effects firsthand. Physical attractiveness discrimination provides a window on the criteria that our society uses to distinguish among people. It represents one of the ways in which we use hazy and illegitimate criteria to separate good from bad, acceptable from unacceptable, and normal from deviant. Stereotypes of all kinds are linked. Together they form a larger "web of stereotypes"⁹³ that leads people at times to treat racial minorities, women, the elderly, and the disabled as "other" and to exclude them. One strand of otherness that is woven deeply into this web is that of appearance.

Appearance discrimination is sometimes closely connected to related kinds of discrimination. One significant aspect of prejudice against blacks, old people, or people in wheelchairs is a negative reaction to the way they look.⁹⁴ Conversely, people may well dislike certain appearance characteristics — such as broad noses or wrinkled skin — because they associate them with groups they disfavor. Decreasing appearance discrimination would help to unravel this entire web of stereotypes.⁹⁵ As we expand our conception of what people

⁹² Cf. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 260 (1971) (noting that "to the victim of the employment decision the appearance of the conduct is identical, whether the use of [the distinguishing characteristic] is efficiency-related or not").

⁹³ S. GILMAN, *DIFFERENCE AND PATHOLOGY* 240 (1985).

⁹⁴ Cf. G. PATZER, *supra* note 5, at 155 (citing a study suggesting that "black individuals who possess more 'white physical features' [may be] perceived as higher in physical attractiveness").

⁹⁵ Appearance discrimination law could also reach instances of race and sex discrimination that existing discrimination law does not. For example, a federal district court recently dismissed a section 1981 suit by a dark-skinned black employee who charged that he was discriminated against in employment in favor of a lighter-skinned job applicant who was also black. *See Sere v. Board of Trustees*, 628 F. Supp. 1543 (N.D. Ill. 1986). The court stated that although "discrimination based on skin color may occur among members of the same race," suits of this kind are not actionable under 42 U.S.C. § 1981. *Id.* at 1546. The court refused to "place

in certain jobs can look like, we open these jobs up further to once excluded groups.

Ultimately, as with the eradication of all forms of discrimination, people's attitudes must change before appearance discrimination will cease. The first step in this process is recognizing the existence of the problem. As Sander Gilman has written:

The need for stereotypes runs so deep that I do not think it will ever be thwarted; nor do I think that it will ever be converted to purely harmless expression. But I believe that education and study can expose the ideologies with which we structure our world, and perhaps help put us in the habit of self-reflection.⁹⁶

The interpretation of the Rehabilitation Act to encompass appearance discrimination can and should promote just such self-reflection.

[itself] in the unsavory business of measuring skin color." *Id.* A plaintiff like Sere might be able to use an appearance discrimination claim to protect himself from this sort of racial discrimination, which now apparently has no remedy under the law.

⁹⁶ See S. GILMAN, *supra* note 93, at 12.